



New York Water Environment Association, Inc.

The Water Quality Management Professionals

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Recent Environmental Legislative, Regulatory and Judicial Developments¹

November 1, 2009 through May28, 2010

I. NEW YORK

A. **Legislation** See separate document.

1. **Non-Water**

N.Y. Governor Signs Bill to Divert RGGI Funds

Gov. David A. Paterson signed a bill Dec. 4 that diverts \$90 million of proceeds from New York's Regional Greenhouse Gas Initiative (RGGI) auctions to the state's General Fund to close its budget deficit. The bill (A. 40023) was part of a package of measures approved by the Legislature to close a midyear budget deficit of about \$3 billion. The funds were originally intended for energy conservation and clean energy programs under the memorandum of understanding among the 10 RGGI states. New York is expected to receive \$220 million through 2010 from the proceeds of the carbon dioxide allowance auctions, according to Paterson. The governor proposed the measure in October.

Source: BNA Environment Reporter, 12/11/09 A copy of the bill is available at <http://assembly.state.ny.us/leg/?bn=A40023&sh=t>.

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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. Regulation and Policy

1. Water

DEC Issues DEC Issues Proposed Cooling Water Policy

Through this policy DEC proposes closed-cycle cooling as best technology available to minimize adverse environmental impacts. This policy applies to all existing and proposed industrial facilities designed to withdraw twenty (20) million gallon per day (MGD) or more of contact or non-contact cooling water from the waters of New York State. Public comments accepted until June 8, 2010.

Source: The Business Council of NY, Environmental Committee Alert, April 23, 2010

EPA to Propose Policy for Addressing Overflows from Sanitary Sewer Systems

EPA Deputy Administrator Robert Perciasepe announced during the National Association of Clean Water Agencies' (NACWA) National Environmental Policy Forum on April 20 that EPA expects to propose by late spring or early summer a policy that would address overflows from sanitary sewer systems. The new policy will look at previous proposals on the topic, and consider what has been learned since that time, said Perciasepe. In the absence of a policy for controlling sanitary sewer overflows, EPA may make an announcement soon on moving forward with some sort of [sanitary sewer overflow] policy and has indicated a preference to address the issue of blending under the broader sanitary sewer overflow (SSO) policy. NACWA has threatened to petition EPA to establish a consistent policy on how sanitary sewer overflows (SSOs) and collection systems are treated due to concerns that EPA will view every overflow as illegal and in violation of the Clean Water Act. Perciasepe also stated during the forum that EPA is evaluating how to integrate wet weather issues, including stormwater, and is looking at stormwater "more holistically."

The WEF Government Affairs Committee, working with other appropriate WEF Committees, has drafted a position statement on Management of Wet Weather Flows by Municipal Utilities. This position statement builds on WEF's "Guide to Managing Peak Wet Weather Flows in Municipal Wastewater Collection and Treatment Systems" and WEF/NACWA's "Core Attributes of Effectively Managed Collection Systems." The WEF Board of Trustees will be considering this position statement during their April 30 meeting.

Source: WEF This Week in Washington, April 23, 2010

South Shore Estuary Now a No-Discharge Zone

The U.S. Environmental Protection Agency approved a proposal to prohibit vessel waste discharges within the South Shore Estuary Reserve of Long Island, N.Y. After a public review and comment period, the agency determined that the petition prepared by Peconic Baykeeper and the New York State Department of Environmental Conservation (DEC) meets the criteria outlined by the Clean Vessel Act for establishing a No Discharge Zone.

The EPA's affirmative determination requires that, effective immediately, all boat sewage will now have to be discharged at equipped pump-out facilities.

Source: Water and Wastewater News, Nov 19, 2009

EPA to Pay for Full-Time Alternative Water Source During Hudson River Dredging

The Environmental Protection Agency said April 26 it has expanded its commitment to pay two upstate New York towns for the costs of drawing from a drinking water system in Troy, N.Y., during the dredging of sediments containing polychlorinated biphenyls from the Hudson River. The towns of Halfmoon and Waterford previously arranged to draw from the Troy system, at EPA's expense, when PCB levels in the Upper Hudson exceed established criteria. At the time, the agency said that the first three years of dredging would take place 30 miles away from the towns' river water intakes, far enough for the water to be diluted by tributaries. After the towns raised concerns over using the Hudson River water, however, EPA said it would now pay the additional costs of using Troy water full time. The agency said it would cover those costs through the 2012 dredging season, after which it would determine how much to pay the towns for using the Troy water in the off-seasons until the dredging is complete. "To make its post-2012 determination, EPA said, more data must be gathered on "any impact of the dredging activities on off-season PCB levels in the Upper Hudson." In a third municipality, the village of Stillwater, EPA operates a carbon treatment system for the wellfield as a temporary measure until a connection is completed to the Saratoga County water system, the agency said. Discussions with GE are continuing over who will be responsible for the cost of the connection. A scientific peer review panel is considering the results of technical reports completed by EPA and GE in March on the first phase of dredging.

Source: BNA [Toxics Law Reporter 04/29/2010](#)

C. Enforcement and Judicial

NYC to Spend \$115 Million to Improve Jamaica Bay Water Quality

New York City will spend \$100 million on nitrogen control retrofitting at three wastewater treatment plants and \$15 million on marshland restoration projects to improve water quality in Jamaica Bay, under a preliminary agreement announced 2/25/10. Together with \$95 million previously committed for plant upgrades, the improvements will reduce nitrogen loads discharged into the bay by 50 percent by 2020. The agreement with the state Department of Environmental Conservation exempts the city from \$45 million in potential penalties for construction delays in nitrogen control upgrades at two other wastewater treatment plants. Those funds will be invested in future clean water projects.

Mayor Bloomberg called Jamaica Bay, a 31-square-mile estuarial water body closed off by the city's Rockaway Peninsula, "one of the most bountiful wildlife habitats in the entire Northeast." It supports multiple habitats, including open water, salt marshes, grasslands, coastal woodlands, maritime shrublands, and brackish and freshwater wetlands. The habitats support 91 fish species, 325 species of birds, and many reptile, amphibian, and small mammal species, it added.

The wastewater plant upgrades in the agreement will be operational in 2015, and all improvements will be completed by 2020. The agreement also provides for interim nitrogen reduction measures that will improve water quality beginning this spring. The \$15 million saltwater marsh restoration investment will be spent on projects in the interior of Jamaica Bay. The city and state also agreed to pursue the proposal of Jamaica Bay for designation as a "no discharge zone" barring release of sewage from boat toilets and holding tanks.

Source: BNA Environment Reporter, 3/5/10

EPA Pursues Metal Dealers, Recyclers for Mercury Cleanup Costs at New York Site

The federal government filed a superfund cost recovery action against eight metal dealers and recyclers on April 19 to recover \$7 million in costs incurred addressing mercury contamination at a site in Rye Brook, N.Y. The EPA asserts that it has incurred costs since April 2004 cleaning up the Port Refinery superfund site in Rye Brook, a village in suburban Westchester County. The defendants are metal dealers, producers, or recyclers that sold scrap mercury to Port Refinery Inc. to be refined at the site, the U.S. attorney's office said. From the 1970s to 1991, it said, the company refined scrap mercury to resell as commercial-grade mercury for use in dentistry and electronics, in the process releasing mercury and mercury-containing wastes at the site. The \$7 million in costs came on top of an earlier \$2.4 million settlement of a 1996 complaint for a 1991-1996 cleanup.

Emergency Reopening of Cleanup The cleanup was renewed on an emergency basis after residents in a private housing project adjacent to the site discovered mercury along a walkway in April 2004, the government said. Since then, EPA has excavated more than 9,300 tons of mercury-contaminated soil, demolished a mercury-contaminated residence, installed air and water filtration systems for residences, and tested air, water, and soil at the site. The suit also seeks to hold the defendants liable for any future costs incurred at the site.

Source: BNA Toxics Law Reporter: 04/22/2010 citing U.S. v. Jacob Goldberg & Son Inc., S.D.N.Y., No. 10-3237, 4/19/10, see <http://pub.bna.com/ptcj/port10civ3237.pdf>.

Manufacturer to Pay New York \$2 Million for Waste Cleanup at Former Production Site

A New York manufacturer has agreed to pay the state \$2 million in reimbursement for hazardous waste cleanup costs at a Glen Cove, N.Y., superfund site. The settlement with Pall Corp. of Port Washington, N.Y., a manufacturer of fluid filtration, separation, and purification products, covers a five-acre state superfund site in Nassau County where the company's aerospace division made filtration products from 1958 to 1971. The operations contaminated soil, ground water, and surface water at the site and adjacent areas with toxic substances, including tetrachloroethylene and trichloroethylene. The state Department of Environmental Conservation designated the property as a state superfund site in 1996, and Pall has performed interim cleanup under a DEC consent order. The state has now taken over site cleanup, and the settlement requires the company to pay reimbursement for current and future costs associated with completing the cleanup to a depth of 60 feet, he added. DEC is investigating contamination at greater depths at the Glen Cove site, and the state could seek further reimbursement if more cleanup is needed.

Source: BNA [Toxics Law Reporter](#) 11/12/2009

Judge Sentences Safety Consultant to Three Years in Prison, Ordered to Pay \$1.1 Million

The president of an upstate New York safety consulting company has been sentenced to a three-year prison term for his role in a scheme to falsify the qualifications of its employees to serve as safety monitors on New York City Department of Environmental Conservation and U.S. Army Corps of Engineers construction sites. The president and part-owner of IMS Safety Inc. of Middletown, N.Y., was sentenced on Dec. 14. He was also ordered to pay \$1.1 million in restitution to DEP and the Army Corps and to forfeit the same amount.

The company itself was ordered to serve a five-year term of probation and pay a \$500,000 fine. Like its President, the company also must pay \$1.1 million in restitution and forfeiture, prosecutors said. The amount represents the fees paid to IMS for work by employees with falsified qualifications, including some \$1 million for the DEP sites and \$83,000 for an Army Corps project at the U.S. Military Academy at West Point, prosecutors said. In earlier actions in the case, an IMS vice president was sentenced to a year and a day in prison and ordered to pay the same amount in restitution and forfeiture. In July, another company vice president was sentenced to two years in prison. IMS offered worker safety and health regulatory compliance services and had been hired by DEP contractors to provide safety oversight at construction sites under contracts specifying training and experience requirements for the firm's personnel. Company officials, however, were charged with conspired to falsify the qualifications to gain DEP approval of their appointments to the safety oversight positions. (United States v. Mazzurco, S.D.N.Y., No. 09-CR-533, sentencing 12/14/09).

