



New York Water Environment Association, Inc.

The Water Quality Management Professionals

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Recent Environmental Legislative, Regulatory and Judicial Developments¹

November 2006 through January 29, 2007

I. NEW YORK

A. Appointments

New DEC Commissioner and Deputy Secretary for the Environment Appointed

Alexander B. "Pete" Grannis has been nominated to serve as Commissioner of the Department of Environmental Conservation. Mr. Grannis was first elected to the Assembly in 1974 and represents the Upper East Side of Manhattan and Roosevelt Island. He is currently Chair of the Assembly Insurance Committee and as a member of the Assembly Ways and Means Committee.

Judith Enck will be appointed as Deputy Secretary for the Environment. For the past eight years, Ms. Enck has served as a policy advisor to Attorney General Eliot Spitzer. Prior to joining the Attorney General's office, she was a Senior Environmental Associate with the New York Public Interest Research Group (NYPIRG). She has also served as the Executive Director of the Environmental Advocates of New York, a non-profit government watchdog organization dedicated to enforcing laws that protect natural resources and safeguards public health. Ms. Enck received her B.A. from the College of St. Rose.

Source: Press release issued by Gov. Spitzer 1/25/07

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

B. Legislation

1. Environmental Bills which became law or were vetoed in 2006

(Source: Business Council of NY)

<http://www.bcnys.org/inside/env/06environmentwrapup.htm>)

Spill Notification

S.7307-B (Libous) / A.10757-B (Lupardo), signed as Chapter 616 of the laws of 2006.

- Requires DEC to notify municipal officials within 48 hours of spills that "may threaten public health or environment.

Site Investigations

S.7636-A (Winner) / A.10633-A (Lifton), signed as Chapter 707 of the laws of 2006.

- Requires notification to land owners of the results of environmental tests conducted by third parties. Affects state superfund, brownfield, and oil spill programs.

Vehicle Dismantlers

S.8405 (LaValle) / A.7633-B (Eddington), signed as Chapter 180 of the laws of 2006.

- Regulates activities of vehicle dismantlers; applies to entities that receive more than 25 "end of life" vehicles per year, or stores more than 50 such vehicles at an given time.

Diesel Fuel & Vehicles

S.8185 (Marcellino) / A.11340 (Grannis), signed as Chapter 629 of the laws of 2006.

- Requires ultra low sulfur diesel fuel and best available technology for on- and off-road "heavy duty vehicles" (GVW of 8,500 lb. or more) that are owned by, operated by or on "behalf of," or leased by a state agency or a state or regional public authority.

Brownfield Tax Credits

S.8297-A (Spano) / A.11993 (Rules/Pretlow), signed as Chapter 420 of the laws of 2006.

- Clarifies that condos and co-ops constitute "qualified tangible property," and therefore are eligible for the tangible property credit component of the state brownfield redevelopment tax credit.

Ocean Protection

S.8380 (Johnson) / A.10584-B (DiNapoli), signed as Chapter 432 of the laws of 2006.

- Enacts the "New York Ocean and Bays Protection Act." Establishes as the policy of the state to conserve, maintain and restore coastal ecosystems; to promote "sustainable" activities and uses; maintain their ecological integrity; and to apply "caution" when risks are uncertain. Establishes a New York Ocean and Great Lakes Ecosystem Conservation Council

Hazardous Waste Landfills

S.8107 (Maziarz) / A.11713 (DelMonte), vetoed. Reintroduced in 2007 as A248.

- Prohibits approval of new or expanded hazardous waste management facilities in a location "with potential to discharge into the Great Lakes system." Affects commercial and "off-site" facilities."

Creosote

S.7804 (Spano) / A.10737 (Brodsky), vetoed. Reintroduced in 2007 as S1768/A1095.

- Bans the manufacture, sale and use of creosote as a wood preservative; regulates disposal of wood treated with creosote; exempts wood used by railroads and for utility poles

2. 2007 Session

A new 2 year session began on January 3, 2007. No bills were carried over, many we have been tracking will probably be re-introduced.

C. Regulation and Policy

1. Water

New York Issues SPDES Multi-Sector General Permit for Stormwater Discharges

On December 27, 2006, the NYS DEC published a new SPDES Multi-Sector General Permit (MSGP) for Stormwater Discharges Associated with Industrial Activity (GP-0-06-002). The permit will become effective on March 28, 2007. The new permit will be in effect for at least 5 years and will cover both new and existing discharges of stormwater to waters of the United States from industrial activities. Unlike the current State General Industrial Stormwater Permit, the MSGP includes both general requirements applicable to all facilities with permit coverage and industry-specific requirements that have been tailored to address 31 different industrial categories. Facilities needing a stormwater permit will need to submit a new Notice of Intent (or) Termination (NOIT) form to obtain coverage under the MSGP. Facilities with coverage under the existing SPDES General Permit for Stormwater Discharges Associated with Industrial Activity (GP-98-03) will be allowed up to 90 days from the effective date of the new MSGP (by June 26, 2007) to submit their NOIT form. Additionally, these facilities will be allowed up to 150 days from the effective date of the new MSGP (by August 25, 2007) to update their Stormwater Pollution Prevention Plan (SWPPP) to meet any new requirements.

Source: <http://www.dec.state.ny.us/website/dow/gp0601.pdf> Judicial and Enforcement

New York Proposes Changes to Its Water Quality Standards

NYSDEC has announced a series of changes to its water quality standards and its underlying regulations. The rulemaking represents the State's proposed outcome of its Triennial Review of its water quality program under the Clean Water Act. Like most States, New York typically doesn't complete this review within the allotted 3 year time period (the last year New York went through this process was in 1998), so the rulemaking touches upon numerous areas. The proposal:

- Makes changes (including adding new parameters) to various ambient water quality standards;

- Revises/adds methodologies for deriving standards and guidance values for human health, aquatic life, recreation, and aesthetics;
- Revises “best usages” language and clarifies the applicability of standards to trout waters;
- Revises and adds definitions;
- Creates a new type of standard for Recreation;
- Splits the existing Aesthetic Type into two Types;
- Clarifies applicability of existing coliform standards;
- Clarifies the consideration of wet weather when establishing surface water effluent limitations; and
- Makes other minor revisions.

The comment period on the proposal end on February 14th. NYSDEC will accept comments at a Public hearing to be held in Albany, via e-mail or by regular US mail. Details for filing comments can be found at the internet addresses below. The rulemaking is expected to be finalized by year end.

