



# New York Water Environment Association, Inc.

*The Water Quality Management Professionals*

525 Plum Street, Suite 102 • Syracuse, New York 13204  
(315) 422-7811 • Fax: 422-3851 • [www.nywea.org](http://www.nywea.org)

## Recent Environmental Legislative, Regulatory and Judicial Developments<sup>1</sup> July 31, 2012 through October 30, 2012

### I. NEW YORK

#### A. Legislation:

##### 1. Passed and Signed Into Law

- **Sewage Right to Know.**

Chapter 368.

[S.6268-D \(Grisanti\) / A.10585-A \(Sweeney\).](#)

Enacts the "sewage pollution right to know act;" requires publicly owned treatment works to report discharges of untreated or partially treated sewage.

- **Bottle Bill - Unredeemed Deposits.**

[S.7525 \(Grisanti\) / A.10519 \(Sweeney\).](#)

- Requires that unredeemed container deposits be credited to the environmental protection fund, increasing \$10 million of the revenue in fiscal year 2013-14 to \$56 million in fiscal year 2018-2019 and every year thereafter.

- **Invasive Species Act.**

Chapter 267.

[S.6826-A \(Little\) / A.9422-A \(Sweeney\).](#)

Requires the Department of Environmental Conservation, in cooperation with the Department of Agriculture and Markets, to take action with respect to non-native animal and plant species.

- **Brownfield Tax Credit Extender.**

[A.10593 \(Sweeney\) / S.7788 \(Rules\).](#)

Extends brownfield redevelopment tax credits, remediated brownfield credit for real property taxes for qualified sites and environmental remediation

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

The NYWEA GAC thanks Nixon Peabody LLP for its on-going support of this newsletter. It also thanks WEF's Government Affairs Staff, The Business Council of New York and NACWA for much of the information in this newsletter. If you are not already a member of one or all of these organizations, visit their web pages and consider becoming a member. The WEF web page can be reached through the NYWEA web page at <http://www.nywea.org/index.htm>; the NACWA web page is at [www.nacwa.org](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.

insurance credits until December 31, 2015. The authority for those credits is set to expire on March 31, 2015.

**Source:** Business Council of New York website

(<http://www.bcnys.org/inside/gac/2012/EndofLegislativeSessionUpdate.htm#environment>)

## **B. Regulation and Policy**

### **1. Water**

#### **New York Proceeding with a Further Public Health Review of its HVHF SGEIS and Proposed Regulatory Program**

According to a NYSDEC press release, the Governor's instructions are to “let the science determine the outcome”. Reportedly to help achieve this, in late September NYSDEC asked and NYS Health Commissioner to assess the Department's health impact analysis, including the engagement of “the most qualified outside experts” to advise him in his review. While the review will be informed by outside perspectives on the science of hydrofracking, the Press Release indicates that decision-making will remain a governmental responsibility. Once this evaluation is completed, a decision be made about whether to permit high volume hydraulic fracturing in New York. The September Press release indicated that if there was a public health concern that could not be addressed, the State would not proceed with allowing HVHF.

The process to date has been designed to maintain public trust in the integrity of DEC's review, and the NYSDOH Commissioner's assessment is meant to assure New Yorkers that the State has thoroughly examined all the issues before making a final decision. The review will also ensure the strongest possible legal position for the Department given the near certainty of litigation, whether the Department permits hydrofracking or not. According to the Press Release, this recent decision to have the Health Impact review done is to insure that New York has done the most thorough review possible, especially when it comes to public health concerns. In addition, the Public Health review is intended to insure that the Department has the most legally defensible review so that when the Department issues its final determination on this matter, protracted litigation is avoided, whatever the outcome.

**Source:** <http://www.dec.ny.gov/press/85071.html>.

#### **USGS and NYSDEC Release Report on Groundwater Quality in Genesee River Basin**

Entitled *Groundwater quality in the Genesee River Basin, New York, 2010*, this report contains data from Water samples collected from eight production wells and eight private residential wells in the Genesee River Basin from September through December 2010 were analyzed to characterize the groundwater quality in the basin. Water samples from the 2010 study were analyzed for 147 physiochemical properties and constituents that included major ions, nutrients, trace elements, radionuclides, pesticides, volatile organic compounds (VOCs), and indicator bacteria. The results indicate that groundwater generally is of acceptable quality, although concentrations of the following constituents exceeded current or proposed Federal or New York State drinking-water standards at each of the 16 wells sampled: color, sodium, sulfate, total dissolved solids, aluminum, arsenic, copper, iron, manganese, radon-222, and total coliform bacteria. Existing drinking-water standards for pH, chloride, fluoride, nitrate, nitrite, antimony, barium, beryllium, cadmium, chromium, lead, mercury, selenium, silver, thallium, zinc, gross alpha radioactivity, uranium, fecal coliform, Escherichia coli, and heterotrophic bacteria were

not exceeded in any of the samples collected. None of the pesticides and VOCs analyzed exceeded existing drinking-water standards.

**Source:** [http://pubs.usgs.gov/of/2012/1135/pdf/ofr2012-1135\\_reddy\\_508.pdf](http://pubs.usgs.gov/of/2012/1135/pdf/ofr2012-1135_reddy_508.pdf)

### **State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (Permit No. GP-0-12-001)**

DEC has released its Final *SPDES Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity*, GP-0-12-001. This General Permit, which replaced the interim permit GP-0-11-009, became effective on October 1, 2012 and will expire on September 30, 2017. This permit is intended to provide SPDES Permit coverage to facilities with stormwater discharges to surface waters of the State from a point source or outlet that conduct industrial activities. Under this permit, the owner or operator must develop and implement a Stormwater Pollution Prevention Plan (SWPPP) which identifies specific best management practices (BMPs) to be selected, installed, implemented and maintained at the facility to minimize the presence of pollutants in the stormwater discharges.

Permittees covered under GP-0-11-009 and all new dischargers may seek coverage under this permit by submitting a new Notice of Intent as set forth in Part I of this permit by December 29, 2012. If a timely NOI is filed, they will continue to be covered under the old MSGP until 30 days after their NOI is deemed complete. As of this date, they will be covered by and subject to the new MSGP.

**Source:** [http://www.dec.ny.gov/enb/20121003\\_not0.html](http://www.dec.ny.gov/enb/20121003_not0.html), NYSDEC contact: Ryan Waldron, NYS DEC - Bureau of Water Permits, General Permits Section Phone: (518) 402-8244, E-mail: [rpwaldro@gw.dec.state.ny.us](mailto:rpwaldro@gw.dec.state.ny.us).