Source: BNA Infrastructure Investment & Policy Report, 12/17/09

Oswego to Invest \$87 M in Sewers to Comply with Clean Water Act

To resolve long-standing problems with unpermitted sewer overflows, the city of Oswego, N.Y., will invest an estimated \$87 million in improvements to its west side sewer system, the Justice Department and U.S. Environmental Protection Agency announced last week. The New York State Department of Environmental Conservation was also a partner in the [agreement](#). The city's west side sewer system, which serves approximately 10,000 people, is designed to transport the city's sewage to a wastewater treatment plant for treatment prior to discharge into Lake Ontario. The system includes both combined and sanitary components. Heavy rainfall or snowmelt often overwhelms the capacity of the system, resulting in sewer overflows that discharge contaminated stormwater and untreated human and industrial waste to local waterways.

The improvements to the city's sewer system, to be implemented under the settlement lodged in federal court in Syracuse, N.Y., will significantly reduce the number of sewer overflows. The city also will pay a penalty of \$99,000. The settlement resolves claims against the city by both the United States and the state of New York. Under the settlement, the city has agreed to undertake a comprehensive, system-wide program that will bring the city into compliance with the Clean Water Act. Specific measures include at least 75 percent separation of the combined system into sanitary and stormwater components, in order to prevent high volumes of rainwater from overwhelming the treatment plant, a 50 percent expansion of the west side wastewater treatment plant's treatment capacity, disconnection of catch basins to reduce the inflow of rain water into the existing sanitary sewer system, major improvements to its operation and maintenance program, and sewer financing reforms.

Source: Water & Wastewater News, May 18, 2010

EPA Releases Guidance to Help Federal Facilities Better Manage Stormwater

EPA announced on December 8 that it has issued [guidance](#) to help federal agencies minimize the impact of federal development projects on nearby water bodies. The guidance is being issued in response to a change in law and an Executive Order signed by President Obama, which calls upon all federal agencies to lead by example to address a wide range of environmental issues, including stormwater runoff. EPA worked closely with other federal agencies to develop this

document, which provides background information, key definitions, case studies and guidance on meeting the new requirements of the Energy Independence and Security Act of 2007.

Under the new requirements, federal agencies must minimize stormwater runoff from federal development projects to protect water resources. Federal agencies can comply using a variety of stormwater management practices often referred to as green infrastructure or low impact development practices, including reducing impervious surfaces, using vegetative practices, using porous pavements and installing green roofs. EPA is using sustainable techniques for reducing the effects of stormwater runoff at its facilities, such as installing a 3,000 square foot green roof as well as using rain gardens and cisterns to capture and reuse stormwater.

Source: This Week in Washington from WEF 12/11/09

EPA To Start Rulemaking Process for Post-Construction Stormwater Rule

The Environmental Protection Agency in a Dec. 28 Federal Register notice announced plans to begin a rulemaking to reduce stormwater discharges from new development and redevelopment and to make other regulatory changes to strengthen its stormwater program. EPA has requested input regarding the performance, effectiveness, and cost of stormwater control measures; ecological benefits from stormwater controls; and technical information on design, implementation, operation, and maintenance of stormwater control measures. In addition, the agency said it seeks any other information that may help it develop improvements to the existing program, including better control of pollutants in stormwater from the built environment created by development and redevelopment.

Comments, identified by Docket No. EPA-HQ-OW-2009-0817, may be submitted by accessing <http://www.regulations.gov> and following the online instructions.

Source: BNA Environment Reporter: 01/08/2010

EPA Finalizes Stormwater Construction Rule

On Dec. 1, EPA published a final rule that would subject for the first time owners and operators of construction sites disturbing 10 acres or more to national monitoring requirements and enforceable numeric limits on stormwater discharges (74 Fed. Reg. 62,996). That rule requires owners and operators of all construction sites disturbing one or more acres to use best management practices for erosion and sediment control to ensure that soil disturbed during construction activity does not pollute nearby water bodies. In announcing the construction rule, EPA said it received comments encouraging the agency to include in the final rule controls on stormwater discharges that occur after construction has ceased, or “post-construction” stormwater discharges.

Source: BNA Environment Reporter 1/8/10

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Source: BNA Environment Reporter 1/8/10. Comments, identified by Docket No. EPA-HQ-OW-2009-0817, may be submitted by accessing <http://www.regulations.gov> and following the online instructions.

EPA Cites Tonawanda Coke for Faulty Equipment, Violation of Opacity Limits

The Environmental Protection Agency announced two enforcement actions April 29 against a western New York foundry coke plant that has allegedly committed numerous environmental violations. EPA issued a notice of violation to Tonawanda Coke Corp. for alleged violations of average opacity emissions limits at the facility, which is about 10 miles north of Buffalo. It also issued an administrative order against Tonawanda Coke for alleged violations of the general duty clause of the Clean Air Act. Under the administrative order, the company must investigate and repair the cause of two incidents in which untreated coke oven gas was released due to equipment failures. The facility has 30 days to submit a schedule for repair and maintenance and 60 days to assess the root causes of the incidents.

Coke oven gas, which is generated when coal is heated at high temperatures, contains hydrogen sulfide, ammonia, sulfur dioxide and other regulated substances. The facility assessment, which must be conducted by an independent engineer, will include recommendations to repair failed equipment, improve plant safety, and prevent future problems. The company must also document that the recommended steps are implemented. According to the notice of violation, Tonawanda Coke violated the opacity requirements 23 times in February and March 2009. The notice also alleges that the facility operated a pressure relief valve on a coke oven without a valid state certificate.

In a statement, Judith Enck, EPA's Region 2 administrator, said the general duty clause "is only used when there is serious risk of accidental releases because a facility is poorly operated." Under the Clean Air Act, companies have a "general duty" to design and maintain safe facilities. They are required to take all the steps needed to prevent air releases of regulated substances and extremely hazardous substances.

The enforcement actions against Tonawanda Coke are part of an ongoing effort by EPA to address alleged environmental violations at the plant. EPA announced in January that the company had violated the Clean Air Act, the Clean Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. Moreover, the facility's pollution control manager was arrested in December for criminal violations related to alleged releases of hazardous substances and air pollutants (U.S. v. Kamholz, W.D.N.Y., No. 09-CR-220, arrest warrant issued 12/23/09. Reportedly, the manager is currently in discussions with the U.S. Attorney for the Western District of New York to explore the possibility of settling the case without an indictment and trial, according to an April 15 motion filed by his attorney with the U.S. District Court for the Western District of New York.

Source: BNA Toxic Law Reporter, May 3, 2010

Sauerkraut firm pleads guilty to illegal discharges

An Ontario County sauerkraut manufacturer has pleaded guilty to illegally discharging pollutants into the Canandaigua Outlet and will pay \$60,000 in fines, the state Department of Environmental Conservation announced Friday. The former plant manager has been indicted on related charges. Great Lakes Kraut LLC, located in Shortsville, pleaded guilty to three misdemeanors of the Environmental Conservation Law relating to State Pollutant Discharge Elimination System requirements. The company also signed a consent order with DEC requiring further enhancements to its wastewater treatment system to prevent further unlawful discharges into the Canandaigua Outlet.

Also, an Ontario County grand jury has indicted the former plant manager, on felony charges of second-degree forgery, first-degree offering a false instrument for filing, tampering with a monitoring device and three counts of prohibited discharge of pollutants. The grand jury also charged Mulholland with misdemeanor counts of fourth-degree criminal solicitation and contravention of water quality standards.

All charges against Great Lakes Kraut resulted from an investigation into the unlawful discharge of pollutants into the Canandaigua Outlet in 2008. DEC investigators determined that on more than one occasion discharges from the plant occurred when the water flow rate of the outlet was below the threshold for allowable discharges. In addition, those discharges were not reported on required discharge monitoring reports submitted to DEC. Due to prior felony convictions on his record, the former plant manager faces mandatory state prison time if convicted.

Source: Rochester Business Journal Daily Report - 4/30/10

EPA Moves to Develop Guidelines for Steam Electric Power Generation

The Environmental Protection Agency plans to pursue rulemaking to revise effluent guidelines for the steam electric power industry, the agency said in its preliminary 2010 effluent guidelines plan, published Dec. 28 (74 Fed. Reg. 68,599). EPA said in the notice it has completed a multiyear study of the steam electric power generating industry, and based on the results, has determined that a revision of the current effluent guidelines is warranted. Over the course of the study, EPA said it has identified technologies that are available to significantly reduce these pollutant discharges. EPA's most recent revisions to the effluent guidelines and standards for this category were promulgated in 1982. EPA said its review of the industry's wastewater characteristics indicates that most of the toxic pollutant loadings for this category are associated with metals and certain other elements present in wastewater discharges.

Source: BNA Environment Reporter: 01/08/2010

EPA Withdraws Mine's Discharge Permit, In Response to Alleged Pollutant Releases

The Environmental Protection Agency has withdrawn, pending further review and comment, a water discharge permit in effect since Oct. 1 for Peabody Energy Corp. in connection with mining operations in northern Arizona. The Dec. 3, 2009 withdrawal of the five-year permit, issued by EPA under the Clean Water Act, is in response to environmentalists' claims that the discharge of heavy metal and pollutants threatens water sources used by nearby Native American communities for drinking. In the interim, mining operations continue under the extension of an expired 2006 permit, according to EPA.

The Tucson, Ariz.-based Center for Biological Diversity made the appeal. Peabody Energy's Black Mesa and Kayenta mines have been in operation since the 1970s and sit on about 65,000 acres that it leases from the Navajo and Hopi tribes. Coal from the Kayenta mine supplies the Navajo Generating Station near Page, Ariz.

Water discharge that includes storm water and runoff from mining, coal preparation, and reclamation areas is held in more than 230 ponds at the mining complex. About 33 have leaks, and EPA has said some of those fail to meet water quality standards, need additional monitoring, or need removal.