Source: (<http://www.dec.state.ny.us/website/dow/bwam/propwqsreg.html>)

Plan To Restore and Enhance Niagara River, Lake Ontario and St. Lawrence River Fisheries

NYS DEC will be holding five public meetings (from February 12 through 15) and is soliciting public comments on the draft "Sportfishing Restoration and Spending Plan" for the Lake Ontario system. The Draft Plan proposes ways to restore and enhance recreational fishing and fisheries in the New York waters of the lower Niagara River, Lake Ontario, the St. Lawrence River, and their tributaries upstream to the first barrier impassable to fish (referred to as the Lake Ontario system). Funds for this restoration are available from a settlement of the state's Natural Resource Damages (NRD) claim with Occidental Chemical Corporation (OCC). The settlement arose under the federal Comprehensive Environmental Response, Compensation and Liability Act, and state common law, and compensates the people of the state for injuries to natural resources caused by the discharge of dangerous chemicals to the environment. OCC agreed to pay the state \$12 million in five equal payments over four years. The settlement was based on an assessment of the damages to the state's natural resources, in particular a loss of recreational fishing benefits, resulting from the imposition of fish consumption advisories because of the presence of contaminants in fish in the Lake Ontario system. The proceeds of the settlement will be used to restore/enhance sportfishing and the injured natural resources.

Copies of the draft plan can be viewed or downloaded from www.dec.state.ny.us/website/dfwmr/fish/lkontactivities.html or can be obtained at the DEC Regional headquarters in Watertown, Syracuse, Avon and Buffalo.

New Hazardous Spill Reporting Requirement

Chapter 616 of the laws of 2006 amended the Environmental Conservation Law to require the DEC to provide notification to local officials and the public of reports when certain spills of specific DEC-regulated hazardous materials occur. Within 48 hours of a spill reported to the State, DEC must notify the chief executive officer of the village, town, or city in which the spill occurred and that meets the following criteria:

- the material spilled is a hazardous substance listed in 6NYCRR Part 597 (which does not include petroleum);
- the spiller is in actual or constructive possession or control of more than 1100 gallons of the substance; and
- the spill could reach the lands or waters of the state (including groundwater).

When a spill meeting these criteria occurs, DEC will provide local officials with information regarding the spill along with a summary of the requirements of this new law. If the spill has the potential to impact adjacent communities, the DEC will also provide notification to officials representing these areas. Also as required by the new law, DEC will provide notification of spills that meet these criteria to the public through local news outlets. As spills meeting these criteria are reported, media outlets will begin receiving media advisories to notify them of the spill with the information provided to DEC at the time the spill was reported. The spill media advisory will include a DEC contact to reach for additional spill information. In addition, information about spills meeting the law's notification criteria, as well as other spills regulated by the Department, will continue to be regularly posted to the DEC spills database found at www.dec.state.ny.us/cfm/extapps/derfoil/index.cfm?pageid=2 on DEC's website.

Source: Information about NYSDEC's Spill Response and Remediation Program can be found at www.dec.state.ny.us/website/der/spills/
<http://www.dec.state.ny.us/website/press/pressrel/2006/2006188spillsadv.html>.

Sewage Problems Cited in Great Lakes Basin Cities

Most Canadian and U.S. cities in the Great Lakes basin are regularly dumping untreated sewage into local waterways, according to the first *Great Lakes Sewage Report Card* issued Nov. 29, 2006 by the Sierra Legal Defense Fund. The report card concludes that although many cities have made efforts to regulate the amount of untreated waste that makes its way into local waterways, the waters surrounding urban cities are "commonly unsafe" for recreational swimming and fishing and many parts of the ecosystem are still in peril. The report card represents the first attempt to survey and analyze sewage discharges and municipal waste treatment processes across the Great Lakes ecosystem. It said that many cities, including Toronto; Syracuse, N.Y.; and Detroit, have antiquated systems for collecting and treating sewage that result in regular releases of untreated sewage into local waterways. The chief causes of untreated sewer overflows are the combined sewer systems that were built more than a century ago to handle both stormwater and wastewater.

Source: Environment Reporter, BNA, Inc. 12/1/06. The report card and background materials are available at <http://www.sierralegal.org>.

Initiative to Clean Up Bronx River -- Sewage Treatment

Four municipalities in suburban Westchester County have agreed to stop discharging raw sewage into the Bronx River from storm sewers, adding to a series of settlements in a state cleanup initiative. The agreements cover the cities of White Plains and Mount Vernon, the town of Greenburgh, and the village of Scarsdale. The municipalities agreed to end raw sewage discharges from storm sewers by May 1, 2007 and to monitor storm sewers to prevent future discharges. They agreed to spend more than \$150,000 in penalties and stormwater system upgrade investments. Under the agreements, Scarsdale will pay \$8,775 in penalties and spend \$78,975 on stormwater pollution reduction projects, White Plains (\$6,318 in penalties, \$56,852 on projects), Greenburgh (\$1,836 in penalties, \$16,524 on projects), and Mount Vernon (\$5,400 in penalties).

Source: Environment Reporter, BNA. Inc. 12/8/06

2. Non-Water

New York Approves Regulations to Reduce Mercury Emissions

The New York State Environmental Board approved final regulations Dec. 18 that will require coal-fired power plants to reduce their mercury emissions by 50 percent from current levels by 2010 and by 90 percent by 2015. The regulations establish a two-phase program in which total statewide mercury emissions from the power plants will be limited to 786 pounds per year starting Jan. 1, 2010. Emissions will then be lowered to 150 pounds per year, effective Jan. 1, 2015, according to the state DEC.

In the first phase of the program, from 2010-2014, facility wide mercury limits will be established, based on the mercury budget given to New York by the Environmental Protection Agency. In the second phase, which will begin in 2015, the state will establish unit-based emissions limits for each generating unit. Unlike the federal program, the state will not allow the trading of emissions credits. DEC determined that allowing the trading of credits would have created mercury "hot spots" in areas such as the Adirondack and Catskill mountains, according to a regulatory impact statement filed with the regulations. According to DEC, the regulations will apply to 11 active coal-fired electricity generating facilities and two cogeneration facilities. DEC estimates that the new regulations, along with implementation of the second phase of the Clean Air Interstate Rule (CAIR), will increase wholesale electricity prices by an average of 1.7 percent, or \$1.14 per megawatt-hour. According to DEC, virtually all of the incremental price increase, however, is due to compliance with CAIR.

Source: Environment Reporter, BNA, Inc., 12/22/06 Further information on the regulations (6 NYCRR 246, 200) is available at http://www.dec.state.ny.us/website/dar/air_regs.html

3. Global Warming

In December, NYSDEC released a preliminary draft set of rules to implement the Regional Greenhouse Gas Initiative (RGGI) in New York. The proposal represents the first step toward completing the implementation of a program to help address the challenge of climate change in New York and the Northeast region. RGGI is a flexible, market-based cap-and-trade program to reduce carbon dioxide emissions from power plants in the Northeast, and the first of its kind in the United States. Other states that have agreed to take part in the program include Connecticut, Delaware, New Hampshire, New Jersey, Maine, and Vermont. Maryland is expected to join in

2007 and California also recently announced its intent to work with RGGI states to reduce greenhouse gas emissions.

The proposal would begin taking effect in 2009, with emissions of carbon dioxide (CO₂) from power plants in the region being capped at current levels — approximately 121 million tons annually — and with this cap remaining in place until 2015. The states would then begin reducing emissions incrementally over a four-year period to achieve a 10 percent reduction by 2019. Compared to the emissions increases New York and other participating States would see from the sector without the program, RGGI will result in an approximately 35 percent reduction by 2020. The deadline for comments on the proposal is March 13, 2007.

