



New York Water Environment Association, Inc.

The Water Quality Management Professionals

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Recent Environmental Legislative, Regulatory and Judicial Developments¹

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I. NEW YORK

A. Legislation -- Budget

The 2006-07 State Budget provides more than \$1 billion to support the NYSDEC's environmental, resource management and recreation programs, including:

- \$135 million to support the refinanced Superfund program to continue the clean up of inactive hazardous waste sites and to address hazardous substance sites.
- \$180 million in new funding from the EPF to provide resources to address such high priority programs as open space preservation, continued implementation of the Hudson River Estuary Management Plan and development of the Hudson River Park.
- The total 1996 Clean Water/Clean Air Bond Act authorization of \$1.75 billion has been appropriated. This includes \$75 million in continued Bond Act disbursements in 2006-07 for critical Water Quality, Air, Solid Waste, Brownfield and Safe Drinking Water Projects;
- \$5.3 million from taxpayer monies to implement the New York City Watershed Agreement.
- \$177.6 million in new State and Federal funds for the Clean Water State Revolving Fund I.
- \$10 million for the remediation of Onondaga Lake;
- \$56.2 million to support the programs of the Conservation Fund;
- \$14.8 million in new and redirected funds from the 1965 Pure Waters Bond Act and the 1972 Environmental Quality Bond Act to support the Long Island Sound Comprehensive Conservation Management Plan, Jamaica Bay, and Hudson River swimmable projects;
- \$30 million in new funding for basic capital infrastructure projects to ensure health, safety and compliance with State and Federal laws and environmental requirements, including \$10.1 million for rehabilitation and improvement of state owned facilities;

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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 AMSA 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 AMSA web page is at amsa-cleanwater.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.

- \$455.1 million to support the operations of the Department, including a workforce of 3,378 positions.

Source: <http://publications.budget.state.ny.us/fy0607app1/encon.pdf> (as of 4/24/06)

B. Policy

1. Water

Hudson River Restoration Action Agenda

In December 2005, NYSDEC announced the release of the final "Hudson River Estuary Action Agenda 2005-2009" and "Generic Environmental Impact Statement". The Action Agenda contains the long-range goals and action steps for the coming four years. DEC will take the lead in implementing the plan. Some of the goals of the Action Agenda include:

- Restoring the signature fisheries of the Estuary
- Making the river swimmable
- Engaging partners in stewardship of natural resources
- Protecting streams
- Preserving the Hudson Valley's scenery
- Promoting public understanding of the river
- Creating more public access to the Hudson River

The Agenda can be viewed at www.dec.state.ny.us/website/hudson/agendacomment.html.

Source: <http://www.dec.state.ny.us/website/press/pressrel/2005/2005145.html>

Great Lakes Cleanup Projects -- New Direction and Funding

How and where contaminated sediment will be cleaned up in the Great Lakes is the subject of a new EPA rule. Acting under the authority of the Great Lakes Legacy Act, the agency has outlined how projects will be identified, selected and evaluated to clean up the sediment and reverse the environmental harm to Great Lakes rivers and harbors. The cleanup of such "areas of concern" has been a priority of the Great Lakes Regional Collaboration. Contaminated sediment is a significant problem in the Great Lakes basin. The United States and Canada have designated 41 areas of concern. In recent years, state and federal agencies have worked with local communities to clean up sediment through dredging and disposal, capping the contaminated material with clean material, allowing natural recovery of the materials in place, or a combination. From 1997-2004, approximately 3.7 million cubic yards of contaminated sediment were remediated from the Great Lakes Basin. Projects that have received funding under the program include the Ashtabula River in northeast Ohio; the Black Lagoon in the Detroit River; Ruddiman Creek in Muskegon, Mich., and Hog Island, near Superior, Wis. Proposed funding for this effort has quintupled in four years. Congress appropriated \$9.9 million in fiscal year 2004, \$22.3 million in 2005, and \$29.6 million in 2006 for Legacy Act cleanups. The president

has requested \$49.6 million in the proposed 2007 budget. Additional funding comes from state and local partners, who contribute at least a 35 percent match for each project. A request for projects will be issued within 90 days after the rule is published in the Federal Register. Proposals may be submitted at any time. More information on Great Lakes Legacy Act: <http://www.epa.gov/glla/> ; More information on Contaminated Sediments Program: <http://www.epa.gov/glnpo/sediments.html>