In re: Peabody Western Coal Co., EPA Environmental Appeals Board, No. 09-10, 12/3/09

Source: BNA Toxics Law Reporter

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Source: BNA Environment Reporter 1/8/10.

Pharmaceuticals Found in Waterways

In its effluent guidelines plan, EPA said scientists have identified numerous pharmaceutical compounds at discernible concentrations in U.S. rivers, lakes, and streams. To address this, the agency said it is studying how the drugs are entering waterways and contributing factors. The preliminary Effluent Guidelines Plan for developing and revising technology-based water pollution control requirements is required by the Clean Water Act and describes the agency's ongoing efforts to develop effluent guidelines. It does not contain regulatory requirements, but rather presents a process the agency is using to identify industries for further investigation and analysis. EPA will use these additional analyses to determine whether to revise or establish new effluent guidelines.

Source: BNA Environment Reporter 1/8/10. Comments on the preliminary plan are due Feb. 26, 2010. They may be submitted, identified by Docket ID No. EPA-HQ-OW-2008-0517, at <http://www.regulations.gov>, and following online instructions.

Five NYC Watershed Hospitals, Nursing Homes Agree to Stop Discharges into Watershed

Five New York hospitals and nursing homes have agreed to end the practice of discharging pharmaceutical waste in the watershed that supplies drinking water to New York City. The [agreements](#) resolve investigations by the inspector general for the watershed, into the facilities' pharmaceutical waste management practices. The inspector general position was created in 1998 as part of a watershed protection agreement reached with the Environmental Protection Agency. The investigations, which began in January 2009 with letters to 15 health care institutions within the watershed, sought to ensure compliance with state law requirements implementing the federal Resource Conservation and Recovery Act and Water Pollution Control Act. Probes at other institutions are continuing, Cuomo said.

To date, only trace amounts of pharmaceuticals have been found in city drinking water, Cuomo said. Low concentrations of some pharmaceuticals have been found in watershed streams, and even lower concentrations of fewer pharmaceuticals have been found in reservoirs, according to the settlement documents. Taking a preventive approach, the settlements address the practice of flushing unused pharmaceuticals—including painkillers, antibiotics, antidepressants, hormones, and other waste drugs—into waterways feeding the city water supply. Halting the flushing of pharmaceutical wastes down toilets and sinks is a commonsense precautionary measure recommended by federal and state regulators, the settlement documents said.

Under the settlements, the health care institutions must immediately cease all discharges of pharmaceutical wastes into the watershed and instead use authorized waste management facilities capable of safely treating the pharmaceuticals. In addition to meeting regulatory requirements, the institutions must also set up pharmaceutical take-back programs for collection and proper disposal of pharmaceutical wastes from area households. The settlements also include payment of fines, fees, and investigative costs for RCRA and CWA violations, ranging from \$3,500 to \$12,000.

The pharmaceutical waste discharge settlements are available at http://www.ag.ny.gov/media_center/2010/jan/jan12a_10.html.

II. FEDERAL

A. Legislation

House Passes Chemical and Water Security Act of 2009

The House of Representatives approved legislation on November 6 that would expand the Department of Homeland Security's (DHS) authority to regulate chemical facilities and add security coverage for drinking water and wastewater treatment plants under EPA's authority. The 230-193 vote on the Chemical and Water Security Act of 2009 (H.R. 2868) followed the defeat of several amendments intended to weaken the measure. They included amendments that would have eliminated the inherently safer technology (IST) provision, deleted the citizen lawsuit provision, and barred states from passing stricter legislation. Under H.R. 2868, facilities that handle chemicals would have to take action to reduce the consequences of a terrorist attack, such as using different chemicals or changing to safer processes for their operations. Under this provision, facilities would have to assess feasible alternative processes or chemicals that could limit the consequences of a terrorist attack.

Title I of the bill, which addresses chemical facilities, would authorize \$900 million for the DHS chemical facility antiterrorism standard program from 2011 through 2013. Title II, which addresses drinking water, would require EPA to establish risk-based performance standards for community water systems serving more than 3,300 people. Title II would authorize \$315 million during this period. Title III would authorize \$1 billion over five years in federal grants for publicly owned treatment works to conduct security vulnerability assessments, develop site security plans, and implement security enhancements. The Senate has not yet taken up a version of the legislation.

Source: This Week in Washington from WEF, November 13, 2009

B. Regulatory and Policy

1. Water

Water Sector Competency Model

Recent reports indicate that over 30% of the water and wastewater professionals will be retiring in the next 5-7 years. To address this growing concern, the U.S. Environmental Protection Agency's Office of Water has collaborated with the Water Environment Federation, the American Water Works Association, and the Department of Labor to develop the Water Sector

Competency Model. A competency model is one of the tools used by the Department of Labor to provide a clear description of what a person needs to know and be able to do (such as knowledge, skills and abilities) to perform well in a specific job, occupation or industry. EPA hopes that having this model in place will help promote the water sector and ensure its recognition as a high growth/ high demand green job sector among other federal agencies, job seekers and academic institutions.

Source: EPA Water Headlines for the week of November 16, 2009 For more information: <http://www.careeronestop.org/competencymodel/default.aspx>

EPA Announces Revisions to Water Enforcement Strategy

EPA announced on December 8 a revision of its enforcement strategy for the Safe Drinking Water Act to focus more attention on water systems with the most serious or repeated violations in all contaminant categories. The new policy is to take effect January 1. Existing enforcement policy is geared to contaminant categories rather than drinking water systems. Giles announced the policy at a hearing of the Senate Environment and Public Works Committee, where she and Peter Silva, were pushed repeatedly by Senate Democrats to explain why the agency had not taken more action to prevent violations and raised questions about alarming claims of severe health hazards. Giles and Silva pointed out that the Safe Drinking Water Act gives primary oversight and enforcement authority to states, although EPA retains enforcement authority as well. Giles indicated that overall compliance with the act is quite high but challenges exist, especially with small water systems.

During the hearing, Committee Chair Sen. Barbara Boxer (D-CA) asked Silva for a timeline on EPA's study of perchlorate, a naturally occurring substance that also has gotten into water from such sources as fertilizer, explosives, fireworks, flares, and rocket fuel. Silva stated that EPA should decide by the middle of 2010 whether to regulate perchlorate and that the Agency has been reevaluating the scientific data on that chemical, especially with regard to the risk it poses to pregnant women, fetuses, and children. Sen. Frank Lautenberg (D-NJ) and Sen. Benjamin L. Cardin (D-Md.) asked about the proliferation of pharmaceuticals in water. Silva pointed out that drugs, primarily entering streams from household wastewater and from livestock operations that use antibiotics, dominate a list of emerging contaminants that EPA is studying, and some drugs have been added to a candidate list of contaminants that EPA is considering for regulation.

Source: This Week in Washington from WEF 12/11/09

Judge Holds Proximity to River Insufficient To Establish That Pond Is 'Intrastate Lake'

The proximity of a pond to a creek and a river is insufficient to establish that it is subject to federal Clean Water Act jurisdiction as an "intrastate lake," a U.S. magistrate judge ruled Oct. 30 (Northwest Environmental Defense Center v. Grabhorn Inc., D. Or., No. CV-08-548, 10/30/09). In determining whether an "intrastate lake" constitutes "waters of the United States" subject to the Clean Water Act, the magistrate in the U.S. District Court for the District of Oregon said, the focus is not on its proximity to navigable waters, but on its impact on interstate or foreign commerce. In this case, an environmental group failed to show that contamination of the pond would in any way impact interstate commerce, the magistrate said. The magistrate, however, deferred a ruling on whether the pond is a "wetland" adjacent to other waters of the United States.

Source: Environment Reporter, 11/6/09

Second Circuit Says Trucks and Helicopters That Sprayed Pesticides Are Point Sources

The U.S. Court of Appeals for the Second Circuit [ruled](#) March 30 that trucks and helicopters that sprayed pesticides on behalf of a county government in New York should be considered point sources under the Clean Water Act. The appeals court affirmed a district court ruling that the county's dredging activities did not violate the Clean Water Act, but vacated its ruling that the trucks and helicopters used to spray the pesticides were not "point sources." The Second Circuit also vacated a separate portion of the lower court's decision, ruling that there was no basis for the district court to conclude that all of the pesticide application activities were in compliance with the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The appeals court remanded the case to the district court for further fact-finding on the issue. The appeals court affirmed the district court's ruling that the county's dredging of mosquito ditches was in compliance with the Clean Water Act and did not require a permit under the National Pollutant Discharge Elimination System.

The decision comes about one month after the U.S. Supreme Court declined to review a similar case from the Court of Appeals for the Sixth District. The Sixth Circuit vacated a 2006 rule by the Environmental Protection Agency exempting certain applications of pesticides from the requirement for Clean Water Act discharge permits. However, the appeals court stayed the ruling until April 9, 2011. "Spraying that occurs prior to expiration of the Sixth Circuit's stay of mandate, and is consistent with the EPA-approved FIFRA labeling, remains in compliance with the Final Rule," the court ruled. "Once the stay of mandate expires, a yet-to-be finalized CWA permitting system will govern the application of pesticides."

On the issue of drainage ditches, the court said, "because the CWA establishes a permit exemption for the maintenance of drainage ditches, and the ditches had as their purpose the draining of surface waters, we agree with the district court that the County's maintenance activities were exempt from the CWA's permit requirements."

Source: BNA Toxics Law Reporter, citing *Peconic Baykeeper Inc. v. Suffolk County*, 2d Cir., No. 09-97-cv, 3/30/10). A copy of the decision is available at http://www.ca2.uscourts.gov/decisions/isysquery/50b02cdb-bec2-4cb5-a2b2-556551fcb889/4/doc/09-0097-cv_opn.pdf.

Coalition Formed to Help Restore Nation's Great Water Bodies

More than 30 environmental organizations joined with several members of Congress on December 8 in launching a new coalition aimed at restoring ecosystems in the nation's great water bodies. The alliance aims to protect nine of the largest water ecosystems in 27 of the lower 48 states, according to a statement from the America's Great Waters Coalition. The coalition intends to help leverage political support for water restoration among citizens nationwide. The Great Waters cited by the coalition include the Chesapeake Bay, Coastal Louisiana, the Everglades, the Great Lakes, the Gulf of Maine, Long Island Sound, the Mississippi River, Puget Sound, and the San Francisco-Sacramento-San Joaquin River Delta. The goals are to make restoration of U.S. great water bodies a national priority; to secure sustainable, dedicated funding for restoration; and to enact and implement restoration projects.