Source: A copy of the preliminary draft proposal can be found at: www.dec.state.ny.us/website/dar/index.html and www.dec.state.ny.us/website/dar/rggi.html on the DEC website.

D. Judicial and Enforcement

New York City Seeks Supreme Court Review Of Second Circuit Ruling on Water Transfers

New York City is seeking U.S. Supreme Court review of an appeals court judgment that held clean water permits are required for water transfers that occur through tunnels, channels, or natural streams for public water supplies. The city wants review of a U.S. Court of Appeals for the Second Circuit judgment that water transfers are subject to the National Pollutant Discharge Elimination System (NPDES) permitting program under Section 402 of the Clean Water Act. In June, the Second Circuit affirmed a 2003 decision by the U.S. District Court for the Northern District of New York that found transfers of sediment-laden water from the city water supply's Shandaken Tunnel into Esopus Creek constitute a discharge of pollutants requiring an NPDES permit.

Source: Environment Reporter, BNA, Inc. 12/1/06, (*City of New York v. Catskill Mountains Chapter of Trout Unlimited*, U.S., 11/20/06 and (*Catskill Mountains Chapter of Trout Unlimited Inc. v. New York City Department of Environmental Protection*, 451 F.3d 77, 62 ERC 1737 (2d Cir. 2006)

Court Says Contaminant Level, Funding Help Determine Qualification as NY Brownfield

The level of contamination and the status of redevelopment funding are appropriate factors to consider in determining whether a site qualifies for New York state's Brownfield Cleanup Program, a New York trial court held Nov. 15 (*377 Greenwich v. New York State Dept. of Environmental Conservation*, N.Y. Sup. Ct., No. 101617/06, 11/15/06).

The court declined to overturn the denial of a developer's application to have a downtown hotel site included in the state's brownfield program. In considering whether the site met the definition of a "brownfield site," the New York State Department of Environmental Conservation properly took into account the relatively low levels of contamination and the fact that the project had secured funding and would proceed regardless of the cost of remediation,

Source: Environment Reporter, BNA, Inc. 12/15/06

Business Owner Accused of Offering Bribe To New York City Environmental Inspector

A Bedford, N.Y., diner owner has been arrested on charges that he offered a \$1,000 bribe to a New York City Department of Environmental Protection inspector to make his watershed protection compliance problems "go away." The defendant, was arraigned on two counts of third-degree bribery, a felony. Prosecutors said that, following a Nov. 29 discussion at the Bedford Diner about continuing problems with the diner's septic system, the owner offered a \$1,000 bribe to the DEP inspector. His intent was for the inspector to ensure that DEP and the county Health Department would ignore the problems and make his violations "go away," they charged. The diner's septic system discharged into a storm drain that flows into wetlands feeding the city's nearby Croton Reservoir.

Source: Environment Reporter, BNA, Inc. 12/15/06 (*People v. Dimopoulos*, N.Y. Town Ct. [Bedford], docket no. not available, *arraignment* 12/7/06).

II. FEDERAL

A. Congress

Senate Committee Assignments Announced, New York has Key Leadership Position

Senator Barbara Boxer (D-CA) is the new Chair of the Senate Environment and Public Works (EPW) Committee, and Senator Dianne Feinstein (D-CA) will likely take over as Chair of the Senate Interior, Environment and Related Agencies Appropriations Subcommittee.

On January 19, chairman Boxer (D-CA) and ranking member Inhofe (R-OK) announced Senate Environment and Public Works Subcommittee Assignments as follows: Public Sector Solutions to Global Warming, Oversight, and Children's Health Protection: Barbara Boxer chair, Lamar Alexander (R-TN) ranking member; Transportation and Infrastructure: Max Baucus (D-MT) chair, Johnny Isakson (R-GA) ranking member; Private Sector and Consumer Solutions to Global Warming and Wildlife Protection: Joe Lieberman (D-CT) chair, John Warner (R-VA) ranking member; Clean Air and Nuclear Safety: Thomas Carper (D-DE) chair, George Voinovich (R-OH) ranking member; ***Hillary Rodham Clinton (NY) chair***, Larry Craig (R-ID) ranking member; and Transportation Safety, Infrastructure Security, and Water Quality: Frank Lautenberg (D-NJ) chair, David Vitter (R-LA) ranking member.

Source: Various WEF This Week in Water, November, December 2006 and Jan. 2007.

House Transportation and Infrastructure

The final list of subcommittee chairmen and ranking members are: Committee Chair, James Oberstar (D-MN), Aviation Chairman Jerry Costello (D-IL) and ranking member Tom Petri (R-WI); Coast Guard and Maritime Transportation Chairman Elijah Cummings (D-MD) and ranking member Steven LaTourette (R-OH); Economic Development, Public Buildings and Emergency Management Chairwoman Eleanor Holmes Norton (D-DC) and ranking member Sam Graves (R-MO); Highways and Transit Chairman Peter DeFazio (D-OR) and ranking member John Duncan (R-TN). Railroads, Pipelines and Hazardous Materials Chairwoman Corrine Brown (D-FL) and ranking member Bill Shuster (R-PA); Water Resources and Environment Chairwoman Eddie Bernice Johnson (D-TX) and ranking member Richard Baker (R-LA). (SJH)

Source: WEF This Week in Washington 1/19/09

Water Conservation is Focus of Two New Federal Announcements

On January 24, President Bush issued an Executive Order requiring Federal agencies to increase their efforts to conserve water. Using 2007 as the baseline, each agency must, through life-cycle cost-effective measures, reduce its water consumption by 2 percent annually through the end of fiscal year 2015 or 16 percent by the end of fiscal year 2015. To read the Executive Order visit, <http://www.whitehouse.gov/news/releases/2007/01/20070124-2.html>. Also on the 24th, EPA released final specifications for water-saving, high-efficiency toilets (HETs) to qualify for EPA's WaterSense label. Toilets that use less than 1.3 gallons per flush, meet certain performance standards for quality, and pass a third-party certification process can now earn the label. "The WaterSense label will help consumers identify high performing, water efficient products," said EPA Assistant Administrator for Water, Benjamin H. Grumbles. "By purchasing WaterSense labeled plumbing fixtures, consumers can help protect the water supply and their wallets." According to the EPA, toilet usage accounts for nearly one-third of home water consumption. More information about the HET Specification is available at <http://epa.gov/watersense/partners/specs/het.htm>.

Source: WEF's This Week in Washington (1/26/07)

Water, Sewer Earmarks in EPA Spending Bill to Be Unaffected by Disclosure Rules

Passage of new budget rules by the House Jan. 5 will not affect millions of dollars in earmarks for water, sewer, and other environmental projects in fiscal year 2007 spending bills when Congress takes up the bills this session, Democratic aides told BNA. The House voted 280-152 to require earmark sponsors to be publicly identified, a move that sponsors of H. Res. 6 say will make the appropriations process more transparent than it has been under Republican control of Congress. The Senate also is expected to take up S. 1, the Legislative Transparency and Accountability Act of 2007, which would require public disclosure of each earmark sponsor and would establish points of order against conference reports that are unavailable on the Internet prior to consideration; points of order against out-of-scope matters in conference reports; and points of order against "dead of night" additions to conference reports.