### **General Permit Proposed For Certain Wetland Activities**

The New York State Department of Environmental Conservation (NYS DEC) proposes to issue General Permit GP-0-12-003 for the following activities within previously disturbed areas of NYS DEC-regulated Freshwater Wetland Adjacent Areas, greater than 50 feet from the wetland boundary, not to exceed .25 acre of disturbance: 1) Demolition and removal of existing appurtenant structures; 2) Construction of driveways or parking areas limited to 3000 square feet; 3) Additions to existing structures; 4) Installation of garages, decks, porches, sheds, pools, utility lines and other appurtenant structures; 5) In-kind, in-place replacement of existing appurtenant structures, roads, and associated utilities.

**Source:** [http://www.dec.ny.gov/enb/20120822\\_reg0.html](http://www.dec.ny.gov/enb/20120822_reg0.html), The Comment period closed on 9/20/2012. The [draft General Permit and draft Request for Authorization](http://www.dec.ny.gov/permits/6061.html) are available at: <http://www.dec.ny.gov/permits/6061.html>

### **Clean Water State Revolving Fund (CWSRF) for Water Pollution Control Drinking Water State Revolving Fund (DWSRF) – Including the Change in MWBE requirements**

The Clean Water State Revolving Fund (CWSRF) and Drinking Water State Revolving Fund (DWSRF) Draft Intended Use Plans (IUP) for Federal Fiscal Year 2013 were issued for comment on July 25, 2012, with the comment period running through September 10, 2012. After the release of the draft IUPs, the Minority and Women Business Enterprise (MWBE) goals were modified. An MWBE participation goal of 20% has been established for all New York

State agencies and authorities, including the New York State Environmental Facilities Corporation (NYS EFC). Therefore, beginning October 1, 2012, all financial assistance agreements for initial Clean and Drinking Water financings will include a requirement to conduct good faith efforts to meet MWBE goals of 20% for all construction contracts greater than \$100,000 and non-construction contracts/agreements and change orders greater than \$25,000 related to the financed project.

**Source:** [http://www.dec.ny.gov/enb/20120822\\_not0.html](http://www.dec.ny.gov/enb/20120822_not0.html)

### **Update to TOGS 1.2.2 – EBPS for Individual SPDES Permits**

The NYS DEC- Division of Water (DOW) is making available the Division of Water policy DOW 1.2.2: Administrative Procedures and the Environmental Benefit Permit Strategy for Individual SPDES Permits. The primary purpose of this document is to describe the administrative steps for developing new, renewed and modified permits under the SPDES permit program. It also describes the procedures for ranking a permit by calculating a priority score, the documentation pathways used in the permitting process, and the procedures for developing the public notice published annually in the Environmental Notice Bulletin (ENB).

**Source:** [http://www.dec.ny.gov/enb/20120808\\_not0.html](http://www.dec.ny.gov/enb/20120808_not0.html). [Copies](#) are available at: <http://www.dec.ny.gov/regulations/2652.html>. Contact: Brian Baker, NYS DEC - Division of Water, Phone: (518) 402-8111.

### **Exploring the Multiple Benefits of Water Recycling Systems for New York City’s Water and Wastewater Utility**

Water’s worth it, but how much? The New York City Department of Environmental Protection (DEP) initiated a study to discover how much a gallon of water saved is worth in terms of DEP’s operational and capital costs, and whether these savings can be converted to incentives for private water recycling systems. DEP is looking at systems that reuse between 94,625 and 1.9 million L/d (25,000 and 500,000 gal/d). The study will help DEP understand the potential uses of onsite water recycling systems for stormwater, graywater, and blackwater — a strategy that could crosscut multiple programs to achieve different objectives. DEP is looking at both ends of the system, water supply and wastewater treatment, encompassing related impacts on water demand, operational savings at wastewater conveyance and treatment facilities, and reduced capital costs for combined sewer overflow (CSO) controls and water quality improvements.

**Source:** WEF Stormwater Report 10/12/12 containing an article written by NYCDEP.

## **C. Enforcement and Judicial**

### **NYC and Others Ask Supreme Court to Overturn Ruling on Liability for L.A. County Stormwater**

New York City and groups representing water utilities have filed a brief urging the U.S. Supreme Court to overturn a March 2011 appeals court ruling that the Los Angeles Flood Control District was liable under the Clean Water Act because it directed contaminated runoff through its storm drains into rivers, harbors, and eventually the Pacific Ocean without a National Pollutant Discharge Elimination System permit. In a friend-of-the-court [brief](#) in support of Los Angeles County, the groups said the U.S. Court of Appeals for the Ninth Circuit in March 2011 ignored a Supreme Court ruling in 2004 that “the flow of water from one portion of a river, through an

engineered improvement, to a downstream portion of the same river does not constitute a regulated discharge of pollutants under the Clean Water Act” ( citing *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95, 105 (2004)).

The case concerns alleged permit violations involving the Los Angeles and San Gabriel rivers. The Supreme Court agreed in June to review the Ninth Circuit ruling but said it would limit review to the question of whether water flowing from one portion of a river through an artificial channel into another portion of the same river constitutes a discharge subject to permitting. Filing the brief were New York City, the New York State Conference of Mayors, the American Water Works Association, the American Public Works Association, the Water Environment Federation, the Association of Metropolitan Water Agencies, and the National Association of Clean Water Agencies. The groups contended the Supreme Court should follow its own ruling in *Miccosukee* in this instance. “Should this Court rule otherwise, amici will be threatened with burdensome and unnecessary regulation that will significantly encumber routine water transfers indispensable to the provision of safe and affordable public water supplies as well as safe, effective stormwater and floodwater management,” the brief said.

**Source:** Bloomberg BNA Infrastructure Investmane and Policy 9/18/2012 discussing *Los Angeles County Flood Control District v. NRDC*, U.S., No. 11-460, brief filed 9/11/12 and the friend-of-the-court brief filed by New York City and water.

## II. FEDERAL

### A. Legislation

#### **Sequestration Will Cut State Revolving Funds**

Rep. Norm Dicks, the leading Democrat on the House Appropriations Committee, recently highlighted that the 2011 deficit reduction act would result in **\$196 million in cuts to wastewater and drinking water infrastructure funds in fiscal year 2013**, affecting at least 75 repair and rehabilitation projects and costing as many as 5,000 jobs. Rep. Dicks cited these figures in a letter to all members of Congress to illustrate the impact of an 8.2 percent cut in nondefense, discretionary spending for the Environmental Protection Agency and other agencies. The mandatory cuts, known as sequestration, will take effect January 2, 2013. These cuts would affect the remaining nine months of FY 2013 unless Congress intervenes in the lame-duck session following presidential elections on November 6. Under the Budget Control Act of 2011 (Pub. L. No. 112-25), Dicks said the clean water state revolving fund program and the drinking water state revolving fund will receive \$2.192 billion in FY 2013, a \$196 million cut from the FY 2012 level of \$2.388 billion, owing to sequestration. The state revolving funds enable states to make low-interest loans to municipalities to fund water infrastructure projects.