House Transportation and Infrastructure Subcommittee on Water Resources and Environment Rep. Eddie Bernice Johnson (D-TX) stated that the coalition wants to streamline conservation efforts for the nation's great water bodies. The coalition cited funding needs for the various great waters, including at least \$19 billion to restore the Chesapeake Bay; \$10.5 billion to implement the Comprehensive Everglades Plan; up to \$26 billion to implement the Great Lakes Regional

Collaboration Strategy; between \$14 billion and \$100 billion to implement the Louisiana Coastal Protection and Restoration Plan; \$5 billion for the Gulf of Maine; \$2 billion for Long Island Sound; \$4.3 billion over 20 years for the San Francisco Bay; \$1.5 billion to \$5.7 billion to restore the upper Mississippi River; and \$601 million for Puget Sound.

Source: This Week in Washington from WEF 12/11/09

Appeals Court Rejects EPA Authority to Fine Company for Failure to Get Stormwater Discharge Permit

A federal appeals court Dec. 28 overturned a \$35,640 administrative penalty imposed by the Environmental Protection Agency against a firm for failing to obtain a stormwater discharge permit, ruling that the agency cannot fine companies under the Clean Water Act without proving the actual discharge of a pollutant (*Service Oil Inc. v. EPA*, 8th Cir., No. 08-2819, 12/28/09). The case began in 2002 when Service Oil started construction of a service plaza in Fargo, N.D. A joint North Dakota-EPA inspection in October 2002 found that a number of sites, including the Service Oil site, lacked stormwater discharge permits required under the National Pollutant Discharge Elimination System. EPA initially claimed that Service Oil failed to conduct weekly site inspections or to record inspection results. The agency later amended its complaint to include failure to obtain a NPDES permit. The administrative law judge found that Service Oil received a \$2,700 benefit from noncompliance, and increased the penalty tenfold based on the company's "complete failure to apply for and obtain a NPDES permit prior to starting construction." Other factors were cited in eventually increasing the fine to \$35,640. "The Clean Water Act contains other provisions confirming that the agency's authority to assess monetary penalties by administrative proceedings is limited to unlawful discharges of pollutants," the court said.

While failure to get a permit can be asserted in an enforcement action without getting into facts such as proving a discharge or sampling for pollutants, that failure cannot be penalized in the same way as the discharge of a pollutant. The appeals court held that Service Oil cannot be penalized as a point source under Section 1319.

Source: [Environment Reporter: All Issues > 2010 > 01/08/2010](#)

Akron Says It Will Improve Sewers to Resolve Overflows

The city of Akron, Ohio, agreed to make extensive improvements to its sewer system to reduce or eliminate sewage overflows that have long polluted the Cuyahoga River and its tributaries, the Justice Department, U.S. Environmental Protection Agency and state of Ohio announced November 13.

According to a Clean Water Act [settlement](#) lodged in federal court, the city is required to develop and implement a comprehensive plan to reduce or eliminate:

- untreated overflows of sanitary sewage and stormwater from its combined sewer system; and
- bypasses around secondary treatment at the wastewater treatment plant.

The city's sewage and wastewater discharges flow into the Cuyahoga River, the Little Cuyahoga River, the Ohio Canal and their tributaries and impair water quality in those waterways. The Cuyahoga River, an American Heritage River, flows through Cuyahoga Valley National Park and the Cleveland metropolitan area, to Lake Erie. In addition to the projects identified through the year-long analysis, over the next six years, the city will expand capacity at its wastewater

treatment plant to allow for treatment of at least an additional 20 million gallons of wastewater per day. Also, over the next eight years, the city will construct separate sewer lines for five combined sewer outfall points. Finally, the city will engage in comprehensive capacity, maintenance and emergency response programs to improve sewer system performance and to eliminate releases from the sewer collection system, including basement backups, releases into buildings, and onto property.

As part of the settlement, the city will pay a \$500,000 civil penalty and provide \$900,000 to fund the removal of the Brecksville (Route 82) Dam on the Cuyahoga River, as a state supplemental environmental project. EPA estimates that the dam removal will contribute to a significant improvement in water quality in the Lower Cuyahoga River.

Source: Water and Wastewater News, 11/18/09

EPA Cites 14 Municipalities for Stormwater Violations

The U.S. Environmental Protection Agency last week cited 14 municipalities in Pennsylvania and Maryland for stormwater violations, nine of which are within the Chesapeake Bay watershed.

In Pennsylvania, EPA issued orders to

- Birdsboro Borough and Ontelaunee Township in Berks County;
- Mechanicsburg Borough in Cumberland County;
- Atrim Township in Franklin County;
- East Donegal Township, Terre Hill Borough, Pequea Township, Akron Borough and East Earl Township in Lancaster County;
- Myerstown Borough in Lebanon County; and, Monaghan and Newberry Townships in York County.

In Maryland, EPA issued orders to Baltimore City and Anne Arundel County.

EPA requires the municipalities to correct problems with their respective municipal separate storm sewer (MS4) programs and come into compliance with their state-issued discharge permits. Several of these municipalities have already taken steps to comply with the orders.

Source: Water and Wastewater News, 11/16/09

EPA: Wastewater Collection Systems Must Protect San Francisco Bay

The U.S. Environmental Protection Agency has ordered seven municipal sewage collection systems in the East Bay Municipal Utility District (EBMUD) to take steps to work with EPA and EBMUD to address inadequately treated sewage discharges from EBMUD Wet Weather Facilities to the San Francisco Bay. On behalf of EPA, the Department of Justice filed a complaint on Dec. 3, with the U.S. District Court for the Northern District of California against the satellite collection systems. The complaint is a continuation of an ongoing effort. In July 2009, a settlement between EBMUD, EPA, and the California Regional Water Quality Control Board was finalized to address inadequately treated wastewater discharges to San Francisco Bay. EPA's November orders are aimed at monitoring and repair of aging and leaky sewer pipes in the communities served by EBMUD.

Under the recent November 2009 orders, each of the East Bay sewage collection systems will be required to:

- Cooperate with EBMUD in developing and implementing a program for routine cleaning, inspection, repair and replacement of sewer pipes.
- Cooperate with EBMUD in the development and implementation of an inspection, repair and replacement program to reduce leaks from private sewer laterals.
- Develop and implement a sewage flow monitoring program to complement the EBMUD regional flow monitoring program. This will allow all parties to focus future infrastructure investments.
- Develop and implement a program to identify and eliminate illicit connections of storm drains to the sewage collection pipes.

EBMUD operates a large sewage treatment plant, three wet weather treatment facilities and major interceptor lines that transport sewage collected from seven East Bay contributing cities and serves a total population of approximately 650,000.

Source: Water and Wastewater News 12/10/09

Contractor Charged with 11 Criminal Counts of Violating Missouri Prevailing Wage Law

A Michigan contractor was charged April 20 with violating the Missouri prevailing wage law at a public-water-system project, the Missouri Department of Labor and Industrial Relations announced April 21. The president of Municipal Construction Inc., was charged with five counts of felony forgery and six counts of violating the Missouri prevailing wage law, according to a statement released by the Department of Labor and Industrial Relations. In addition, project superintendent with MCI, faces six counts of violating the prevailing wage law. MCI is based in Goodrich, Mich. According to the department's statement, MCI was the general contractor hired to perform work for the Scott County Public Water System Supply District No. 4 in Scott County, Mo., approximately 130 miles south of St. Louis. Missouri law requires that all workers for construction projects for a public body be paid the prevailing wage as determined for each occupational title by the department's Division of Labor Standards. The statement said the Division of Labor Standards received four complaints alleging that MCI did not pay prevailing wages on the Scott County project. An investigation by the division found that the contractor violated the law on several occasions by failing to pay workers back wages for overtime work, and by not paying the correct wages for the workers' occupational title. The investigation determined that at least 17 workers were affected, and were underpaid a total of \$66,000, it said.

Source: BNA Infrastructure Investment & Policy Report, 4/2710 citing *Missouri v. Bass*, Mo. Cir. Ct., No. 10SO-CR00305, filed 4/20/10; *Missouri v. LaCosse*, Mo. Cir. Ct., No. 10SO-CR00538, filed 4/20/10

Appeals Court Rejects EPA Authority to Fine Company for Failure to Get Stormwater Discharge Permit

A federal appeals court Dec. 28 overturned a \$35,640 administrative penalty imposed by the Environmental Protection Agency against a firm for failing to obtain a stormwater discharge permit, ruling that the agency cannot fine companies under the Clean Water Act without proving the actual discharge of a pollutant. The case began in 2002 when Service Oil started construction of a service plaza in Fargo, N.D. A joint North Dakota-EPA inspection in October 2002 found that a number of sites, including the Service Oil site, lacked stormwater discharge permits required under the National Pollutant Discharge Elimination System. EPA initially claimed that Service Oil failed to conduct weekly site inspections or to record inspection results. The agency later amended its complaint to include failure to obtain a NPDES permit. The

administrative law judge found that Service Oil received a \$2,700 benefit from noncompliance, and increased the penalty tenfold based on the company's "complete failure to apply for and obtain a NPDES permit prior to starting construction." Other factors were cited in eventually increasing the fine to \$35,640. While failure to get a permit can be asserted in an enforcement action without getting into facts such as proving a discharge or sampling for pollutants, that failure cannot be penalized in the same way as the discharge of a pollutant. The appeals court held that Service Oil cannot be penalized as a point source under Section 1319.

Source: BNA Environment Reporter 1/8/10, citing *Service Oil Inc. v. EPA*, 8th Cir., No. 08-2819, 12/28/09.

NACWA Considering Petition for Sanitary Sewer Policy

The group representing municipal wastewater treatment systems is considering petitioning the Environmental Protection Agency to issue a national policy or propose a rule that would address overflows from sanitary sewer systems. EPA has had a framework in place since 1994 on how to deal with combined sewer overflows, but there is no explicit policy for sanitary sewer system overflows (SSOs), which can occur for a number of reasons, including broken or undersized pipes. According to NACWA, "In the absence of a policy for controlling sanitary sewer overflows, EPA's position is essentially that every overflow is illegal and violates the Clean Water Act. But this "zero overflow" approach is impossible to attain.