Source: Environment Reporter, BNA, Inc., 1/12/07

House Transportation & Infrastructure Plans Active Water Legislation

Rep. James Oberstar (D-MN) as chairman of the House Transportation and Infrastructure Committee on January 17 pledged swift action on water infrastructure projects. Oberstar hopes to move 12 "major bills" through his committee, including the long-awaited Water Resources Development Act as early as this March.

Source: WEF This Week in Washington 1/19/09

House Goal is to Pass Climate Change Legislation

House Democrats will not wait for the Bush administration to reverse its stance in opposing mandatory curbs on greenhouse gas emissions and will pass "groundbreaking" legislation to address global warming and move the United States toward energy independence, House Speaker Nancy Pelosi (D-Calif.) said Jan. 19. Ms. Pelosi has indicated that she wants the House

to take the lead on such legislation and announced Jan. 18 establishment of a new Select Committee on Energy Independence and Global Warming. The House speaker also set a June deadline for other House committees to approve climate legislation.

House Energy and Commerce Committee Chairman John Dingell (D-Mich.), issued a Jan. 17 letter outlining his plans for extensive climate-related hearings in the 110th Congress.

Source: Environment Reporter, BNA, Inc., 1/26/07

B. Judicial And Enforcement

1. Water

Ethanol Producer Guilty of False Reporting

An ethanol producer near Hastings, Neb., pleaded guilty Oct. 25 to violating the Clean Water Act in connection with discharges of wastewater into the Blue River, according to prosecutors. The company, Chief Ethanol Fuels Inc., was sentenced to one year of probation, and ordered to pay a \$100,000 fine. In addition, the company agreed to make a \$100,000 contribution to a local nonprofit group to support its efforts in environmental education. Chief Ethanol admitted to falsely reporting the temperature of wastewater discharges on three occasions beginning in June 2001. The temperature of the water on these occasions was between 90 degrees and 94 degrees Fahrenheit, despite the fact that the company indicated on discharge-monitoring reports filed with the Nebraska Department of Environmental Quality that the temperatures were below 90 degrees. The government did not claim that the river was harmed by the discharges, and the company recently received a new permit allowing discharges of water having a temperature of up to 104 degrees.

Source: Environment Reporter, BNA, Inc., November 3, 2006, citing *United States v. Chief Ethanol Fuels Inc.*, D. Neb., No. 4:06-CR-3153, *plea entered* 10/25/06.

Hackers Break into PA Water System Network

Attackers believed to be operating from outside the U.S. gained access to computers at a Pennsylvania water treatment plant. An infected laptop gave hackers access to computer systems at a Harrisburg, Pennsylvania, water treatment plant. The plant's systems were accessed in early October after an employee's laptop computer was compromised via the Internet, and then used as an entry point to install a computer virus and spyware on the plant's computer system. The incident is under investigation by the U.S. Federal Bureau of Investigation. The hackers do not appear to have targeted the plant " but intended to use the affected computer as a resource for distributing e-mails or whatever electronic information they had planned". The FBI is concerned that even without targeting the system itself, this malicious software could have interfered with the plant's operations. Had the breach targeted the water plant, it could have had grave consequences, according to Mike Snyder, security coordinator for the Pennsylvania section of the American Water Works Association. "It's a serious situation because they could possibly raise the level of chlorine being injected into the water... which would make the water dangerous to drink."

Source: IDG News Service, 11-1-06

U.S. Supreme Court Review to Be Sought On CERCLA Application to Canadian Smelter

Teck Cominco Metals Ltd. will seek U.S. Supreme Court review of an appeals court decision that the Canadian firm is liable for contamination in the United States caused by discharges from its lead and zinc smelter in British Columbia (*Pakootas v. Teck Cominco Metals Ltd.*, 9th Cir., No. 05-35153, 11/3/06). The Vancouver, British Columbia-based company Nov. 3 filed a motion with the U.S. Court of Appeals for the Ninth Circuit to stay the court's July 3 ruling that the Comprehensive Environmental Response, Compensation, and Liability Act applies to contamination of the Upper Columbia River in Washington state that originates in Canada. The smelter in Trail, British Columbia, is located 10 miles above the border.

Teck Cominco has been discharging slag and other hazardous substances into the Columbia River, which leads into Lake Roosevelt, for about 100 years. Deterioration of the slag is releasing heavy metals, "causing harm to human health and the environment," the appeals court said. The Ninth Circuit found that application of CERCLA to the contaminated bodies of water "is a domestic, rather than an extraterritorial application of CERCLA, even though the original source of the hazardous substances is located in a foreign country." The court upheld a November 2004 decision by the U.S. District Court for the Eastern District of Washington that the pollution originating at the Canada smelter is subject to CERCLA. According to the company's motion for stay of mandate, Teck Cominco will ask the Supreme Court to consider whether imposing liability under CERCLA "on a Canadian defendant based on its operations in Canada would be an impermissible extraterritorial application of United States law."

Source: Environment Reporter, BNA, Inc. 11/10/06

First Circuit Tells District Court to Consider Rapanos for Guidance

The U.S. Court of Appeals for the First Circuit Oct. 31 remanded to a district court its decision that a Massachusetts cranberry grower needed a permit to discharge dredged dirt into three wetlands on his property because the wetlands were "hydrologically" connected to a navigable river. A three-judge panel concluded in a 2-1 decision that more fact-finding must occur before the U.S. District Court for the District of Massachusetts can establish Clean Water Act jurisdiction over privately owned wetlands that are linked to tributaries of navigable rivers and that the court should consider the U.S. Supreme Court's dissenting opinion in the *Rapanos* case. The First Circuit directed the lower court to seek guidance from both the majority and the dissenting opinion offered by Justice John Paul Stevens in *Rapanos* (*United States v. Rapanos*, U.S., No. 04-1034, 62 ERC 1481 (2006). "The federal government can establish jurisdiction over the target sites if it can meet either the plurality's or Justice Kennedy's standard as laid out in *Rapanos*," the court stated in remanding the case to the district court.

Source: Environmental Reporter, BNA, Inc. citing *United States v. Johnson*, 1st Cir., No. 05-1444, 10/31/06.

EPA Orders Missouri to Promulgate New Standards for 99 Bodies of Water

The Environmental Protection Agency has told the state of Missouri it must provide new or revised water quality standards for a group of 99 water bodies which the state had said it intended to leave unprotected for recreational use. In an Oct. 31, 2006 letter to the Missouri Department of Natural Resources, EPA said DNR had not "provided sufficient information to show recreational uses are not attainable" for the 99 bodies of water, primarily rivers, streams, and lakes. As a result of EPA's determination, the state will be required to "promptly prepare

and publish" regulations setting forth recreational use standards for the water bodies, EPA said. The state also will be given the opportunity to review its analyses and collect additional information to revise the water quality standards and submit them to EPA for approval.