Source: USEPA Water Headlines for April 28, 2006

C. Judicial and Enforcement

1. Water

State, New York City Reach Agreement To Protect Long Island Sound

The New York State Department of Environmental Conservation (DEC) and the State Attorney General announced on January 10, 2006 that New York State and New York City have reached an agreement that will sharply reduce nitrogen discharges from wastewater treatment plants on the East River. The City and State of New York have been engaged in discussions and legal actions concerning reductions in nitrogen discharges from City wastewater treatment facilities to Long Island Sound since 1999. The agreement must now be approved by the New York State Supreme Court, New York County. The agreement will become effective upon approval by the Court. Under the new agreement, New York City will undertake a phased approach that, by 2017, will result in a 58.5 percent reduction in nitrogen discharges from its wastewater treatment plants. The agreement also provides for the City to construct upgraded wastewater facilities at the 26th Ward Water Pollution Control Plant on Jamaica Bay, conduct further studies on Jamaica Bay, and submit by October 2006 a comprehensive plan to achieve water quality standards for Jamaica Bay.

Source: <http://www.dec.state.ny.us/website/press/pressrel/2006/200606.html>

D. Regulatory

1. Water

State Environmental Board Approves New Used Oil, Elemental Mercury And Dental Amalgam Regulations

On March 1, 2006 the New York State Environmental Board approved State regulations that amend the State's used oil regulations to meet federal standards, prohibit the use and possession of non-encapsulated elemental mercury and set standards for the recycling of dental amalgam waste and pre-encapsulated elemental mercury wastes from dental offices statewide.

- 6 NYCRR Subpart 374-4 and associated amendments: Standards for the management of elemental mercury and dental amalgam waste at dental facilities; and
- 6 NYCRR Subparts 360-1, 360-14, 374-2, Paragraph 372.1 (e)(8) and Appendix 26: Used Oil Rulemaking.

Source: <http://www.dec.state.ny.us/website/press/pressrel/2006/200630.html>

II. FEDERAL

A. Congress

FY 2007 EPA Water Budget Emphasizes Security and Sustainability

According to EPA, the President's budget request emphasizes security and sustainability and reflects the need for maintaining economic competitiveness while accelerating environmental protection. To help support the four pillars of sustainable infrastructure -- Better Management, Water Efficiency, Full Cost Pricing and the Watershed Approach, \$7 million was proposed for a Water Infrastructure initiative-- a major research effort to generate the science and engineering needed to evaluate technologies to reduce the cost of operation, maintenance, and replacement of aging and failing systems for drinking water and wastewater treatment. The Drinking Water SRF was increased over the enacted FY 2006 budget and the Clean Water SRF program is expected to meet its long-term revolving target of \$3.4 billion each year. The FY 2007 budget also requests \$184 million for EPA homeland security efforts including \$38 million for Water Sentinel pilots as well as the continuation of pilots that started in FY 2006. More than \$70 million was proposed to clean and protect the Great Lakes, including \$50 million for Great Lakes Legacy Act that will support four to six sediment remediation projects. (See related topic in I(B)(1) above.)

Source: <http://www.epa.gov/water/waternews/2006/060210.html>

Legislation Introduced in Support of Great Lakes Regional Strategy

Senators Mike DeWine (R-OH) and Carl Levin (D-MI) introduced legislation authorizing \$23.5 billion to help implement recommendations made by the Great Lakes Regional Collaboration, which issued its report last December. The bill, S.508, *The Great Lakes Environmental Restoration Act*, would do the following: provide additional resources to states and cities for their water infrastructure; provide additional funding for contaminated sediment cleanup and give EPA additional tools under the Great Lakes Legacy Act to hasten projects; create a new grant program to phase out mercury in products; authorize additional research and coordination of federal programs; reduce the threat of invasive species through comprehensive legislation and putting ballast technology on board ships; and restore fish and wildlife habitat by reauthorizing the Great Lakes Fish and Wildlife Restoration Act. A related bill in the House, H.R. 792, seeks to accomplish the same goals of the Senate bill and authorizes up to \$800 million annually through 2011.

Source: WEF *This Week In Washington*, 4/7/06.