Joseph DiMura, director of the New York State Department of Environmental Conservation's Bureau of Water Compliance, agreed a national policy is needed. "A policy framework would be helpful in achieving some national consistency and clarifying some of the issues municipalities and states have," he told BNA April 5.

DiMura reportedly recommended that such a policy should include provisions on compliance schedules, performance standards, wastewater blending, remote overflow retention facilities, affordability, and design guidelines.

EPA under the Clinton administration signed a proposed rule addressing sanitary sewer overflows in January 2001 that would have clarified and expanded Clean Water Act permitting requirements for municipal sanitary sewer collection systems and sanitary sewer overflows. Releases of raw sewage can result when these systems fail.

The proposed rule was never published and was pulled back for review by the Bush administration. While any sewer overflow is prohibited under the Clean Water Act because all discharges to a U.S. waterway must have a permit, the SSO proposal was an attempt to loosen that restriction by providing some enforcement leniency for spills that are beyond the control of a publicly owned treatment plant. The proposal would have required a plan for permits called the capacity, management, operation and maintenance program that would provide for efficient operation of the facility to reduce opportunities for overflows. It included a framework for a defense for unavoidable discharges, along with requirements for reporting, public notification, and recordkeeping for municipal sanitary sewer systems and sanitary sewer overflows.

A significant aspect of the proposal was a provision that would have required satellite collection systems to obtain NPDES permits for the first time.

Source: BNA Environment Reporter 4/9/10

Chesapeake Bay Watershed Homebuilder Settles Stormwater Violations in 18 States and D.C.

Hovnanian Enterprises, Inc., a builder of residential homes nationwide, has agreed to pay a \$1 million civil penalty to resolve alleged Clean Water Act violations at 591 construction sites in 18 states and the District of Columbia. As part of the settlement, the company will also implement a company-wide stormwater compliance program designed to improve compliance with stormwater run-off requirements at existing and future construction sites around the country. A portion of the settlement helps EPA efforts to protect the Chesapeake Bay, North America's largest and most biologically diverse estuary. The bay and its tidal tributaries are threatened by pollution from a variety of sources, and overburdened with nitrogen, phosphorus and sediment that can be carried by stormwater. A total of 161 Hovnanian construction sites in the District of Columbia, Maryland, Virginia and West Virginia fall within the bay watershed and are covered by this settlement. This settlement is the latest in a series of enforcement actions to address stormwater violations from construction sites around the country. Similar consent decrees have been reached with multiple national and regional home building companies.

Along with the federal government, the District of Columbia, the states of Maryland and West Virginia and the Commonwealth of Virginia have joined the settlement. The District and each of the states will receive a portion of the \$1 million penalty.

Source: USEPA Water Headlines (4/26/10) More information on the settlement:
<http://www.epa.gov/compliance/resources/cases/civil/cwa/hovnanian.html>

Fitch Revising Muni Bond Ratings

Fitch Ratings April 30 began revising its ratings of municipal debt securities in accordance with its March 25 decision to use a single ratings scale for both municipal and corporate credits. A credit ratings increase for municipal bonds could translate into lower borrowing costs for municipalities. In its April 30 statement, Fitch outlined how its recalibration will impact the ratings of municipal securities. The firm "will adjust upward by two notches local general obligation [GO] ratings and those dependent upon them if the GO rating is currently A to BBB-," the statement said.

Other changes in its ratings regime impacting water and wastewater include:

- adjusting upward by one notch local general obligations and dependent ratings where the general obligation rating is currently A+ or higher and
- adjusting upward by one notch water and sewer and public power distribution-only credits where the rating is current A+ or higher.

Standard & Poor's will not be re-calibrating its municipal bond ratings because it already uses a single ratings scale for both municipal and corporate debt obligations. Moody's said March 16 that it will move to a single ratings scale for municipal and corporate credits, adding that its recalibration would affect about 70,000 municipal securities. Financial regulatory reform legislation currently being considered by the Senate would require certain credit ratings agencies to adopt a single ratings scale. Financial regulatory reform legislation approved by the House in December required credit ratings agencies to use a single ratings scale for rating municipal and corporate debt securities.

Source: BNA, Inc. Infrastructure Investment & Policy Report - Latest Developments April 30, 2010

EPA To Reconsider Final Rule Excluding Water Transfers from Permitting

The Environmental Protection Agency says it intends to reconsider a final rule that excluded water transfers from regulation under the National Pollutant Discharge Elimination System permitting program. An EPA statement e-mailed to BNA Nov. 1 said the agency plans to reconsider the water transfer rule published in June 2008 because it “has concerns about the water quality impacts of some water transfers.” The rule defines a water transfer as an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use (40 C.F.R. Part 122). The issue is the subject of litigation in the U.S. Court of Appeals for the 11th Circuit. The Justice Department notified the court Oct. 13 that EPA intends to reconsider the rule following a request for rehearing by the plaintiffs in the lawsuit. In June, the appeals court reversed a federal district court ruling in 2006 that said pumping polluted water from canals in the Everglades into Lake Okeechobee without a permit violates the Clean Water Act (*Friends of the Everglades Inc. v. South Florida Water Management District*, 570 F.3d 1210, 68 ERC 2121 (11th Cir. 2009)). In July, the plaintiffs filed for a rehearing before the full appeals court.

In October 2008, nine states filed a lawsuit in the Southern District of New York alleging that EPA violated the Clean Water Act when it issued the rule saying permits are not required for transfers of water from one body of water to another (*New York v. EPA*, S.D.N.Y., No. 1:08-cv-08430, 10/2/08).

Source: Environment Reporter, 11/6/09

EPA Study Reveals Widespread Contamination of Fish in U.S. Lakes and Reservoirs

A new EPA study shows concentrations of toxic chemicals in fish tissue from lakes and reservoirs in nearly all 50 U.S. states. For the first time, EPA is able to estimate the percentage of lakes and reservoirs nationwide that have fish containing potentially harmful levels of chemicals such as mercury and PCBs. The data showed mercury concentrations in game fish exceeding EPA’s recommended levels at 49 percent of lakes and reservoirs nationwide, and polychlorinated biphenyls (PCBs) in game fish at levels of potential concern at 17 percent of lakes and reservoirs. These findings are based on a comprehensive national study using more data on levels of contamination in fish tissue than any previous study. Burning fossil fuels, primarily coal, accounts for nearly half of mercury air emissions caused by human activity in the U.S., and those emissions are a significant contributor to mercury in water bodies. From 1990 through 2005, emissions of mercury into the air decreased by 58 percent. EPA is committed to developing a new rule to substantially reduce mercury emissions from power plants, and the Obama Administration is actively supporting a new international agreement that will reduce mercury emissions worldwide.

The study also confirms the widespread occurrence of PCBs and dioxins in fish, illustrating the need for federal, state and local government to continue efforts to reduce the presence of these harmful chemicals in our lakes and reservoirs and ensure that fish advisory information is readily available. Results from the four-year National Study of Chemical Residues in Lake Fish Tissue show that mercury and PCBs are widely distributed in U.S. lakes and reservoirs. Mercury and PCBs were detected in all of the fish samples collected from the nationally representative sample of 500 lakes and reservoirs in the study.

More information: <http://www.epa.gov/waterscience/fishstudy>

More information on local fish advisories: <http://www.epa.gov/waterscience/fish/states.htm>

Source: EPA Water Headlines, November 10, 2009

States Urged to Respond Quickly To Call for Great Lakes Restoration Proposals

Cameron Davis, senior adviser on the Great Lakes to EPA Administrator Lisa Jackson told state lawmakers attending the **National Caucus of Environmental Legislators' Midwest Forum** in Chicago on December 4 that states must move quickly if they hope to obtain federal funds available under the \$475 million Great Lakes Restoration Initiative. Proposals for the first round of grant funding must be submitted to EPA by January 29, 2010. The government's perspectives on projects appropriate under the ambitious five-year restoration plan were laid out in a request for proposals (RFP) announced November 23. Davis said state agencies can enhance their chances for funding success by participating in a series of webinars covering the Great Lakes funding program and procedures established under the RFP Funding. Davis said the interagency restoration initiative will fund projects targeting the most significant water quality problems in the region. Five priority areas for funding have been established: toxic substances and areas of concern; invasive species; near-shore health and nonpoint-source pollution; habitat and wildlife protection; and accountability, education, monitoring, evaluation, communication, and partnerships.

Source: This Week in Washington from WEF 12/11/09

EPA to Award Nearly \$10 Million to Protect, Monitor Coastal, Great Lakes Water Quality

The Environmental Protection Agency is planning to award nearly \$10 million in grants—primarily to eligible state, territorial, and tribal governments—for monitoring beach water quality and notifying the public of conditions that may be unsafe for swimming, according to a notice published Jan. 11 (75 Fed. Reg. 1373). For fiscal year 2010, EPA said it expects to award grants to all 37 eligible coastal states that apply for funding based on a new grant allocation formula that takes into account the length of a state's beaches and how much they are used. The 2010 grants, which are being made available under the Beaches Environmental and Coastal Health (BEACH) Act of 2000, will support microbiological monitoring and public notification of the potential for exposure to disease-causing microorganisms in coastal recreation waters, including the Great Lakes. Applications are due March 12.

Grant applicants must describe how the state or local government used BEACH Act grant funds to develop and implement the beach monitoring and notification program and how the program is consistent with performance criteria cited in the 2002 National Beach Guidance and Required Performance Criteria for Grants (EPA-823-B-02-004), which is available at <http://www.epa.gov/waterscience/beaches/grants/guidance/index.html>. The program summary also should describe the program's objectives for the grant year. For more information, contact EPA's Lars Wilcut at (202) 566-0447 or by e-mail at wilcut.lars@epa.gov.

Court Upholds Corps of Engineers' Authority Over Upland Ditches

A federal court on March 30 rejected a request by the National Association of Home Builders to rule that the U.S. Army Corps of Engineers has no authority to regulate the discharge of dredged or fill materials into non-tidal upland ditches (National Ass'n of Home Builders v. U.S. Army Corps of Engineers, D.D.C., No. 07-972, 3/30/10).