**Source:** WEF *This Week in Washington*, 10/16/12

### B. Regulation and Policy

#### 1. Water

##### a. *Other Water*

#### **Federal Regulations Hinder Water Utilities in Adapting to Climate Change, Report Says**

Federal laws and regulations governing water quality are hindering the ability of utilities to adapt to climate change, according to a report issued Sept. 10 by the Water Research Foundation. Regulations also limit water utilities' ability to cost-effectively reduce greenhouse gas emissions,

according to the report, *Building a Climate-Ready Regulatory System*. The U.S. water industry is expected to face increasingly strict water quality standards as well as greenhouse gas emissions controls, along with climate change impacts, in the next few years, according to Rob Renner, executive director of WRF.

The Safe Drinking Water Act prevents regulators from revising standards to become less restrictive, according to the report. As water supply quantity and quality decline in the future, meeting water quality standards will require more energy, the report states. Additionally, the Clean Water Act, the Clean Air Act, and the SDWA do not allow the Environmental Protection Agency to defer action under the law if it conflicts with the goals or requirements of another environmental law. Federal agencies should insert language into the laws to make the requirements more flexible, according to the report.

For example, the report says EPA needs to include provisions in future water quality standards to help utilities meet energy regulations, according to the report. More stringent water quality standards would make it harder for water utilities to improve their energy efficiency. The objective of the report is to help utility managers prepare for greenhouse gas emission regulations, climate change impacts, water supply demand, and other issues the industry is expected to face. It is also aimed at giving policymakers direction for helping the industry prepare for these changes, according to the report.

The report outlines potential state, regional, and federal climate change and water quality legislation and regulation, and policy changes that would allow utilities to reduce their carbon footprint while complying with laws and regulations to meet water supply demands.

**Source:** Bloomberg BNA Environment Reporter [09/14/2012](#).

### **Three States Join in Pilot Program to Try Credit Trading System for Water Quality**

A pilot plan for trading credits on water quality was signed Aug. 9 as a strategy to reduce nitrogen and phosphorus pollution in the Ohio River Basin. Federal and state officials joined with representatives of agriculture interests and the electric power industry for a signing ceremony in Cincinnati to promote the voluntary program, an outgrowth of a research project of the Electric Power Research Institute (EPRI). It was the first time an interstate program has been set up for a water quality trading program for nitrogen and phosphorus pollution, often called nutrient pollution. Such a trading system has been studied for the Chesapeake Bay watershed with an eye toward reducing the costs of nutrient pollution controls. The Ohio River Basin plan is intended to serve as the basis for Ohio, Indiana, and Kentucky to begin pilot trades later in 2012 and continue through 2015. Trading rules will allow a water quality credit generated in one of the states to be purchased in any of the states. The plan has been in development since 2009. Project promoters, with help from local soil and water conservation districts, have been reaching out to farmers to line up participants

EPRI, a research organization supported by the electric power industry, said pilot trades could include at least three power plants and up to 30 farms. Wastewater treatment systems also release nutrient pollution and might benefit from credit trading. For coal-fired power plants, the trading program could help reduce the cost of meeting nutrient reduction targets for point sources. For farmers, the project supports the adoption of best conservation practices to reduce nutrient runoff. The incentive for participation in the trading system would come from generating credits through conservation and then selling the credits for a profit.

**Source:** Bloomberg BNA 08/17/2012; More information on the Ohio River Basin water quality trading project is available at <http://bit.ly/Mid6E8>.

## **GAO Report Finds that EPA Review of Effluent Guidelines Could Benefit from More Information on Treatment Technologies**

According to an October 10 report released by the **Government Accountability Office (GAO)**, EPA could better prevent water pollution from industrial sources by focusing more on treatment technologies during its regular review of effluent guidelines. GAO was asked to examine (1) the process EPA follows to screen and review industrial categories potentially needing new or revised guidelines and the results of that process from 2003 through 2010; (2) limitations to this process, if any, that could hinder EPA's effectiveness in advancing the goals of the Clean Water Act; and (3) EPA's actions to address any such limitations. GAO analyzed the results of EPA's screening and review process from 2003 through 2010, surveyed state officials, and interviewed EPA officials and experts to obtain their views on EPA's process and its results. To improve the effectiveness of EPA's efforts to update or develop new effluent guidelines, GAO recommended that the EPA Administrator should direct the effluent guidelines program to identify and evaluate additional sources of data on the hazards posed by the discharges from industrial categories as it considers revisions to its screening and review process.

**Source:** WEF *This Week in Washington*, 10/16/12

### **b. *New Tools and Databases***

#### **New EPA Tool Helps Estimate the Affordability of Water Pollution Control Requirements**

EPA has released a new, web-based tool to help a variety of stakeholders evaluate the economic and social impacts of pollution controls needed to meet water quality standards set for specific uses for a waterbody, such as swimming or fishing. This tool could be used by states, territories, tribes, local governments, industry, municipalities and stormwater management districts.

The tool will help stakeholders identify and organize the necessary information, and perform the calculations to evaluate the costs of pollution control requirements necessary to meet specific water quality standards. The tool prompts users to submit treatment technology information, alternative pollution reduction techniques and their costs and efficiencies, and financing information, as well as explain where that information can be found. [Click here for more information.](#) For additional information, contact Gary Russo at 202-566-1335 or email [russo.gary@epa.gov](mailto:russo.gary@epa.gov)

**Source:** Water Headlines, July 31, 2012

#### **A Function-Based Framework for Stream Assessment and Restoration Projects Available Online**

EPA has released a new technical resource to improve stream assessment and restoration for watershed practitioners. A Function-Based Framework for Stream Assessment and Restoration Projects lays out a framework for approaching stream assessment and restoration projects that focus on understanding the suite of stream functions at a site in the context of what is happening in the watershed. The framework is an expansive resource covering watershed and river corridor processes, and the document provides several hypothetical examples and a detailed discussion of how the framework could be used to develop and assess stream restoration projects.

**Source:** Water Headlines, July 31, 2012

## **Freshwater Species Going Extinct Quicker than Birds, Mammals**

Freshwater fish in North America are going extinct at a rate faster than birds and mammals, according to a new study. Freshwater fish species have vanished from lakes and rivers much faster since 1898 than in previous centuries, and if the trend continues, dozens more species could go extinct by 2050, according to the study by a U.S. Geological Survey scientist.