B. Judicial And Enforcement

1. Water

\$20 Million Plan to Cut CSO Related Contamination in Charles River

The various parties to the court-mandated cleanup of Boston Harbor have reached agreement on a \$20 million plan that is expected to sharply reduce sewage contamination of the Charles River. The settlement is expected to bring Combined Sewer Overflows (CSOs) into the Charles River down from a 1988 level of 1.7 billion gallons to about 8 million gallons per year. The \$20 million plan to address CSO discharge into the Charles is the final and a key piece of an \$850

million effort by the Massachusetts Water Resources Authority to eliminate, reduce, or treat CSOs throughout the Greater Boston Harbor and its tributaries, MWRA Executive Director Fred Laskey told BNA. Once this project is completed, more than 99 percent of the CSOs will be controlled. The MWRA says that by 2015, it is projected to spend over \$850 million on CSO control projects, in addition to the \$3.8 billion already spent on the Boston Harbor cleanup.

Source: BNA, Inc. 3/24/06, citing *United States v. Metropolitan District Commission*, D. Mass., A. No. 85-0489-RGS, 3/15/2006

EPA Moves Toward Industry-wide Actions In Enforcement Arena

The Environmental Protection Agency is continuing to move toward bringing industry-wide enforcement actions instead of piecemeal individual actions at a specific unit or facility. EPA believes that this approach will allow more flexibility and innovation in gaining environmental benefits. The EPA website lists enforcement priorities and areas that are being focused on in the future. Currently there are a variety of areas which have been targeted for Clean Water Act enforcement including concentrated animal feeding operations wet weather activities, sanitary sewers and stormwater issues. Clean Air Act enforcement targets include new source review, air toxics, refineries, mobile source fuels, engines, mineral processing and financial assurances.

Source: BNA, Inc.

Companies Agree to Spend \$30 Million To Remove PCBs From River in Wisconsin

Two companies have agreed to spend an estimated \$30 million to remove nearly 120,000 cubic yards of contaminated sediments from Wisconsin's Lower Fox River. Under terms of a consent decree to be filed in the U.S. District Court for the Eastern District of Wisconsin, NCR Corp., and Sonoco-U.S. Mills Inc. will design and implement a plan to dredge, dewater, and dispose of the contaminated sediments in a stretch of the river downstream of the De Pere Dam. The remediation design plan for Operable Units 2-5 is being prepared under an administrative settlement agreement between the agencies and NCR Corp. and Fort James Operating Co.. The April 12 agreement covers contamination hot spots in Operable Unit 4. The settlement requires NCR Corp. and Sonoco-U.S. Mills Inc. to submit a cleanup plan in August 2006 and begin dredging in spring 2007.

Source: BNA Inc. Environmental Reporter (4/14/06) reporting on the most recent agreements on *In re: Lower Fox River and Green Bay Site*, U.S. EPA Region 5, CERCLA Docket No. V-W-04-C-781, 2004 and (*In re: Lower Fox River and Green Bay Site*, U.S. EPA Region 5, CERCLA Docket No. V-W-04-C-781, 2004).

Supreme Court Declines Review Involving CWA Passive Landowner Liability

On April 3, the U.S. Supreme Court declined to rule whether a landowner who takes no affirmative action can be held liable under the Clean Water Act for naturally occurring discharges flowing through its property. The Supreme Court's decision leaves intact a ruling by the U.S. Court of Appeals for the Tenth Circuit that found a Clean Water Act permit is required if the mine is "actually" discharging pollutants into the waters of the United States. El Paso Properties Inc. purchased approximately 100 acres of property and accompanying mineral rights in the Cripple Creek mining district in Teller County, Colo., in 1968. The company claims it has not engaged in any mining activity at the site, which includes an abandoned gold mine and a portion of a collapsed mine shaft. The shaft connects to an underground tunnel that leads to

Cripple Creek, a navigable water under the Clean Water Act, as it empties into the Arkansas River.

The appellate court held that the Sierra Club and Mineral Policy Center could bring a citizen suit against the company for alleged continuous and intermittent unpermitted discharges. The Court Circuit, however, also ruled that a pretrial summary judgment on El Paso's liability could not be allowed to stand because questions of "material fact" remained unanswered as to whether zinc and manganese discharges actually traveled two-and-a-half miles down a porous tunnel from the Colorado mine into Cripple Creek.

Source: BNA 4/13/06 reporting on *El Paso Properties Inc. v. Sierra Club*, U.S., No. 05-933,4/3/06) and *Sierra Club v. El Paso Gold Mines Inc.*, 421 F. 3d 1131, (10th Cir. 2005).