The association charged that Nationwide Permit 46, a Corps of Engineers permit governing the placing of dredged or fill materials into upland ditches, violated the Administrative Procedure Act. The core of the case, filed in the U.S. District Court for the District of Columbia, focused on whether an attempt to regulate ditches under the Clean Water Act would violate the Administrative Procedure Act in light of the Supreme Court ruling in *Rapanos v. United States* (547 U.S. 715, 62 ERC 1481 (2006)). A ditch cannot fit the Clean Water Act definition of “navigable waters,” the builders group argued. The Court issued a summary judgment against the plaintiff. By filing a challenge to a nationwide permit rather than disputing the permit for a particular ditch, the plaintiff could only prevail by showing that under no circumstance would the permit be valid, and the plaintiff had failed to do so, the judge wrote in his decision. “The Supreme Court, having the opportunity to definitively hold that ditches are not navigable waters, declined to do so,” the Court said March. Instead, according to the decision, the plurality opinion admitted that ditches can be navigable waters. “The court recognizes that some courts have held that particular ditches are not navigable waters,” the judge said. But he said those cases could not serve as guides to a challenge to the Corps of Engineers' authority to regulate ditches generally.

Source: BNA Environment Reporter: [04/02/2010](#)

EPA to initiate rulemaking to reduce harmful effects of sanitary sewer overflows

The EPA is initiating a rulemaking to better protect the environment and public health from the harmful effects of sanitary sewer overflows (SSOs) and basement backups. In many cities, SSOs and basement backups occur because of blockages, broken pipes and excessive water flowing into the pipes. SSOs present environmental and health problems because they discharge untreated wastewater that contains bacteria, viruses, suspended solids, toxics, trash and other pollutants into waterways. These overflows may also contribute to beach closures, shellfish bed closures, contamination of drinking water supplies and other environmental and health concerns.

Specifically, EPA is considering two possible modifications to existing regulations:

1. Establishing standard National Pollutant Discharge Elimination System (NPDES) permit conditions for publicly owned treatment works (POTWs) permits that specifically address sanitary sewer collection systems and SSOs; and
2. Clarifying the regulatory framework for applying NPDES permit conditions to municipal satellite collection systems. Municipal satellite collection systems are sanitary sewers owned or operated by a municipality that conveys wastewater to a POTW operated by a different municipality.

As a part of this effort, the agency is also considering whether to address long-standing questions about peak wet weather flows at municipal wastewater treatment plants to allow for a holistic, integrated approach to reducing SSOs while at the same time addressing peak flows at POTWs.

To help the agency make decisions on this proposed rulemaking, EPA will hold public

listening sessions and the public can submit written comments. EPA will accept written comments on the potential rule until 60 days after publication in the Federal Register.

Source: **The Essential Haz Mat news**, May 28, 2010. More information on sanitary sewer overflows, the potential rule and a schedule of the upcoming listening sessions:

http://cfpub.epa.gov/npdes/home.cfm?program_id=4

C. Enforcement and Judicial

State and Federal Enforcement Data

Federal and state regulators assessed more in penalties in West Virginia for Clean Air Act violations in fiscal 2008 than in any other state—\$15.3 million—while Florida topped all states in penalties for violations of federal waste law at \$2.4 million, according to Environmental Protection Agency data made available Nov. 6. The data were included on new websites unveiled by the agency Nov. 6 that provide a variety of compliance and enforcement data along with tools that allow users to access customized data. EPA said the new sites enable the public for the first time to compare toxic release data with compliance data from facilities. The website provides a state-by-state breakdown of enforcement data, including inspections conducted in each state and penalties assessed, with totals for penalties issued by state agencies and by EPA.

In Clean Air Act enforcement, states assessed \$66.3 million in penalties in 2008, and EPA assessed \$42 million. For RCRA enforcement, overall penalties assessed by EPA in 2008 were \$40 million, nearly triple the \$14.5 million assessed by states. However, the federal total includes \$30.1 million assessed by EPA in the territory of Puerto Rico. The states with the highest rate of inspections of waste sites covered by RCRA were Nevada, at 38.6 percent of 1,848 facilities, Kentucky at 28.1 percent of 2,828 facilities, and Wyoming at 24.6 percent 913 facilities. New York, with 15,614 facilities, had the most RCRA violations at 447, while Ohio with 20,740 facilities had 436 violations.

Source: BNA Toxics Law Reporter 11/12/2009

EPA Announces Revisions to Water Enforcement Strategy

EPA assistant administrator for enforcement and compliance assurance Cynthia Giles, announced on December 8 a revision of its enforcement strategy for the Safe Drinking Water Act to focus more attention on water systems with the most serious or repeated violations in all contaminant categories. The new policy is to take effect January 1. Existing enforcement policy is geared to contaminant categories rather than drinking water systems. Giles announced the policy at a hearing of the Senate Environment and Public Works Committee, where she and Peter Silva, EPA assistant administrator for water, were pushed repeatedly by Senate Democrats to explain why the agency had not taken more action to prevent violations and raised questions about alarming claims of severe health hazards. Giles and Silva pointed out that the Safe Drinking Water Act gives primary oversight and enforcement authority to states, although EPA retains enforcement authority as well. Giles indicated that overall compliance with the act is quite high but challenges exist, especially with small water systems.

During the hearing, Sen. Frank Lautenberg (D-NJ) and Sen. Benjamin L. Cardin (D-Md.) asked about the proliferation of pharmaceuticals in water. Silva pointed out that drugs, primarily entering streams from household wastewater and from livestock operations that use antibiotics,

dominate a list of emerging contaminants that EPA is studying, and some drugs have been added to a candidate list of contaminants that EPA is considering for regulation.

EPA Considers New Enforcement Priorities for 2011-2013

The Environmental Protection Agency has identified 15 enforcement areas as potential national priorities for the next several years, including new areas such as environmental justice, marine debris, and surface impoundments used to treat or store a variety of liquid and solid waste. EPA also is considering adding pesticide-related issues to its priority list and is looking at focusing on resource extraction in the energy and mining sectors. EPA also posted [fact sheets](#) online Jan. 4-5 on the enforcement priorities under consideration.

EPA reviews its enforcement priorities every three years. The current priority list covers the period 2008-2010. Among the areas being considered for national priority areas for 2011 through 2013 are:

- air toxics,
- concentrated animal feeding operations,
- community-based approaches to environmental justice,
- municipal stormwater infrastructure,
- Resource Conservation and Recovery Act enforcement,
- RCRA financial assurance,
- surface impoundments,
- wetlands, and
- worker protection standards

The new categories include marine debris, which also includes illegal dumping in waterways, according to EPA. The agency also is considering stricter enforcement of pesticide worker protection standards, saying farmers and employees “face disproportionately high risk of exposure.”

EPA is proposing a new national effort to target violations in wetlands, particularly of discharge of dredge and fill material under Section 404 of the Clean Water Act. EPA also added surface impoundments for wastewater treatment, storm water surge capacity, and hazardous wastes. A 2001 study by the agency found that 90 percent of industrial surface impoundments operators are not accurately reporting the presence of all chemicals of concern at their sites.

Unlike other proposed enforcement priorities, EPA said pursuing environmental justice initiatives would be geographically based, rather than sector-based. Each region would identify disadvantaged communities for targeted enforcement programs.

The agency has proposed retaining some of the priorities as national enforcement areas, particularly municipal stormwater infrastructure, new source review, mineral processing, financial responsibility under RCRA, air toxics, and concentrated animal feeding operations. Speaking at a Dec. 18 telephone briefing sponsored by the American Bar Association, Cynthia Giles, EPA's assistant administrator for enforcement and compliance assurance, said the agency is looking for patterns of environmental violations that could benefit from a coordinated national enforcement effort. Giles had said at that time that wetlands protection and clean energy extraction were under consideration by EPA.

Source: BNA Environment Reporter 1/8/10. Comment and recommendations on the candidate enforcement priorities can be submitted at <http://www.regulations.gov> and should reference docket No. EPA-HQ-OECA-2009-0986.

EPA Launches New Web Tools to Inform the Public About Clean Water Enforcement

The U.S. Environmental Protection Agency (EPA) is launching a new set of web tools, data, and interactive maps to inform the public about serious Clean Water Act violations in their communities. Improving water quality is one of EPA Administrator Lisa P. Jackson's priorities and in 2009, Administrator Jackson directed the agency to develop concrete steps to improve water quality to better enforce the Clean Water Act and to use 21st Century technology to transform the collection, use and availability of EPA data. The web tools announced are part of EPA's Clean Water Act Action Plan to work with states in ensuring that facilities comply with standards that keep our water clean. The new web page provides interactive information from EPA's 2008 Annual Noncompliance Report, which pertains to about 40,000 permitted Clean Water Act dischargers across the country. The report lists state-by-state summary data of violations and enforcement responses taken by the states for smaller facilities. The new web page also makes it easy to compare states by compliance rates and enforcement actions taken and provides access to updated State Review Framework reports.

Source: EPA's Water Headlines for the week of May 3, 2010. The Interactive Map for Clean Water Act Annual Noncompliance Report can be found at: <http://www.epa-echo.gov/echo/ancr/us/>

Online Map Helps Users Track Chesapeake Bay Enforcement

The U.S. Environmental Protection Agency has launched an online map that shows the locations of federal air and water enforcement actions in the Chesapeake Bay watershed and air shed. The map is part of EPA's increased focus on enforcement of federal pollution laws in the Chesapeake Bay region, including a new strategy of targeting geographic areas and pollution sources contributing the greatest amounts of nitrogen, phosphorus and sediment to streams, creeks, rivers and the bay. As of May 5, there were only 2 New York enforcement actions, one water and one air, depicted on the map.

Source: Water & Wastewater 5/5/10, the map can be found at <http://eponline.com/articles/2010/05/03/online-map-helps-users-track-chesapeake-bay-enforcement.aspx>

San Francisco Transit Authority Pays \$250,000 in Spill Settlement

The San Francisco Municipal Transit Authority will pay \$250,000 to resolve environmental charges stemming from a 2005 diesel spill at a refueling facility. The proposed consent decree will resolve alleged violations of the federal Clean Water Act and Resource Conservation and Recovery Act. The spill occurred at the transit agency's bus servicing facility when a faulty hose ruptured causing underground storage tanks to overflow. About 39,000 gallons of red dye diesel fuel spilled into a storm drain triggering problems at a wastewater treatment pump station. Some of the fuel spilled into a creek that empties into the San Francisco Bay. The transit agency has upgraded its facilities and improved procedures to help prevent future spills. (United States v. City and County of San Francisco, N.D. Cal., CV 09-5104, 11/2/09).