Between 1898 and 2006, 57 fish species went extinct, and three distinct populations were removed from North America, according to the paper published in *BioScience* by USGS fish biologist Noel Burkhead. Extinctions occur as a natural part of evolution, but they typically occur at a frequency of about one species every 3 million years. The modern average extinction rate of 3.2 percent of North American fish species a year is 877 times greater than the background rate, the study said. That rate is the highest of any vertebrate group, including mammals and birds. Today, there are 1,212 described fish species in Canada, the United States and Mexico. More species are likely to be discovered and described each year, but if the current extinction rate continues, Burkhead calculates an additional 53 to 86 species will be lost by 2050. Burkhead said that estimate is conservative because he used the average rate since modern extinctions began in the 1900s, rather than accelerating the rate by looking at data only since the 1950s. About 25 percent of the extinct fish species were added after 1989. While he plans to further explore causes for the extinctions in future papers, Burkhead noted that habitat destruction and invasive species are two leading factors.

**Source:** ClimateWire, 8/10/2012

## **EPA Guidelines on Water Reuse Released at WEFTEC 2012**

EPA has released a set of water reuse guidelines during WEFTEC 2012 to help states develop and implement water reuse regulations and serve as a reference on water reuse practices. **2012 Guidelines for Water Reuse** summarizes existing U.S. regulations and details water reuse practices outside the United States, including 100 global case studies. Information on planning for future water reuse systems, indirect potable reuse and industrial reuse, and disinfection and treatment technologies is also provided. These guidelines were developed by EPA in coordination with the U.S. Agency for International Development and the consulting and engineering firm CDM Smith, based in Cambridge, Mass. The guidelines were released September 29, 2012, at WEFTEC. The guidelines may now be downloaded at <http://www.waterreuseguidelines.org/images/documents/2012epaguidelines.pdf>.

**Source:** WEF *This Week in Washington*, 10/16/12

## **EPA and USGS Announce a New Water Quality Portal**

EPA and the USGS have developed a new **Water Quality Portal for water quality data**. The portal brings together chemical, physical and microbiological data from EPA's Storage and Retrieval Data Warehouse and U.S. Geological Survey's (USGS) National Water Information System for scientists, policy-makers, and the public in a single, user-friendly web interface, while reducing the burden of searching, compiling, and formatting water monitoring data for analysis. EPA's Water Quality Exchange, a web-based data entry tool that enables data owners to upload their data so the public has access to the data through the new water quality portal, is also highlighted. The new portal can be entered at <http://www.waterqualitydata.us/>

**Source:** WEF *This Week in Washington*, 10/16/12

## **EPA Releases Interactive Map for National Estuaries**

EPA's **National Estuary Program (NEP)**, a place-based program to protect and restore the water quality and ecological integrity of estuaries of national significance, has released a first-ever interactive map, NEPmap, with more than a decade's worth of NEP habitat data. A simple static map with contained descriptions of NEP habitat protection and yearly restoration projects has been replaced with a large set of data layers to enable viewing of NEP habitat information in a wider environmental context. The NEP map allows users to view water quality conditions in their estuary and surrounding watershed alongside NEP habitat projects. NEPmap users can also generate and print maps and reports, change map scales, turn on and off background layers and interact with information points to provide a greater level of detail than a traditional static map. See, <http://water.epa.gov/type/oceb/nep/index.cfm>.

**Source:** WEF *This Week in Washington*, 10/16/12

## **WEF Launches Water for Jobs Initiative**

In a report released in 2011 — *Water Works: Rebuilding Infrastructure, Creating Jobs, Greening the Environment*— an estimated investment of \$188.4 billion is necessary to manage stormwater and preserve water quality. Spread over the next 5 years, this investment could generate \$265.6 billion in economic activity and create nearly 1.9 million jobs. The Water Environment Federation (WEF) has launched a new initiative to increase the visibility of water in the current election campaign. *Water for Jobs: Water Puts America to Work* uses traditional and social media to let candidates and voters know that investing in water infrastructure creates jobs, promotes innovation and economic growth, and safeguards public health and water quality.

**Source:** WEF Stormwater Report 10/12/12.

## **New App Lets Users Check Health of Waterways Anywhere in the U.S.**

EPA has launched a new app and website to help people find information on the condition of thousands of lakes, rivers and streams across the United States from their smart phone, tablet or desktop computer. Available at <http://www.epa.gov/mywaterway>, the How's My Waterway app and website uses GPS technology or a user-entered zip code or city name to provide information about the quality of local water bodies. The release of the app and website helps mark the 40th anniversary of the Clean Water Act, which Congress enacted on October 18, 1972, giving citizens a special role in caring for the nation's water resources. Forty years later, EPA is providing citizens with a technology-based tool to expand that stewardship.

**Source:** Water Headlines from EPA, 10/23/2012.

## **2. Judicial and Enforcement**

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

## **Suit Claims that Chicago Water Agency's EPA Accord Violates CWA**

Three environmental groups lodged an intervenor complaint in Illinois federal court in a U.S. Environmental Protection Agency suit against Chicago's wastewater management district, claiming a consent decree reached by the two parties should be rejected because it does not adequately address damages caused by untreated sewage discharges. Natural Resources Defense Council Inc., Sierra Club and Prairie Rivers Network are claiming that, despite the agreement,

the Metropolitan Water Reclamation District of Greater Chicago is violating the Clean Water Act by allowing oxygen levels in local waters to drop “dangerously low” because of combined sewer outflow discharges.

The groups also filed a CWA citizen suit in May 2011 against the district seeking civil penalties for the same violations, but later that year the district reached an agreement with the EPA establishing a program of compliance that purportedly resolves the CWA violations. That agreement does not properly address the district's failure to meet the numeric standard for dissolved oxygen from its discharges, the groups said. According to the complaint, pollutants from the district's system have made their way into the Lower Des Plaines River, the Illinois River and other waterways that must maintain a dissolved oxygen level of no less than 4.0 milligrams per liter. The district's own data shows that the district is violating that standard, according to the suit.

Calling for a permanent injunction against the district, the groups argue the violations will continue unless the court intervenes. They are also asking the court to impose civil penalties of up to \$32,500 for each violation up to Jan. 12, 2009, and \$37,500 for instances after that date. They state that the consent decree should be blocked because it is not “fair, adequate, reasonable and/or in the public interest.”

The district, which manages water for the city and a large area of surrounding suburbs, reached its settlement with the EPA in December, agreeing to pay a \$675,000 civil penalty for violations of the CWA and build a series of projects aimed at stemming the flow of pollution into the city's waterways. The projects include efforts to increase the district's capacity to handle storm runoff, pick up trash from overflows and build a network of green roofs and rain gardens to prevent flooding. The consent decree settles long-standing allegations by the EPA that the MWRD was allowing too much untreated wastewater, including sewage, to flow into Chicago's waterways. The EPA and its state counterpart, the Illinois Environmental Protection Agency, want to make some of the waterways, which have been polluted since Chicago's industrial heyday, clean enough to swim in.