The EPA action comes in the wake of a lawsuit filed against EPA and DNR by the Missouri Coalition for the Environment in October 2003 over what the coalition said was EPA's failure to monitor the state's water quality standards, and its failure to force the state to adopt standards that were protective of recreational use for many of its rivers and streams. Pursuant to a consent decree in the lawsuit, DNR submitted to EPA in March 2006 revised recreational-use designations for 3,600 water body segments and 400 lakes, designations which were approved by EPA shortly thereafter. But DNR did not revise or adopt new standards for 142 water bodies covered by the settlement agreement for which the state said recreational use was not attainable. EPA accepted DNR's determination that recreational uses were not attainable for 42 of the bodies. EPA and the Missouri Coalition for the Environment (MCE) agreed to extend the deadline regarding one other water body, leaving 99 for which the state had not provided enough information to justify leaving them unprotected for recreational use according to EPA.

Source: Environment Reporter, BNA, Inc. 11/10/06 citing (*Missouri Coalition for the Environment v. Horinko*, W.D. Mo., No. 03-4217-CV-C, filed 10/7/03).

EPA Fines Gas Station Company \$3.1 million for Underground Storage Tank Violations

On November 16, 2006 an EPA Administrative Law Judge assessed a \$3.1 million penalty against Euclid of Virginia, Inc. for not taking required measures to detect and prevent leaks from underground storage tanks at 23 gas stations in Maryland, Virginia and the District of Columbia. This is the largest penalty ever assessed by an EPA Administrative Law Judge for violations of any federal environmental statute. The judge ruled that Euclid failed to maintain required leak detection and control equipment, and perform required leak detection activities for 72 underground storage tanks at 23 gas stations. In addition, Euclid did not maintain required financial assurances to respond and clean up potential fuel leaks or spills for its facilities in the District of Columbia.

Source: This Week in Washington 11/17/06. **The full text of the decision is available at <http://www.epa.gov/oalj/orders/euclidof-va-id-110906.pdf>.**

Developer Fined Extra for Missing Cleanup Deadline

The Environmental Protection Agency and the Hawaii Department of Health Nov. 28 levied an additional \$135,000 on a developer, for failing to meet court-ordered deadlines to resolve stormwater violations at a Pila'a on Kaua'i, Hawaii. In March, both agencies reached a settlement with the Developer, who agreed to pay \$7.5 million to resolve the violations that resulted from a failure to prevent soil erosion and stream damage. The consent decree required specific restoration and repair work by the end of October 2006, but "work has yet to be started in the specified areas outlined in the consent decree."

Source: Environment Reporter, BNA, Inc. 12/1/06

Coastal, Great Lakes States Adopt Criteria For Disease-Causing Pathogens

EPA announced Nov. 21, 2006 that all coastal and Great Lakes states and territories have adopted water quality criteria to protect swimmers against disease-causing pathogens. By the end of 2004, EPA said 35 coastal and Great Lakes states and territories that fall under the

Beaches Environmental Assessment and Coastal Health Act of 2000 (BEACH Act; Pub. L. 106-284) had adopted the agency's 1986 recreational criteria for enterococci or *Escherichia coli* (*E. coli*). The presence of enterococci and *E. coli* is indicative of the extent of fecal contamination in water. EPA released the finding as part of its first *Report to Congress: Implementing the Beach Act of 2000* on the progress it and affected states have made since enactment of the act.

Meanwhile, the Natural Resources Defense Council (NRDC) environmental advocacy group is pursuing its lawsuit against EPA for continuing to rely on 20-year-old criteria for bacteria. The NRDC is claiming that EPA violated the BEACH Act by failing to issue revised water quality criteria for bacteria by the congressionally mandated deadline of October 2005 and making states use "obsolete" water quality criteria for bacteria to set standards.

The National Association of Clean Water Agencies said it will be the supporting NRDC lawsuit against EPA.

Source: Environment Reporter, BNA, Inc. 12/1/06. *EPA's Report to Congress: Implementing the Beach Act of 2000*, is available at <http://www.epa.gov/waterscience/beaches/report/>. Also, (*Natural Resources Defense Council v. Johnson*, C.D. Cal., No. 06-cv-4843, 8/03/06; 37 ER 1682, 8/11/06).

Ashland Settles with SEC

On November 29, the Securities and Exchange Commission issued a settled administrative cease-and-desist order against Ashland Inc., a Fortune 500 chemical company incorporated in Kentucky, and a current Ashland employee, in connection with misstatements of Ashland's environmental reserve. Ashland also consented to a number of undertakings, including the strengthening of its internal controls for determining its environmental reserve, and the retention of both its independent auditor and an outside firm to review its policies, procedures, and internal controls for determining its environmental reserve and for soliciting and investigating internal complaints, including measures to prevent retaliation against complainants.

Source: SEC News Digest, 11/29/06

EPA Rule Exempting Water Use of Pesticides From NPDES Permits Challenged in Court

Environmental and industry groups have filed lawsuits challenging a final EPA rule (see below) stating that farmers, public health officials, and ranchers who apply pesticides directly into, over, or near U.S. waters to control mosquitoes and other pests do not need clean water permits. The lawsuits have been filed by San Francisco-based Baykeeper and other environmental groups, and industry groups including CropLife America. The EPA rule, published Nov. 27, 2006 clarifies that National Pollutant Discharge Elimination System permits, issued under Section 402 of the Clean Water Act, are not required as long as the pesticides are sprayed in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act

Source: Environment Reporter, BNA, Inc., 12/22/06, citing (*Baykeeper v. EPA*, 9th Cir., No. 06-75612, 12/11/06; *CropLife America v. EPA*, D.C. Cir., No. 06-1396, 12/4/06).

Coeur Alaska Settles Stormwater Violations Stemming From Kensington Gold Mine Runoff

Coeur Alaska Inc. has agreed to settle Clean Water Act violations stemming from stormwater runoff near the Kensington Gold Mine site in 2005. In an administrative settlement, the company agreed to pay an \$18,334 fine and to spend \$90,000 acquiring a wetlands area near the mine site that will be protected under a conservation easement. The violations involved excessive amounts of aluminum and excessive turbidity in water flowing into a creek near the mine site. The company had failed to put into force an adequate plan to control stormwater drainage. The \$18,334 fine was agreed upon through negotiation and reflects a credit for Coeur's voluntary supplemental environmental program, the wetlands purchase.

Source: Environment Reporter, BNA, Inc. 1/5/07

Supreme Court Denies Petition Seeking Review of TMDL Decision

On January 16, 2007 the United States Supreme Court let stand a lower court ruling requiring daily pollutant limits for the Anacostia River. In April 2006, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the word "daily" means "every day" in the Clean Water Act (CWA) for total maximum daily loads (TMDLs). On July 24, 2006 the D.C. Water and Sewer Authority filed a certiorari petition with the Supreme Court, seeking review of the case, and the National Association of Clean Water Agencies submitted an amici curiae brief to the high court. Both argued that the decision places a burden on wastewater utilities, weakens the national TMDL program, and creates a split between appellate circuits on how TMDLs should be expressed. On Nov. 24 the U.S. Environmental Protection Agency (EPA) and Friends of the Earth filed separate briefs with the Supreme Court arguing against review of the decision. EPA began implementing its approach to manage the D.C. Circuit Court decision in November when it issued a nationwide guidance requesting daily load allocations in all TMDLs but allowing them to be implemented through permits in nondaily ways. EPA is currently drafting a series of fact sheets on how to derive daily load expressions for different types of TMDLs (see below).