Source: Environment Reporter, 11/6/09

Alabama Grease Haulers Charged for Dumping into Mobile Sewers

A Mobile, Ala., grand jury indicted a waste disposal company, its president and top manager for offenses involving the illegal disposal of waste into the sewage treatment systems of Mobile and of neighboring municipalities. DHS Inc., operating under the name Roto Rooter; its president, and manager were charged Oct. 29 in a 43-count indictment with numerous violations of the Clean Water Act and with fraud and conspiracy for having dumped into local sewers thousands of gallons of waste grease and oil that they had been hired to dispose of safely and legally. The indictment recites Mobile's history of years of sewage overflows, inadequate wastewater treatment and polluting effluent caused by blockages of sewer lines and treatment works with solidified grease.

In response to lawsuits under the Clean Water Act, the city of Mobile entered into a court-ordered agreement with EPA under which Mobile implemented a grease control program requiring restaurants and other food service establishments to install grease traps to prevent cooking oils from entering the sewer system. The indictment charges that Roto Rooter, on the representation that it would pump out the grease traps of restaurants and other commercial customers and dispose of their grease waste at legal facilities, instead discharged the grease through grease traps and manholes into the sewer lines that the defendants were being paid to prevent it from entering.

Source: Water and Wastewater News, 11/6/09

Water Provider Files Suit Against DuPont Seeking Cessation, Cleanup of PFOA

A residential water provider in Ohio has filed a Resource Conservation and Recovery Act suit against DuPont Corp., charging that releases of perfluorooctanoic acid from a DuPont facility across the river in West Virginia are threatening drinking water supplies. Despite actions taken by DuPont to filter out the chemical at water treatment plants, PFOA contamination persists in air emissions, liquid discharges, and solid residues emanating from manufacturing processes at DuPont's Washington Works plant and could spread elsewhere, the Little Hocking Water Association said in a complaint. Little Hocking is asking the court to issue an order declaring DuPont's conduct in violation of RCRA and requiring compliance with the federal law, as well as requiring the chemical company to fund a comprehensive cleanup of all affected well-fields.

The Little Hocking Water Association, a user-owned, nonprofit distribution system serving about 12,000 residents near Marietta, Ohio, has wells on the north side of the Ohio River directly across from DuPont's Washington Works plant. For decades, PFOA discharges from the West Virginia plant that manufactures Teflon™ have contaminated 45 acres of well-fields and the underlying aquifer from which the Little Hocking Water Association draws supplies, the association said.

As part of a 2005 class-action settlement reached with individuals served by six Ohio and West Virginia water districts, including Little Hocking, DuPont installed high-technology filters at local water treatment plants to remove PFOA. The water filtration system ordered under the class-action settlement is not enough to adequately protect Little Hocking's customers from the Washington Works' chemical discharges, according to the lawsuit. In addition, Little Hocking wants the court to issue an order declaring that the Washington Works plant “has caused or contributed to an imminent and substantial endangerment to health or the environment” and to direct DuPont to fund a comprehensive cleanup of all affected well-fields, plus an investigation, assessment, and remediation of all sources of PFOA contamination.

The lawsuit also seeks compensatory damages in excess of \$25,000 for costs incurred by Little Hocking as a result of the contamination, unspecified punitive damages, and all legal costs.

Although the United States has not established a safety standard for exposure, DuPont has agreed to stop using perfluorooctanoic acid, also known as C8, by 2015 and is part of the Environmental Protection Agency's PFOA Stewardship Program, which is working to reduce environmental releases of the compound, and its use in products, by 95 percent by 2010. (Little Hocking Water Association v. DuPont, S.D. Ohio, No. 09CV1081, filed 11/27/09).

Source: BNA Toxics Reporter, 12/17/09

Lockheed Martin to Pay \$1.2 Million to Settle Natural Resource Damage Claims

Lockheed Martin Corp. will pay New Jersey a total of \$1.2 million to resolve the state's natural resource damage claims resulting from hazardous substance discharges at two sites in Somerset and Mercer counties, under terms of a proposal. The proposed consent judgment would settle allegations against Lockheed Martin, in a lawsuit filed by the New Jersey Department of Environmental Protection (DEP) under the state Spill Compensation and Control Act. Under terms of the settlement Lockheed Martin will make a \$600,000 payment to the state in partial reimbursement for natural resource damages at the two sites. That payment also covers assessment costs, legal fees, and consultant and expert fees incurred by the DEP in connection with the sites. In addition, the company will contribute \$600,000 toward the purchase and preservation of a portion of the 255-acre Windy Acres land preservation project in Hunterdon County, N.J.

In its lawsuit, the state sought reimbursement for injury to natural resources at the Watchung Site, a 54-acre property in Somerset County; and the East Windsor Site, which comprises 127 acres on two parcels of land in Mercer County. The company made, tested, and assembled electronic components from 1953 through 1989 at the Watchung Site, where soil and groundwater are contaminated with trichloroethylene, according to the complaint. The East Windsor property was used by Lockheed Martin and predecessor companies for the research, development, manufacturing, and testing of satellites and related projects. Soil and groundwater at the site are tainted with volatile organic compounds, primarily trichloroethylene, according to the complaint.

Source BNA Environmental Citing, *New Jersey v. Lockheed Martin Corp.*, N.J. Super. Ct., No. MER-L-2006-05, 1/4/10. Text of the proposed settlement in N.J. Department of Environmental Protection v. Lockheed Martin Corp. is available at <http://www.nj.gov/dep/nrr/settlements>

Ferry Company Agrees to Pay \$300,000 Fine over Sewage Discharges

A Massachusetts ferry company pleaded guilty Feb. 8 in federal court to charges that it discharged sewage into coastal waters and agreed to pay a \$300,000 fine and publish apologies in regional newspapers. Rockmore Co. of Marblehead, Mass., pleaded guilty to two violations of the Rivers and Harbors Act stemming from its practice of discharging untreated wastewater into local waters during summer dinner cruises and sightseeing tours. According to federal prosecutors, for many years crew members routinely used the ship's sewage pump to discharge hundreds of gallons of untreated sewage directly overboard. The Department of Justice said the discharges took place at various locations along the Massachusetts coast, including in Salem Harbor and off beaches in Marblehead and Beverly, as well as in the Charles River. In addition, the company allowed the sewage holding tank aboard a barge that housed a restaurant to

intermittently overflow, such that untreated sewage spilled into Salem Harbor. Under a plea agreement, the company will pay a fine of \$300,000, of which \$75,000 will be directed to the Massachusetts Environmental Trust to be used for water quality projects. The company will also issue a public apology in regional newspapers that serve the coastal communities. In addition, it will serve a three-year period of probation during which it must report its activities to the U.S. Coast Guard.

United States v. Rockmore Co., D. Mass., Docket No. 1:10-cr-10003, plea entered 2/8/2010.

Source: 2/10/10 BNA Environment Reporter

Chemical Company Receives Probation, Fines Of Up to \$250,000 for Illegal Sewer Disposal

A Connecticut specialty chemical and packaging company that had pleaded guilty to improperly dumping a pollutant into a local sewer system was sentenced Feb. 1 to three years of probation and ordered to pay up to \$250,000 by the U.S. District Court for the District of Connecticut. Phoenix Products Co. of Terryville, Conn., pleaded guilty on Jan. 4 to one count of knowingly discharging a pollutant into the Town of Plymouth sewer system in violation of the Clean Water Act. Under the terms of a plea agreement approved by the court, the company is required to pay a \$50,000 federal criminal fine, a \$25,000 civil penalty to the state of Connecticut, and a payment of \$75,000 in the Department of Environmental Protection's Supplement Environmental Project (SEP) account. The plea agreement also requires Phoenix to make an additional SEP payment of up to \$100,000 if the business is sold. According to federal prosecutors, the company, which provides formulation, blending, and packaging services for a variety of personal care and swimming pool products, generated six 250-gallon totes filled with a highly acidic, off-specification product while fulfilling a customer contract. The Company was charged with instructing its employees of to dump several gallons of the off-specification product down the drain although the company had never applied for or received a discharge permit from the state. In addition to the fines and SEP payments, the company has already reimbursed the town of Plymouth for the costs incurred to neutralize the acidic conditions. *United States v. Phoenix Products Co.*, D. Conn., No. 3:10cr1, sentenced 2/1/10.

Source: 2/10/10 BNA Environment Reporter

District Court to State and EPA: Meet Everglades Cleanup Deadlines or Face Contempt

A federal judge in Miami April 14 threatened to hold Environmental Protection Agency Administrator Lisa P. Jackson, the EPA regional administrator, and Florida's top environmental official in civil contempt if their agencies do not meet court-mandated deadlines to reduce phosphorus pollution in the Everglades (*Miccosukee Tribe of Indians v. U.S.*, S.D. Fla., No. 04-21448-CIV, order 4/14/10). In a 48-page order, a U.S. District Court Judge for the Southern District of Florida also ordered the officials to appear personally before the court in October to report on compliance. The Judge stated that failure to comply "will not be tolerated," adding that the court would issue an order to show cause why EPA and Florida's Department of Environmental Protection should not be held in civil contempt "and subjected to appropriate sanctions."

In the 2008 ruling, the Judge had ordered EPA to re-review 2003 changes by Florida lawmakers to the state's Everglades Forever Act (EFA), saying that amendments to the law sought to postpone for 10 years a 2006 statutory deadline to use a numeric water quality standard to regulate phosphorus and constituted a change in water quality standards. The extended deadline

violated the “fundamental commitment and promise to protect the Everglades” under the Clean Water Act, according to the 2008 Order. The Judge had also indicated that EPA had erred by failing to review adequately whether a state phosphorus rule complied with Section 303 of the act. The rule established a numeric phosphorus standard of 10 parts per billion in surface water in the Everglades.