**Source:** Law360, August 22, 2012

### **WEF Joins Amicus Brief to U.S. Supreme Court on Los Angeles Stormwater Case**

A March 2011 Ninth Circuit appeals court decision held that the flow of water from one portion of a river through an engineered improvement into a downstream portion of the same river constitutes a regulated discharge of pollutants under the Clean Water Act (CWA). By this ruling, a National Pollutant Discharge Elimination System permit would be required. The Ninth Circuit Court found the district liable for stormwater pollution that originated from upstream dischargers but was conveyed within the San Gabriel and Los Angeles rivers. The court stated that highly channelized portions of these rivers flow into natural areas and should be treated as outfalls subject to permit violations. However, the district argued that alterations to a river do not change its designation as a navigable waterbody under the CWA, and thus points where manmade sections terminate cannot constitute outfalls. The Supreme Court has previously ruled that transfers of water from one section of a waterbody to another do not qualify as a CWA discharge requiring a permit. The Supreme Court is scheduled to hear oral arguments in the case Dec. 4.

The Water Environment Federation and others on Sept. 11 filed a friend-of-the-court brief with the U.S. Supreme Court supporting the position that such a scenario does not constitute a

“discharge” for purposes of CWA. The brief argues that the Supreme Court should reverse the 9th U.S. Circuit Court of Appeals ruling to avoid serious negative consequences for public agencies and authorities nationwide involved in water management for water supply, flood control, and related public purposes.

**Source:** WEF Stormwater Report 10/12/12.

### **Mass. City Settles EPA Suit**

The city of Fitchburg, Mass. has agreed to pay nearly a quarter of a million dollars to resolve allegations it violated the Clean Water Act by failing to properly treat sewage and industrial waste being pumped into the Nashua River. The North Nashua River is a Class B waterway, meaning it must be clean enough for swimming, fishing and recreation. Under the terms of a consent decree, the city will pay a civil penalty of \$141,000 for the violations, perform a supplemental environmental project that will cost at least another \$100,000, and implement significant remedial measures to minimize future discharges.

Since at least 2005, the city’s publicly owned sewage treatment works have allegedly violated multiple provisions of wastewater treatment permits by discharging hazardous bacteria and chemicals into a public-use waterway, according to the complaint. Beginning in 2002, EPA issued a series of NPDES permits to Fitchburg that allowed a set amount of sewer discharge into the north branch of the Nashua River, so long as those discharges did not cause fecal bacteria levels in the river to exceed state-mandated water standards, according to the complaint. EPA was seeking a permanent injunction ordering the city to upgrade the Fitchburg water pollution control facility in order to bring it into compliance with its NPDES permits, as well as civil penalties of \$32,500 per day for each violation prior to 2009 and \$37,500 for each subsequent violation.

The city also exceeded NPDES permit limits for pH levels, suspended solids, chlorine, phosphorous, ammonia, copper and lead, logging at least 164 monthly average concentration limit violations over the period in which the permits were in effect, according to the complaint. Further, according to the complaint, the NPDES permits also prohibit the city from diverting sewage past the treatment facilities without processing it except where required for essential facilities maintenance; the city allegedly bypassed the secondary treatment facilities at least 50 times since 2005. EPA further alleged that the city failed to undertake monthly inspections of the waste treatment facilities as required during at least 36 months since 2005, according to the complaint.

This is not the first time the EPA has brought an action against Fitchburg over wastewater discharges into the Nashua River. In October 2001, the city settled a suit accusing it of violating NPDES permits by agreeing to pay \$65,000 in penalties and to spend at least \$44,000 to complete two supplemental environmental projects, according to an EPA press release.

**Source:** Law 360, 8/16/12 discussing *U.S. v. The City of Fitchburg, Massachusetts*, case number 1:12-cv-11511, in the U.S. District Court for the District of Massachusetts.

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

#### **1st Circ. Upholds EPA Pollution Limits For Mass. Sewage Plant**

The First Circuit rejected challenges to the USEPA's nitrogen, phosphorous and aluminum discharge limits imposed on a Massachusetts sewage treatment plant, ruling that the EPA's

decision was supported by the scientific record and was not premature. Lifting a stay that had been in place for more than a year, the appeals court denied petitions from the Upper Blackstone Water Pollution Abatement District and the Conservation Law Foundation and said it could find no error in the EPA's final permit decision limiting the amount of pollutants the district can release into the Blackstone River.

The district and its member towns had claimed that crucial parts of the science used by the EPA was were inadequate and unreliable, arguing that the agency should have delayed the permit until the district could complete an ongoing facility upgrade and a new water quality model. The appeals court found that the district overstated the availability of data and ruled that the EPA had no obligation to wait. The ruling also deferred to the EPA's conclusion that even with a finished computer model and fully completed facility upgrades, there was no reasonable likelihood that a less stringent limit would meet state water quality standards.

The agency also had the right to factor in the consequences of delay when making the permit decision, especially considering that the pollution emitted from the sewage plant becomes harder to address the longer it continues unabated, according to the ruling.

Both Massachusetts and Rhode Island have listed the Blackstone River as impaired under the Clean Air Act. The states requested and recommended to the EPA that nitrogen discharges into the river be tightened. Because of the particular sensitivity to nitrogen, phosphorous and aluminum in the Blackstone River, the EPA determined that lower discharge limits were necessary to achieve compliance with state water quality standards, the ruling said.

The Conservation Law Foundation argued that the EPA's nitrogen standards for the district were too high. The 5.0 milligrams per liter limit set by the EPA should not be considered an acceptable water quality goal for the area because a limit of at least 3.0 mg/L is needed to comply with Rhode Island water quality standards, the group said. The appeals court disagreed, finding that the EPA was correct in stating that "some uncertainty remains" regarding predicted water quality improvement, and noting that the Rhode Island Department of Environmental Management set a 5.0 mg/L limit for two comparably sized sewage treatment facilities along the Providence River.

**Source:** Law360, 8/06/2012 , discussing *Upper Blackstone Water Pollution Abatement District v. U.S. Environmental Protection Agency*, case number 11-1471, and *Conservation Law Foundation Inc. v. Upper Blackstone Water Pollution Abatement District et al.*, case number 11-1610, in the U.S. Court of Appeals for the First Circuit.