2. Air

States Sue EPA For Violating Clean Air Act And Refusing To Act On Global Warming

Ten state Attorneys General, including New York's, have sued the EPA for failing to adopt strong emission standards to reduce air pollution from new power plants across the nation. The District of Columbia and the City of New York also joined in the legal action. The suit alleges that the Clean Air Act requires that the EPA review and revise emission standards for new pollution sources every eight years to ensure that they protect public health and the environment. On February 27, 2006, EPA issued revised regulations in accordance with a court order. However, according to the suit, the revised standards completely fail to regulate power plant emissions of carbon dioxide, the major contributor to global warming. In addition, the suit alleges that the "revised standards for other air pollutants harmful to public health are unacceptably lax." According to the Plaintiffs, EPA's rulemaking in this matter is inadequate in two fundamental ways: (1) EPA refused to regulate carbon dioxide, despite "overwhelming research and scientific consensus" that carbon dioxide contributes to global warming and thus harms "public health and welfare" and (2) EPA failed to set adequate standards for sulfur dioxide and nitrogen oxides, power plant pollutants that contribute to soot, smog, acid rain and higher levels of respiratory disease. The lawsuit was filed in federal appeals court for the District of Columbia Circuit. On the same day, a coalition of environmental organizations, the Natural Resources Defense Council, Sierra Club and Environmental Defense filed a related petition. **Source:** April 27, 2006 Press Release Issued by the Plaintiffs.

C. Regulatory

1. Water

Extended Term Financing through the CWSRF Affirmed

EPA's Office of Water issued a statement affirming EPA's policy to allow states to purchase or refinance municipal debt through Clean Water State Revolving Funds (CWSRF) with terms exceeding 20 years. The Clean Water Act (CWA) authorizes the CWSRF program to provide loans for water quality purposes with terms up to 20 years. However, since the CWA does not directly limit the term of transactions for purchasing or refinancing local debt, it has been EPA's policy to permit purchase or refinance transactions to exceed 20 years. A copy of the *Policy*

Statement on Extended Financing Terms Under the Clean Water Act State Revolving Fund Program is available on the OWM web site at <http://epa.gov/owm/cwfinance/cwsrf/law.htm>.

Source: <http://www.epa.gov/water/waternews/2006/060323.html>

Draft EPA FY 2007 Water Program Guidance

EPA's National Water Program has published Draft FY 2007 Guidance and is seeking comment from States, Tribes and other interested parties. With the help of States, Tribes and other partners, EPA expects to make significant progress toward protecting human health and improving water quality by 2008 including:

- **Water Safe to Drink:** increase the rate of compliance with drinking water standards to 95%;
- **Fish Safe to Eat:** reduce pollution in waters with fish advisories so that consumption limits can be relaxed for 3% of problem waters;
- **Water Safe for Swimming:** restore polluted waters to allow swimming again in at least 5% of the waters where swimming was unsafe in 2000;
- **Healthy Waters:** restore an increasing percentage of the approximately 20,000 impaired waters across the Nation, with the goal of restoring 25 percent of these waters by 2012;
 - **Healthy Coastal Waters:** show steady improvement in seven specific indicators of the health of each of the four major coastal ecosystems around the country; and
 - **More Wetlands:** marshal the resources of Federal agencies and others to meet the President's goal to achieve an overall increase in the Nation's wetlands, including restoring, improving, and protecting three million acres of wetlands over five years (by 2009).

The *Strategic Plan* also identifies additional goals for environmental improvements by 2008 in critical waters including the Gulf of Mexico, the Great Lakes, the Chesapeake Bay, and the Mexico Border area.

Source: <http://www.epa.gov/water/waterplan/index.html#VI> , see also <http://www.epa.gov/adminweb/administrator/actionplan.htm>

EPA Solicits Comments on Additional Method To Measure E. Coli in Wastewater & Sludge

The Environmental Protection Agency is soliciting comments about a new technique to measure levels of *Escherichia coli* (E. coli) in wastewater and sewage sludge. The new technique, known as m-ColiBlue 24(r), to measure and to monitor E. coli bacteria in wastewater and sludge is in addition to the techniques listed in an Aug. 16, 2005, proposal.

Source: BNA Environment 4/14/06, citing 71 Fed. Reg. 18,329.