Source: WEF - This Week in Washington 1/19/07.

Supreme Court Agrees to Review Decision on Endangered Species Act Role in Permits

The U.S. Supreme Court granted certiorari in a case to determine whether a federal court could add criteria to Section 402(b) of the Clean Water Act to require state permit programs to include protections for endangered species. The consolidated cases will address whether the U.S. Court of Appeals for the Ninth Circuit correctly held that the Environmental Protection Agency's decision to transfer water pollution permitting authority under the Clean Water Act was arbitrary and capricious because it was based on inconsistent interpretations of Section 7(a)(2) of the Endangered Species Act. Section 7(a)(2) of the Endangered Species Act requires federal agencies to consult with the U.S. Fish and Wildlife Service or with NOAA Fisheries to ensure their actions do not harm a listed species or its habitat (37 ER 2245, 11/3/06).

Source: Environment Reporter, BNA, Inc., 1/12/07, citing *National Ass'n of Homebuilders v. Defenders of Wildlife*, U.S., No. 06-340, *certiorari granted* 1/5/07; *EPA v. Defenders of Wildlife*, U.S., No. 06-549, *certiorari granted* 1/5/07.

Second Circuit Remands Significant Sections of EPA's Cooling Water Intake System Rules For Existing Power Plants

In what has to be viewed as a major blow to EPA's efforts over the last decade to establish national standards of performance for existing large Power Plant cooling water intake systems ("Existing CWIS"), the United States Court Of Appeals for The Second Circuit remanded significant sections of EPA's Existing CWIS rules, throwing into doubt the ability of Power Plants which are covered by the eviscerated rules to develop a compliance strategy in time to meet the January 8, 2008 deadline to submit their "Comprehensive Demonstration Studies ("CDS") reports which lay out their plans to comply with the Existing CWIS rules. In its self named "Riverkeeper II" decision, the Second Circuit ruled on petitions filed by States, citizen environmental groups and industry. The Court's decision granted in part, denied in part and dismissed in part for lack of jurisdiction 16 different issues.

Source: ¹ *Riverkeeper, Inc. v. United States Environmental Protection Agency*, United States Court Of Appeals For The Second Circuit January 25, 2007.

Federal Court Approves Consent Order For Cleanup of PCBs in Hudson River

The consent order between the Environmental Protection Agency and General Electric Co. for cleanup of the Hudson River was approved by the U.S. District Court for the Northern District of New York Nov. 2, clearing the way for the \$600 million dredging project to proceed. The court rejected a challenge to the consent order by the town of Fort Edward, N.Y., which argued that it should have some local permitting authority over construction of a facility that will treat sediments containing polychlorinated biphenyls (PCBs). The court said the facility should be exempt from all federal, state, and local permitting because it will be located "on site" pursuant to Section 12 of the Comprehensive Environmental Response, Compensation, and Liability Act. Under the consent order, GE is required to undertake the first phase of the two-phase dredging project, including construction of a sediment transfer and processing facility. A total of 2.65 million cubic yards of PCB-contaminated sediments will eventually be removed from a 43-mile stretch of the river

Source: Environment Reporter, BNA, Inc. 11/10/06 citing *United States v. General Electric Co.*, N.D.N.Y., No. 05-CV-1270, 11/2/06.

Kentucky Utility Agrees to Spend \$79 Million For Improvements to Settle Water Violations

The city of Winchester, Ky., and Winchester Municipal Utilities have agreed to make improvements worth more than \$79 million and to pay a \$75,000 penalty for alleged illegal discharges of pollutants into the Kentucky River. The proposed consent decree was filed Jan. 16 in the U.S. District Court for the Eastern District of Kentucky. Under the terms of the proposed agreement, the charges against Winchester Municipal Utilities will be resolved once the utility pays a \$75,000 fine and completes a supplemental environmental project valued at \$230,000 to abate stormwater runoff to an impaired waterway. The utility also agreed to take steps costing more than \$79 million to eliminate sanitary sewer overflows and unpermitted bypasses of wastewater from the treatment plant during heavy rains.

Source: BNA Environment Reporter, 1/26/07 citing *United States v. Winchester Municipal Utilities*, E.D. Ky., Civ. No. 06-102, 1/16/07; 72 Fed. Reg. 3410. (Summary of 2006 important water-related cases available).

If you would like to receive a summary of other important CWA cases from the last year, please send Libby an e-mail at lford@nixonpeabody.com.

Oklahoma Sinclair Refinery Fined \$5 Million, Managers Face Prison for Water Violations

A Sinclair Oil subsidiary and two company managers have pleaded guilty to violations of the Clean Water Act at a Tulsa, Okla., refinery. Sinclair Tulsa Refining Co. and two managers pleaded guilty to deliberately manipulating wastewater discharges during mandatory testing required under the National Pollutant Discharge Elimination System (NPDES) permit program. The manipulations were intended to influence testing results reported to the Oklahoma Department of Environmental Quality and the Environmental Protection Agency. Under a plea agreement, Sinclair Tulsa agreed to pay \$5 million in criminal penalties and \$500,000 for a community environmental project. The two managers each face a maximum of three years in prison and a penalty to be determined by the court. Sentencing is set for April 2, 2007

Source: Environment Reporter, BNA, Inc., 12/22/06 (*United States v. Sinclair Tulsa Refining Co.*, N.D. Okla., No. 4:06-cr-00214-CVE-ALL, 12/12/06).

Bus Companies Will Pay More Than \$237,000, Settling Environmental Violations

Three bus companies in Conn., R.I. and Mass. will install new filters on most of their buses to settle violations of federal clean air and clean water rules. All three companies violated Clean Water Act storm water permit requirements, and violated federal oil spill prevention regulations and associated spill prevention plan requirements. The companies' bus maintenance garages in Providence, R.I. and Chelsea, Mass. failed to obtain a storm water discharge permit, and failed to prepare and fully implement an oil spill prevention plan. Some of the maintenance garages had storm water permit coverage through prior owners, but failed to conduct monthly inspections and site evaluations, thus increasing the chance that potential storm water pollution sources would not be identified in a timely manner. One garage also lacked "secondary containment" for various oil storage tanks, and failed to adequately respond to a June 2006 bus fueling accident that spilled about 156 gallons of diesel fuel oil in an outside parking lot.

In addition to monetary fines, the Company also agreed to perform an environmental project. It will equip nearly its entire New England passenger bus fleet with new crankcase filters that will minimize potential storm water pollution from bus oil leaks. The new filters will reduce each bus's leaks by one to six gallons of oil per year, thereby shrinking a significant source of storm water runoff contamination from the company's outdoor bus parking lots.