### **EPA to Respond to NRDC Petition Seeking Data on Secondary Treatment Technology**

The Environmental Protection Agency Aug. 9 agreed to respond by Dec. 14 to a petition from environmental groups asking the agency to publish updated information on secondary treatment technology for publicly owned waste water plants that could be used to set new treatment standards, in particular for removing nitrogen and phosphorus. In a motion filed in the U.S. District Court for the Southern District of New York, the agency stated its willingness to respond to the 2007 petition by the Natural Resources Defense Council and other groups. As a result, the groups have agreed to suspend a suit filed in March against EPA for failing to respond to the petition.

At issue in the suit is EPA's failure to respond to the petition filed under Sections 301 and 304 of the Clean Water Act asserting the agency is required to update its secondary treatment standards to reflect the most recent technology for removing pollutants. Section 301 requires EPA to

update secondary treatment standards to reflect any new information published from time to time pursuant to Section 304 (d)(1), which requires the agency to periodically assess the science on removal technology and update it. The groups alleged that excess quantities of nitrogen and phosphorus discharged by publicly owned treatment plants fuel excessive growth of algae, which contributes to the formation of low-oxygen zones, leading to fish kills.

Through its 2007 petition, NRDC asked EPA to modernize its treatment requirements that have not been updated since 1985 to reflect new technology that can dramatically reduce harmful nutrient pollution.

Meanwhile, another suit that NRDC and other environmental groups filed in March against EPA in the U.S. District Court for the Southern District of Louisiana over the agency's alleged failure to require states to reduce nutrient pollution in the Mississippi River Basin and the northern Gulf of Mexico "is proceeding on a separate track."

The suit may eventually affect everyday operations of publicly owned waste water treatment plants, up to 16,000 waste water treatment plants may have to install costly nutrient removal technology.

**Source:** Bloomberg BNA Toxic law reporter, 8/23/2012, discussing *Natural Resources Defense Council v. EPA*, S.D.N.Y., No. 1:12-cv-01848, *motion filed* 8/9/12 and *Gulf Restoration Network v. Jackson*, E.D. La., No. 2:12-cv-00677, 3/13/12

### **Water District Liable for Significant Fire-related Damages**

The Yorba Linda water district in California has been found liable for nearly seventy million dollars in damages resulting from the 2008 Freeway Complex fire, one of the largest wildfires in Orange County history lasting five days and burning more than 30,000 acres. A group of homeowners sued the district for not being able to provide water effectively. During the fire some water lines went dry when three electrical pumps shorted and stopped working. The district argued that it shouldn't be liable because it didn't start the fire but the judge determined that the failure of the pumps directly resulted in damage to homes. The district is suing its insurer AIG in federal court for refusing to contribute litigation expenses.

**Source:** Water Word Weekly 9/2/12 (<http://ww.ramp.com/m/video/62024226/waterworld-weekly-sept-4-2012.htm>)

### **City Immune from Suit over Damages to Gas Line Caused by Water Main Break**

The city of Akron, Ohio, is entitled to immunity from a lawsuit filed by the Dominion East Ohio Gas Co. alleging that a break in one of the city's water mains damaged a Dominion gas pipe and disrupted service to the gas company's customers. The Ohio Court of Appeals, Ninth Judicial District, reversed an order of the Summit County Court of Common Pleas that denied the city's motion for summary judgment asserting governmental immunity under Ohio laws.

At about 2:30 a.m. on a weekend, a water main at the intersection of Glenwood Avenue and Gorge Boulevard in Akron ruptured, the opinion said. A supervisor with the city's water department did not send an inspector or crew to the scene until 7:30 that morning. In the meantime, Dominion customers complained about a disruption in their service. The appeals court held that the supervisor exercised judgment and discretion in deciding to wait until the morning to send a crew to the scene, and thus, the city was entitled to immunity. According to the opinion, after the water main erupted, an employee of the Akron Highway Department barricaded the area and notified the Akron Water Department that it looked like a "bad break."

The employee subsequently concluded, however, that it was not a “bad break,” and called the water department again. In its opinion, the appeals court explained that exceptions to governmental immunity occur where the damage is caused by an employee's negligent act in carrying out the governmental function. That said, however, under Ohio law, a political subdivision may still be immune from suit despite an employee's negligent performance of an act if the damage resulted from the employee's exercise of judgment or discretion in determining whether or how to use equipment, personnel, facilities, and other resources, unless the judgment was exercised in bad faith or a reckless manner. Here, the supervisor's decision not to send an inspector and crew to the scene until the following morning “reflected an exercise of judgment or discretion” in determining how to use personnel the appeals court said in concluding that Akron was entitled to immunity.

**Source:** Bloomberg BNA Infrastructure Investment & Policy Report 9/6/12, discussing *East Ohio Gas Company v. City of Akron*, Ohio Ct. App., C.A. No. 25830, 8/22/12

### c. *Criminal*

#### **N.C. Poultry Processor Convicted of Clean Water Act Violations**

A federal jury found a North Carolina poultry processing company guilty of 10 counts of violating the Clean Water Act. The House of Raeford Farms, based in Rose Hill, was charged with authorizing employees to bypass the company's pretreatment system and discharge untreated wastewater containing turkey parts, blood, and grease directly into the municipal treatment plant without notifying the city first. Under the company's discharge permit, bypasses of its treatment system were prohibited without prior authorization from the city of Raeford.

The jury found Raeford Farms not guilty of four charges, and acquitted its plant manager on all 14 felony counts for which he was charged. The 14 felony counts on which House of Raeford and Steenblock were indicted represented separate occasions that illegal discharges allegedly took place. Sentencing is scheduled for Nov. 28. Prosecutors said the company faces a maximum fine of \$500,000 for each of the 10 counts upon which it was convicted, or twice the gain resulting from the offense, whichever is greater.

In a statement issued following the verdicts, House of Raeford said it was “pleased” that Steenblock was acquitted on all charges and that the jury found the company innocent on several charges. “House of Raeford will continue to address the remaining charges in the courts,” the company said. According to the poultry processor, it completed a \$1.4 million upgrade to its wastewater treatment system in September 2006 “that solved the issues that led to the trial.” None of the materials the government cited as being in the discharges ever reached the environment, the company said.

A request by the defendants to dismiss the charges because they had resolved the issue with the city of Raeford was rejected, a ruling upheld by the U.S. Court of Appeals for the Fourth Circuit in October 2010 (*United States v. House of Raeford Farms Inc.*, 4th Cir., No. 10-4599, 10/18/10). The district court subsequently dismissed the case because prosecutors did not move expeditiously, but the Justice Department refiled the claims and the case was allowed to proceed.