Rules on Water Transfers, Livestock Operations, Pesticides in Water

The Environmental Protection Agency expects to publish a revised rule for concentrated animal feeding operations (CAFOs) by the end of June, followed by a 45-day comment period. The upcoming revisions to the CAFO rule are necessary due to a 2005 ruling by the U.S. Court of Appeals for the Second Circuit, which vacated key portions of the rule that was originally adopted in 2003 (*Waterkeeper Alliance v. EPA*, 399 F3d. 486, 59 ERC 2089 (2nd Cir. 2005)). The Second Circuit said EPA may not require all concentrated animal feeding operations to obtain NPDES permits based on their "potential to discharge." Instead, the court said, EPA may only require permits for those CAFOs that actually discharge pollutants into waters of the United States.

The agency will finalize a rule on water transfers in mid-May. The rule will be based on a legal interpretation issued in August 2005 by EPA's general counsel who issued a legal statement that said simple transfers of water from one body of water to another are exempt from permitting under the Clean Water Act. The legal interpretation was based on a partial ruling issued by the U.S. Supreme Court in 2004 in the water transfers case involving the South Florida Water Management District (*South Florida Water Management District v. Miccosukee Tribe*, 441 U.S. 95, 58 ERC 1001; 35 ER 664, 03/26/04).

In addition, a rule on pesticides in water should be proposed in late summer or early fall. The rule would finalize an EPA proposal, which was issued Feb. 1, 2005. The rule, once adopted, would clarify that application of pesticides to U.S. waters does not trigger the need for a Clean Water Act discharge.

Source: BNA Inc. Environment Reporter Vol. 37, No. 11

EPA Preparing Guidance on "Significant Noncompliance"

EPA is soliciting comments from state agencies on draft guidance to clarify which discharge events result in "significant noncompliance" with Clean Water Act regulations. The so-called "Wet Weather Guidance" will describe and clarify conditions and circumstances under which discharges from stormwater flows, concentrated animal feeding operations, combined sewer overflows, and sanitary sewer overflows result in "significant" violations of clean water permits. The guidance uses rules that currently exist under the Clean Water Act to explain how states can enforce instances of "significant noncompliance". Under current Clean Water Act rules, a facility can be considered in significant noncompliance for the following circumstances: chronic violations of discharge limits, technical review criteria violations, violations of pretreatment effluent limits that may have caused interference with the treatment system or that allowed effluents to pass through the system illegally, discharges of pollutants that could cause imminent harm to human health or environment, and failure to meet certain reporting deadlines. The draft guidance will not be available until 2007. Although agency officials refer to the guidance as "wet weather guidance," the guidance would incorporate overflow events that occur during dry weather as well. For instance, if a sewer in a town repeatedly overflows during dry weather, that would be cause for a state to decide whether this should be deemed an event of "significant noncompliance."

The guidance, though not binding, would show how states can use existing Clean Water Act rules to enforce compliance.

Source: BNA, Inc. Environment Reporter Vol. 37 No. 11

Violations at Wastewater Treatment Plant Result In Fine For Keene, N.H.

The city of Keene, N.H., will pay a \$58,000 fine as part of an EPA settlement for violations of the federal Clean Water Act at the city's municipal wastewater treatment plant and sewer collection system. The violations resulted in sewage overflowing from the system on dozens of occasions. The settlement resolves EPA concerns regarding Keene's wastewater treatment plant and sewer collection system. Keene's violations led to more than 30 overflows of untreated sanitary sewage between 2000 and 2005. Most of the overflows were caused by blockages in the system, which can be prevented by routine cleaning and maintenance. Keene's public sewer system includes a secondary wastewater treatment facility that discharges 3.5 million gallons per day of treated wastewater into the Ashuelot River. The collection system is made up of about 86 miles of sewer, 2000 manholes, five city-owned pump stations and 10 privately-owned pump stations. Other violations included exceeding effluent limits for zinc in the city's National Pollution Discharge Elimination System (NPDES) permit, and the failure to develop appropriate local limits for industries that discharge wastewater to the system. Keene has been complying with a separate order issued by EPA in September 2004, which should prevent sanitary sewer overflows in the future. Keene has been required to develop and implement a plan to remove structural deficiencies in their wastewater treatment infrastructure. This includes evaluating manholes and collection system accessibility, establishing a plan to restore the capacity of the sewer system (including a preventative maintenance program), an analysis of appropriate effluent limits for local industries, putting appropriate limits for local industries into the city's sewer use ordinance, and other requirements.

Source: Water and Wastewater E-News, 4/19/06.