Source: <http://cfpub.epa.gov/compliance/newsroom/> (1/10/07).

2. Water

EPA Releases Memo on Establishing TMDL “Daily” Loads

In response to a U.S. Court of Appeals for the District of Columbia Circuit decision in April that the word "daily" means "every day" in the Clean Water Act for total maximum daily loads (TMDLs), the U.S. Environmental Protection Agency (EPA) finalized a memo on November 15 clarifying its expectations for TMDL time increments. In the memo, EPA states that all TMDLs should contain daily limits, but that there is flexibility in how these limits are implemented. The memo provides examples demonstrating flexibility in how daily time increments may be expressed in TMDLs. EPA also makes it clear that the development of future TMDLs according to state schedules is the highest priority at this time, not revising already approved TMDLs. EPA expects to release three draft fact sheets on how to apply the flexibility outlined in the memo to actual TMDL development. WEF is providing informal comments to EPA on the initial drafts of these memos.

EPA Issues Final Rule on Pesticides Applied to Water

On November 20, 2006 EPA signed a final rule that describes two circumstances under which National Pollutant Discharge Elimination System (NPDES) permits are not required to apply pesticides to waters of the United States. The rule reflects EPA's long-standing policy that an NPDES permit is not required where application of a particular pesticide to, over, or near waters of the United States is consistent with requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). As mentioned above, this rule has been challenged.

Source: EPA Waterheadlines for November 22, 2006. Additional information, including a copy of the final rule, is available at:

http://cfpub.epa.gov/npdes/home.cfm?program_id=41#water_transfer

Ashtabula River Restoration Project Establishes New Federal Funding Precedent

The Ashtabula River restoration project is the largest project to be funded for cleanup under the Great Lakes Legacy Act (GLLA). The implementation of the sediment removal and natural resource restoration process for the Ashtabula River is the culmination of nearly two decades of community-based environmental planning and represents a model of partnership and shared responsibility for restoring natural resources in industrial waterways. Supporters claim that the Ashtabula River project illustrates the technical innovation and interagency cooperation that is possible when the process for restoring aquatic resources and other "mega sites" is set free from the rigid and contentious framework of the Comprehensive Environmental Response, Compensation, and Liability Act. Hydraulic dredging began Sept. 12, 2006 to remove contaminated sediment and to restore natural resources in the Ashtabula River, a tributary to Lake Erie designated in 1985 as an area of concern under the *1978 Great Lakes Water Quality Agreement* between the United States and Canada. This is the latest of many milestones in a project that has established new precedents for cooperative planning, design, and funding for contaminated sediment projects. The Ashtabula River project is the first in which private companies identified as potentially responsible parties under the Comprehensive Environmental Response, Compensation, and Liability Act¹ have partnered with a local sponsor to obtain funding for a cleanup under GLLA. When completed, the project will restore natural resources

throughout the lower two miles of the Ashtabula River. The entire project, from containment facility construction to closure, is expected to last three years and to cost in excess of \$70 million.

Source: Environment Reporter, BNA, Inc. 11/24/06

Nation's First Physical Security Standard Guidelines for Water/Wastewater Utilities Released

The nation's first standard guidelines for protecting the public from potential malevolent acts and other threats by enhancing the physical security of water and wastewater infrastructure systems have been released for trial use by water and wastewater utilities. The voluntary standard guidelines—jointly developed by the American Society of Civil Engineers (ASCE) and the American Water Works Association (AWWA) with technical input from the Water Environment Federation (WEF)—are the result of Phase III of the Water Infrastructure Security Enhancements (WISE) program. Titled “Guidelines for the Physical Security of Water Utilities” and “Guidelines for the Physical Security of Wastewater/Stormwater Utilities,” the draft guidelines are open for public comment and trial use until June 30, 2007.

Source: WEF This Week in Washington 12/15/06. Copies of the draft standards for trial use are available on each organization's web site: www.asce.org, www.awwa.org, and www.wef.org.

Draft Nutrient Criteria Technical Guidance Manual for Wetlands

EPA announced in the December 14 Federal Register the availability of a draft nutrient criteria technical guidance manual for wetlands. The document provides state and tribal water quality managers and others with information on how to develop numeric nutrient criteria for wetlands; however, the document does not contain site-specific numeric nutrient criteria. EPA is soliciting data and comments on issues of science pertaining to the information the Agency used to develop the guidance. The document contains EPA's scientific recommendations regarding defensible approaches for developing regional nutrient criteria but does not impose legally binding requirements. State and tribal decision makers have discretion to adopt water quality standards that use approaches that differ from EPA's recommendations. Scientific views, data, and information should be submitted by February 12.

Source: This Week in Washington, WEF 12/15/06. The notice is at <http://www.epa.gov/fedrgstr/EPA-WATER/2006/December/Day-14/w21287.htm>.

USGS Announces New Fact Sheet on Water Quality Data Warehouse

The National Water-Quality Assessment (NAWQA) Program has announced the availability of USGS Fact Sheet (2006-3101), *Data Delivery and Mapping Over the Web - National Water Quality Assessment Data Warehouse*. NAWQA's Data Warehouse integrates over 11 million data records on water quality, ecology, and hydrology across the Nation, providing one of the largest nationally consistent on-line collections of water-quality data and associated information. It contains information and links on chemical concentrations in water, sediment, and aquatic-organism tissues; biological community data for about 16,000 algae, fish and invertebrate samples; information on 8,000 stream sites and 8,000 wells; and daily streamflow and temperature information.

Source: This Week in Washington, WEF 12/15/06. The Fact Sheet is available at <http://pubs.usgs.gov/fs/2006/3101/>. NAWQA's Data Warehouse is at <http://water.usgs.gov/nawqa/data>.

EPA Finalizes Oil-Spill Rule

EPA release the final revised oil-spill prevention and control rule governing a host of industries that store petroleum products. The agency also announced plans to further extend deadlines for complying with the regulation. Industry compliance with the Oil Spill Prevention, Control, and Countermeasure (SPCC) rule has been repeatedly delayed amid concerns from sectors that it is onerous. The changes include allowing facilities that store less than 10,000 gallons of oil to "self-certify" SPCC plans rather than hiring a professional engineer. The final rule also allows some facilities an "alternative" to secondary containment requirements if they have an acceptable history of spill avoidance. Operators of these facilities, in lieu of secondary containment requirements, can instead develop an inspection and monitoring program, develop an oil spill contingency plan, and provide a written commitment of resources to control and remove oil discharged. However, EPA simultaneously proposed a rule to extend the compliance date until July 1, 2009.

Source: This Week in Washington, WEF 12/15/06 To view the rule, visit: http://www.eenews.net/features/documents/2006/12/14/document_gw_03.pdf.