**Source:** Bloomberg BNA Environment Reported 8/24/2012 discussing *United States v. House of Raeford Farms Inc.*, M.D.N.C., No. 1:12-cr-248, 8/20/12

### **Owner of Environmental Testing Lab Sentenced to Prison for Falsifying Results**

A federal trial court sentenced the owner of an environmental testing laboratory to nine months in prison for his role in a conspiracy that resulted in reporting of false water test. The U.S. District Court for the Eastern District of Pennsylvania ordered the president and his company, Blue Marsh Laboratories Inc. in Douglassville, Pa., to share the cost of restitution totaling \$14,114. The court sentenced Blue Marsh Labs to five years of probation. The defendants pleaded guilty to three counts of an 83-count superseding. The President and his company admitted to conspiring to defraud customers by making false representations regarding test results, violating the Clean Water Act, and making false statements to the Food and Drug Administration. Between September 2005 and December 2007, Blue Marsh caused test reports to be prepared and mailed to customers falsely stating that the lab had followed proper Environmental Protection Agency methods. The test results provided by the lab, whose main business involved analytical testing of environmental samples of water and waste water, were false, inaccurate, and unreliable, federal prosecutors said. They included fraudulent results of EPA-required tests for cyanide, herbicides, and other pollutants in Hurricane Katrina flood water samples and fraudulent test results required by FDA for pesticide contamination of tangelos imported from South America.

**Source:** Bloomberg BNA Toxics Law reporter, 9/17/2012. Discussing results (*U.S. v. Blue Marsh Laboratories Inc.*, E.D. Pa., No. 11-cr-259, *sentencing* 9/10/12).

### **Stormwater Non-Compliance puts Construction Company Owner in Prison**

In a rare criminal prosecution under the Clean Water Act, a Puget Sound-area developer who flouted conditions of a construction stormwater general permit was sentenced Oct. 10 to spend six months in jail. The president pleaded guilty to knowingly violating the conditions of a Clean Water Act permit. Under a plea agreement, the U.S. District Court for the Western District of Washington ordered the president to pay a \$300,000 fine as well as a \$100,000 community service payment to the National Fish and Wildlife Foundation to be used toward wetlands restoration projects in the south Puget Sound watershed. The president of Stowe Construction Inc. is the second person sentenced to prison for violating the Clean Water Act and one of only 10 individuals criminally prosecuted under the law. Beginning in 2007 and continuing for more than three years, this individual took numerous steps to evade compliance with permit requirements despite “very regular meetings” with state and subsequently federal regulators at his 70-acre warehouse construction site in the White River watershed, according to the government's sentencing memorandum. According to the sentencing memorandum, this individual and his firm undertook a number of measures to circumvent the stormwater permit, including putting in a bypass pipe that dumped silt-laden runoff directly in a drainage ditch on adjacent to the construction site. The runoff from the pipe was not sampled as required by the permit, and the pipe did not appear on any of the approved engineering plans for the site. An employee also made false statements in weekly discharge monitoring reports to the state Department of Ecology, according to the memorandum. Two major landslides “directly traceable” to the failure to control erosion on the construction site caused closures of the adjacent highway for safety reasons. According to the EPA, “the material discharged by Stowe was “equivalent to 3,000 large dump trucks full of material dumped into nearby streams.” The White River is a salmon stream that tumbles off the glacial flanks of Mt. Rainier and flows about 75 miles before its confluence near Stowe's construction site with another river flowing into Puget Sound.

**Source:** Bloomberg BNA Infrastructure Policy and Investment 10/11/12 discussing *United States v. Stowe*, W.D. Wash., No. 12-cr-05121, *sentencing* 10/10/12

### **Boston/Gloucester to Upgrade Sewers to End EPA Harbor Pollution Claims**

The cities of Boston and Gloucester, Mass., have agreed to consent decrees with the U.S. government to update their municipal sewer systems in an effort to improve the water quality along the state's coastline. EPA found both cities' wastewater systems emptied too much pollution into Boston Harbor and Gloucester Harbor. The Boston Water and Sewer Commission agreed to pay about \$300,000 in civil penalties and environmental projects. The cost of system upgrades was not immediately available Friday. The settlement will require BWSC to take specific steps to significantly reduce discharges from its storm drain and sanitary sewer. The settlement also calls for incorporating green infrastructure, low-impact development and other controls that would help reduce harmful discharges and protect the environment.

Water sampling conducted by the EPA indicated untreated sanitary sewage discharging from numerous BWSC storm water outfalls. The consent decree establishes a schedule for BWSC to investigate the sources of sewage being discharged from its storm drains. The agreement requires BWSC to remove all identified sources of sewage as expeditiously as possible. Under the settlement, BWSC must conduct frequent and enhanced monitoring of its storm water outfalls. And the consent decree requires BWSC to control pollutants other than sewage, such as phosphorus and metals, being discharged from its storm drain system. BWSC has also committed to implement a supplemental environmental project to address leakage from private sewer lines.

Gloucester, which had already agreed to a consent decree in 1992 but due to continued problems agreed to a new modification, will not pay any penalties, but said it would upgrade its sewage treatment plant and work to stem overflows from its sewer system. Gloucester's existing primary sewer treatment plant is nearly 30 years old, the EPA said, and while the city has recently completed important upgrades, the system is in need of additional repair and rehabilitation to meet the terms and conditions of its current discharge permit. "Maintenance has been inadequate and parts have not been replaced in a timely manner. These problems have resulted in discharges of poorly treated sewage in violation of the city's permit. Under the consent decree, the city will address these problems," the EPA said.

**Source:** Law360, 8/27/2012. The BWSC case is *Conservation Law Foundation Inc. et al. v. Boston Water and Sewer Commission et al.*, case number 1:10-cv-10250, in the U.S. District Court for the District of Massachusetts. The Gloucester case is *U.S.A. et al. v. City of Gloucester*, case number 1:89-cv-02206, in the same court.

### **Ship Owner Fined \$1 Million for Concealing Discharges of Oily Wastewater**

A shipping company headquartered in Italy and the chief engineer of one of its ships were sentenced in federal court in Mobile, Ala., for deliberately falsifying records to conceal discharges of oily wastewater from the ship directly into the sea. Giuseppe Bottiglieri Shipping Company S.P.A, was sentenced to pay a \$1 million criminal fine, serve four years of probation, and make a \$300,000 community service payment to the National Fish and Wildlife Foundation. The company must also fund and implement a comprehensive environmental compliance plan during the term of probation. The Chief Engineer was sentenced to one month in jail.

The owner and operator of the M/V Bottiglieri Challenger pleaded guilty to a violation of the *Act to Prevent Pollution from Ships* for failing to properly maintain an oil record book as required by

federal and international law. The ship's chief engineer pleaded guilty to violating the Act to Prevent Pollution from Ships.