EPA Proposes Extension to Deadline For Preparing Oil Spill Prevention Plans

The Environmental Protection Agency proposed Dec. 26 to give facilities until July 1, 2009, to prepare or amend oil spill prevention plans required under newly revised regulations (71 Fed. Reg. 77,357). EPA said the extension would allow the regulated community more time to adjust to further revisions to the existing oil spill prevention and countermeasures (SPCC) rules that the agency is planning to issue prior to July 2009. It also would give facility owners and operators more time to digest the SPCC Guidance for Regional Inspectors, which the agency will update to reflect new requirements as they are promulgated prior to 2009. The proposed rule extends the compliance date to July 1, 2009, from October 2007. According to EPA, this would be the fifth extension since the rules were published in 2002.

Source: BNA Environment Reporter 1/5/07

EPA Moves to Exempt Some NPDES Permits and Water-related Grants, From Environmental Reviews

EPA has proposed a "categorical exclusion" that would allow the agency to reissue National Pollutant Discharge Elimination System (NPDES) permits that cover new sources of pollution without first conducting an environmental assessment or environmental impact statement. The categorical exclusion could apply even if the facility seeking the renewed permit has added new discharges since the permit was first issued. The policy change is included in proposed revisions to EPA's Procedures for Implementing the National Environmental Policy Act (NEPA) and Assessing the Environmental Effect Abroad of EPA Actions (40 C.F.R. Part 6). The proposal would affect a wide range of operations--such as industrial facilities, wastewater plants, animal feedlots, mines, and drilling rigs--but only in areas where EPA, rather than the state, is the water permitting authority. NEPA requires all federal agencies to analyze the environmental effects of proposed actions before making final decisions. State actions are not subject to NEPA requirements. The law allows categorical exclusions for those federal actions that routinely do

not have a significant effect on the environment. Those activities can proceed without an environmental review. Most EPA actions already are exempt from NEPA. The proposed rule would further narrow the number of activities that have to undergo environmental reviews.

Source: BNA Env. Reporter 12/ 22/06 citing December 19, 2006 Federal Register (71 Fed. Reg. 76,082).

EPA Proposal Would Give States “Incentives” To Establish Fees for Discharge Permits

The Environmental Protection Agency published a proposed rule Jan. 4 that would give states up to 3 percent in additional water pollution control grants if they implement adequate fee programs for clean water permitting programs (72 Fed. Reg. 293). Under the proposal, states that certify they are recovering at least 75 percent of the funds spent on operating the NPDES program are eligible for the incentives. In the proposal, EPA said it would use this information to determine any additional amount a state is eligible to receive in its Section 106 grant based on the financial incentive allotment formula. Under the proposal, a state is eligible to receive:

- a quarter of its full share if it has recovered permit fees equaling or exceeding 75 percent of total NPDES program costs.
- half of the full share if it has recovered permit fees equaling or exceeding 90 percent of total NPDES program costs; and
- a full share if a state recovers 100 percent of total NPDES program costs.

New York and many other states are opposing this rule. A recent survey of 39 states and one multistate agency showing that more than half of all states charge fees to process clean water permits, but many still would not qualify for incentives under EPA's proposed rule. Sens. Hillary Clinton (D-N.Y.) and James Inhofe (R-Okla.) sought to prevent EPA from proposing the rule. The proposed rulemaking includes a 60-day public comment period following publication Jan. 4 in the *Federal Register*. Comments identified by Docket ID No. EPA-HQ-OW-2006-0765 should be submitted electronically by March 5 to <http://www.regulations.gov>.

Source: Environment Reporter, BNA, Inc. 1/5/07 *EPA's proposed permit fee incentive rule is available at <http://www.epa.gov/owm/cwfinance/npdes-permit-fee.htm>.*

Avian Flu Virus Unlikely To Survive Wastewater, Drinking Water Treatments

Cornell University researchers have found that a close relative of the highly pathogenic avian influenza virus (H5N1) can be eliminated by wastewater and drinking water treatments, including chlorination, ultraviolet (UV) radiation and bacterial digesters. To test the effectiveness of UV radiation for killing the H5N2 virus, the researchers exposed the virus in drinking water as well as in wastewater effluents to UV light at varying levels. The treatment was very effective in killing H5N2 at levels well within industry standards (and at lower levels than are used for killing *Cryptosporidium* and *Giardia* in water).

For chlorine, the results were less definitive, the researchers said. Inactivation of H5N2 depends on both chlorine concentrations and time of exposure. On average, U.S. treatment plants treat drinking water with chlorine concentrations of 1 milligram per liter for 237 minutes. Under these conditions, the researchers found that H5N2 (and probably H5N1) would be mostly inactivated, but further studies are needed to see if the viruses stay active when they come out of feces or are

at different pH and salinity levels. Similarly, the small laboratory-scale study found that bacterial digesters also reduced H5N2 to undetectable levels after 72 hours, which is consistent with industry standards. The researchers also found that higher digester temperatures inactivated the virus more quickly.

Source: Water and Wastewater Products, 1/5/07

(<http://www.stevenspublishing.com/Stevens/WWPPub.nsf/frame?open&redirect=http://www.stevenspublishing.com/stevens/wwppub.nsf/d3d5b4f938b22b6e8625670c006dbc58/70e2e18fa1f05ca68625725900590b1d?OpenDocument>); Cornell contact Dwight Bowman: <http://web.vet.cornell.edu/public/microbiology/bowmannew2.htm>

EPA Denies Petition to Reconsider Exclusion of Sewage Sludge Incinerators from Regulation Under CAA Section 129

EPA announced in the January 22, 2007 Federal Register that it will not change the regulation for other solid waste incineration (OSWI) units, specifically the exclusion of sewage sludge incinerators (SSI). On December 16, 2005, EPA promulgated a final rule that excluded SSI units from regulation under section 129 of the Clean Air Act as a type of OSWI. The Sierra Club petitioned EPA to reconsider this decision and claimed that there was no opportunity for public comment on EPA's decision. As a result, on June 28, 2006, EPA issued a notice of reconsideration and request for comments on the exclusion of SSIs from the OSWI rule. After carefully considering all of the comments and information received, EPA concluded that no additional changes are necessary to the final OSWI rules and denied the request for reconsideration for all other issues raised by the Sierra Club.

Source: WEF GAC Staff, 1/26/07. The Federal Register notice of the final decision is available at <http://www.epa.gov/fedrgstr/EPA-AIR/2007/January/Day-22/a820.htm>.

EPA Proposes Rule to Amend Hazardous Waste Code F019 Listing

EPA announced in the January 18 Federal Register that it is proposing to amend the list of hazardous wastes from non-specific sources (called F-wastes) under 40 CFR 261.31 by modifying the scope of wastes that fall under EPA Hazardous Waste No. F019. The Agency would be amending the F019 listing to exempt wastewater treatment sludges from zinc phosphating when used in the motor vehicle manufacturing process. EPA is proposing two options that would require the wastes be disposed in a landfill unit that meets certain liner design criteria. The proposed modifications to the F019 listing would not affect any other wastewater treatment sludges. Comments must be received on or before March 19, 2007.

Source: WEF This Week in Washington. To view the Federal Register proposed rule, visit: <http://www.epa.gov/fedrgstr/EPA-WASTE/2007/January/Day-18/f640.htm>