**Source:** Environmental Protection, Aug 17, 2012

d. *Industrial*

**Citgo Could Pay \$2M after Judge Backs Bird Death Conviction**

A Texas federal judge has let stand Citgo Petroleum Corp.'s 2007 conviction for intentionally letting migratory birds die in uncovered oil tanks, setting the petroleum giant up to face a possible \$2.1 million fine and five years of probation. Senior U.S. District Judge John D. Rainey denied Citgo's motion to vacate its conviction for failing to install emission control equipment on its tanks in violation of the Clean Air Act and for intentionally letting the birds die in those open-top tanks in violation of the Migratory Bird Treaty Act. The Judge rejected Citgo's argument that it shouldn't be held strictly liable for the unintentional death of 10 migratory birds found to have flown into two open-top tanks at its East Refinery Plant in Corpus Christi and died after getting trapped in the oil. The judge rejected Citgo's argument that the Migratory Bird Treaty Act was limited to just poaching, hunting or trapping birds and didn't apply to commercial activity. According to the decision, Citgo stuck to its commercial practices and knew for years that birds were dying in the tanks, yet did not act to prevent it, so Citgo was in fact liable, according to the order.

The U.S. government sued Citgo Petroleum Corp. and its subsidiary Citgo Refining and Chemicals Co. in 2006 for violations of the CAA and the MBTA after finding evidence and remains of migratory birds in the two tanks. Evidence and testimony from plant workers showed that Citgo had been aware since 1997 that ducks, pelicans and other migratory birds were flying into the open-top tanks, getting trapped in the oil and dying, the order said. Prosecutors have asked the court to sentence Citgo to the maximum fine of \$2.1 million; place it on five years of probation; and order it to fund seven community service projects related to migratory bird protection and emissions control totaling approximately \$17 million as a condition of that probation.

**Source:** Law 360, September 10, 2012 discussing *United States of America v. Citgo Petroleum Corp. et al.*, case number 2:06-cr-00563, in the U.S. District Court for the Southern District of Texas.

**Suffolk Downs, EPA Reach \$5M Settlement over CWA Claims**

Sterling Suffolk Racecourse LLC will pay a civil penalty of \$1.25 million to resolve the violations at its facility in Massachusetts cities Revere and East Boston. It will also spend more than \$3 million to prevent polluted water from entering nearby waterways and will perform three environmental projects worth approximately \$742,000 to provide water quality monitoring and protection efforts for more than 123 square miles of watershed. The federal complaint alleged that Suffolk allowed polluted wastewater, including horse manure, urine and bedding material, to discharge into Sales Creek, a tributary of Belle Isle Inlet and Boston Harbor. In addition, the federal complaint alleged that Suffolk operated its concentrated animal feeding operation, which stables race horses from March through November, without a permit under the CWA."

The EPA said its inspections revealed that Suffolk Downs' wastewater discharged from the facility to Sales Creek during dry and wet weather. Inspectors observed stormwater

contaminated with manure and turbid, brown runoff being discharged from the facility to Sales Creek.

In response to the enforcement, Suffolk is completing construction of a wastewater collection system, is making improvements to its stormwater collection system and has applied for a National Pollutant Discharge Elimination System permit. It will minimize the volume of and properly manage the wastewater it produces, which will now be collected in a detention pond and discharged during nonpeak hours to the sanitary sewer system. The company will also implement green infrastructure and low-impact development techniques to address stormwater discharges from the racetrack and maintenance areas of the facility. In addition, Suffolk will complete three supplemental environmental projects, including two water quality monitoring projects and one habitat protection project.

**Source:** Law 360, 8/24/2012 discussing *U.S.A. v. Sterling Suffolk Racecourse LLC*, case number 1:12-cv-11556, in the U.S. District Court for the District of Massachusetts.

e. **Other Enforcement Topics of possible Interest**

**EPA Sued to Set Strict Nutrient Control Limits**

Environmentalists have filed two major lawsuits aimed at forcing EPA to step up its efforts to strictly regulate nutrient levels under the Clean Water Act (CWA), a move that is likely to revive controversy over the issue just as the agency has begun to get states to craft measures aimed at curbing nutrient pollution.

A broad coalition of groups March 13 filed a suit, *Gulf Restoration Network, et al. v. EPA*, in the U.S. District Court for the Eastern District of Louisiana seeking to compel EPA to force Mississippi River Basin states to adopt strict numeric nutrient criteria after the agency last year denied a 2008 administrative petition on the issue.

In a separate suit filed the same day in the U.S. District for the Southern District of New York, *Natural Resources Defense Council, et al. v. EPA*, activists also sought to require EPA to respond to a 2007 petition asking the agency to update its secondary treatment requirements for nutrient discharges from wastewater treatment plants.

Environmentalists have for years been pushing EPA to clamp down on excessive nitrogen and phosphorous levels, which deplete dissolved oxygen in water causing massive hypoxic “dead” zones in the Gulf of Mexico, Chesapeake Bay and other major waters. In 2007, they filed a petition calling on EPA to publish “updated” information concerning the state of secondary treatment technology for wastewater treatment plants and to update discharge requirements reflecting that data. The petition cited the CWA’s requirements for wastewater treatment standards to be periodically updated, and the agency’s failure to update the standards since they were put in place in 1985. The petition calls for the agency to revise the secondary treatment standards to reflect the improvement in nutrient removal technology and require a greater share of nutrients to be removed from publicly owned treatment works effluent (*Inside EPA*, Jan.4, 2008).

And in 2008, activists filed a petition urging EPA to require states in the Mississippi River watershed to craft numeric criteria given that most states have only crafted narrative standards.

In 2011, EPA denied that activist's petition to craft numeric criteria for Mississippi basin states, saying encouraging states to develop their own limits is a better use of agency resources. In their APA suit over numeric criteria in Mississippi watershed states, the activists charge that EPA's denial of their 2008 petition failed to provide a reason for the denial based on the statutory factors allowed in the water law. Instead, the EPA's denial said that developing water quality standards for the Mississippi Review basin would be impractical and that the agency is cooperating with state regulators – neither of which “provide a reasoned explanation as to why revised or new water quality standards to address nutrient pollution in Mississippi Basin and Northern Gulf of Mexico waters are not “necessary to meet the requirements of the [CWA]. . . .”

The complaint further claims that the agency's denial of the 2008 petition violates the APA because it is “contrary to the undisputed evidence in the Petition that numeric water quality standards are necessary . . . to implement the CWA's requirements for Mississippi River Basin and Gulf of Mexico waters.”

In their complaint over the secondary treatment requirements, the environmental groups say the agency's response to the petition was unreasonably delayed according to federal regulations, which require “prompt” response to petitions filed under the APA.

**Source:** Inside EPA, March 16, 2012