In the April 14 order, EPA and the state were taken to task for attempting to extend the compliance deadline to 2016 through “moderating provisions” adopted in legislation and rulemaking. “If any clarity has come from the Contempt Hearing, it is this: any meaningful effort to save the Everglades will take continued will, focused expertise, and a ‘heavy lift’ in difficult economic times.” In the April 14 order, the judge ordered EPA to issue an amended determination by Sept. 3 that, among other things, specifically directs Florida officials to correct deficiencies in the Everglades Forever Act and phosphorus rule. EPA also must, through an amended determination, notify Florida officials that the state is out of compliance with narrative and nutrient standards for the Everglades Protection Area. In addition, EPA is to direct Florida to conform all National Pollutant Discharge Elimination System (NPDES) permits to the Clean Water Act for six storm water treatment areas used to filter phosphorus from surface water. The Judge also enjoined the state from issuing any new NPDES permits, or modifying existing permits, for the storm water treatment areas until EPA and the court determine them to be in full compliance with the act.

Source: BNA Toxics Law Reporter: 04/22/2010 The order issued by Judge Gold of the U.S. District Court for the Southern District of Florida in *Miccosukee Tribe of Indians v. United States* is available at <http://pub.bna.com/ptcj/GoldOrder.pdf>.

Company Pleads Guilty to Clean Water Act Violations to Pay Up to \$250,000

A Connecticut specialty chemical and packaging company accused of improperly dumping a pollutant into a local sewer system pleaded guilty in federal court Jan. 4 to violating the Clean Water Act and agreed to pay up to \$250,000. Phoenix Products Co. of Terryville, Conn., pleaded guilty to one count of knowingly discharging a pollutant into the Town of Plymouth sewer system in violation of the Clean Water Act. Allegedly, the company, which provides formulation, blending, and packaging services for a variety of personal care and swimming pool products, had a contract with a customer to blend and package a drain opener product. During the course of fulfilling the terms of the contract, the company generated six 250-gallon totes at its manufacturing facility filled with this highly acidic, off-specification product. Over a period of several weeks in the fall of 2008, allegedly employees of Phoenix were instructed to dump several gallons of the off-specification drain opener product from the totes down certain drains at the firm's facility. As required by a statewide pretreatment program, Phoenix was prohibited from discharging any pollutants into the public sewer system except as allowed by permit and in compliance state regulations. However, according to the U.S. attorney's office, Phoenix never applied for or received a discharge permit from the state Department of Environmental Protection to discharge pollutants into the Plymouth sewer system. When Phoenix is sentenced, the company faces a maximum penalty of five years of probation and a \$500,000 fine, according to the U.S. Attorney's Office. Reportedly, a plea agreement has been reached under which the company will pay a \$50,000 federal criminal fine, a \$25,000 civil penalty to the state of Connecticut, and a payment of \$75,000 into the DEP Supplemental Environmental Project (SEP) Account. The plea agreement also calls for Phoenix to make an additional SEP payment of up to

\$100,000 if the business is sold. In addition, the company has reimbursed the Town of Plymouth for the costs incurred to neutralize the acidic conditions.

Source: BNA Environment Reporter 1/8/10, citing *United States v. Phoenix Products Co., D. Conn., No. 3:10cr1*, plea entered 1/4/10.

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Phoenix Products Co. of Terryville, Conn., pleaded guilty in the U.S. District Court for the District of Connecticut to one count of knowingly discharging a pollutant into the Town of Plymouth sewer system in violation of the Clean Water Act. Allegedly, the company, which provides formulation, blending, and packaging services for a variety of personal care and swimming pool products, had a contract with a customer to blend and package a drain opener product. During the course of fulfilling the terms of the contract, the company generated six 250-gallon totes at its manufacturing facility filled with this highly acidic, off-specification product. Over a period of several weeks in the fall of 2008, allegedly employees of Phoenix were instructed to dump several gallons of the off-specification drain opener product from the totes down certain drains at the firm's facility. As required by a statewide pretreatment program approved by the Environmental Protection Agency under the Clean Water Act, Phoenix was prohibited from discharging any pollutants into the public sewer system except as allowed by permit and in compliance state regulations. However, according to the U.S. attorney's office, Phoenix never applied for or received a discharge permit from the state Department of Environmental Protection to discharge pollutants into the Plymouth sewer system. When Phoenix is sentenced, the company faces a maximum penalty of five years of probation and a \$500,000 fine, according to the U.S. Attorney's Office. A sentencing date has not been scheduled.

U.S. Attorney stated that a plea agreement has been reached under which the company has agreed to pay a \$50,000 federal criminal fine, a \$25,000 civil penalty to the state of Connecticut, and a payment of \$75,000 into the DEP Supplemental Environmental Project (SEP) Account. The plea agreement also calls for Phoenix to make an additional SEP payment of up to \$100,000 if the business is sold. In addition, the company has reimbursed the Town of Plymouth for the costs incurred to neutralize the acidic conditions.

Source: BNA Environment Reporter: All Issues 01/08/2010

U.S. Lags Other Nations in Infrastructure Rebuilding, Expansion, Report Says

The United States is continuing to fall further and further behind other nations in rebuilding and expanding its infrastructure, according to an annual report produced by the Urban Land Institute and Ernst & Young. The report, [Infrastructure 2010: An Investment Imperative](#), is the fourth in an annual series that analyzes the infrastructure needs of the United States and compares its policies with other countries. "Perhaps the most troubling conclusion overall is that the world is moving ahead in rebuilding and expanding its infrastructure without the United States. Bottom line, the U.S. is seriously threatening not only its quality of life now and for the future but also its very basic ability to compete economically with the rest of the world," Howard Roth, a global

real estate leader with Ernst & Young, said in a statement. Reportedly, in the opinion of Ernst & Young, private investment is key to move infrastructure projects forward quickly. Many states are reportedly starting to move forward with private investment in infrastructure. The report includes a map of states with “significant transportation PPP authority,” which highlighted 23 states, including California, Texas, Alaska, Florida, and Virginia, among others. Ernst & Young estimate that there is private equity waiting on the sidelines that could be leveraged up to \$380 to \$475 billion, including almost \$38 billion from 49 pension funds that are interested in investing in infrastructure. Other recommendations offered by the report include more and higher user fees, replacing the fuel tax with a vehicle miles traveled tax, smart meters for electricity and water usage monitoring, and creation of a national infrastructure bank. The report included an update on the status of U.S. infrastructure, an overview of global infrastructure development, a spotlight on the challenges facing water infrastructure, and a section on how to pay for needed infrastructure improvements.

Source: BNA Infrastructure Investment & Policy Report 04/19/2010 The report, *Infrastructure 2010: An Investment Imperative*, is available at <http://www.uli.org/sitcore/~media/Documents/ResearchAndPublications/Reports/Infrastructure/IR2010.ashx>.

Court Upholds Penalty against Contractor for Use of Subcontractor on Sewer Project

The City of Los Angeles legally imposed a \$200,000 penalty against a general contractor for reducing its use of “bid-listed” subcontractors on a public works sewer project without first obtaining the city's approval, a state appellate court ruled Jan. 15. The California Court of Appeal affirmed a judgment of the Superior Court of Los Angeles County. The lower court held that Los Angeles had the authority to assess a 10 percent penalty against construction contractor Kenny/Shea/ Traylor/Frontier Kemper (“Kenny”) for failing to adhere to contractual requirements relating to reducing and/or substituting “bid-listed” subcontractors. In 2001, the parties entered a \$250 million contract to construct an 11-mile sewer tunnel that required Kenny to obtain city approval before substituting or reducing its use of any subcontractors listed in its original bid proposal.

At issue in the case was Kenny's reduced use of minority and women-owned businesses that served as sub-subcontractors or suppliers on the project.

“We conclude that a fair reading of the contract as whole supports the trial court's finding that the underlying contract provided [the city] with discretion to impose a ten percent penalty upon [Kenny] for failing to seek permission for its reduced use of subcontractors listed in the bid,” the court wrote, noting that the contractor's performance on the project was “extraordinary” and that it did not act in bad faith.

Source: BNA Infrastructure Investment & Policy Report 1/28/10, citing *Kenny/Shea/ Traylor/Frontier Kemper v. City of Los Angeles*, Cal. Ct. App., No. BC369247, 1/15/10).

San Diego Sewage Spills Down Sharply

The number of sewage spills released through San Diego's wastewater system in 2009 was 38, a nearly 10-fold decrease from 2000, when there were 365 spills. The Mayor attributed the decrease to more a “more aggressive and tactical game-plan” for cleaning San Diego's 3,000 miles of sewer pipes, more sophisticated cleaning tools, and increased efforts to limit discharges of fats, oils, and greases by local restaurants. Legal commitments played a role also. Coastkeeper, along with other environmental groups, filed a lawsuit over Clean Water Act

violations in 2002, which led to an Environmental Protection Agency-approved consent decree committing the city to approximately \$1 billion-worth of expenditures on infrastructure upgrades (United States v. San Diego, S.D. Cal., No. 01CV050550, 7/31/07).

Source: BNA Environment Reporter, 3/5/10

WEF Files Joint Brief on Biosolids with Supreme Court, Court Refuses to Hear Case

On April 16 WEF co-filed an amicus (friend of the court) brief in an appeal by three utilities (the city and county of Los Angeles and Orange County Sanitation Districts) to the U.S. Supreme Court to consider issues related to the Kern County, California, biosolids land application litigation. The litigation was initiated when the county of Kern introduced a ban on the land application of biosolids generated outside the county. The April 16 brief was co-filed with the National Association of Clean Water Association (NACWA), the North East Biosolids and Residuals Association (NEBRA) and the Northwest Biosolids Management Associations (NBMA).

WEF filed its own amicus brief on this case in 2008 in the 9th Circuit Court. According to Chief Technical Officer Eileen O'Neill, "WEF's involvement in this brief is a continuation of our efforts to inform consideration of this case. WEF's earlier brief focused on the science underlying the efficacy of biosolids land application. The appeal to the Supreme Court, however, relates to interstate commerce issues involved in the Kern County ban and so this is the focus of the new joint brief." In June the Supreme Court announced that it would not hear this appeal.

Source: WEF This Week in Washington, April 23, 2010. The WEF Amicus brief is available through www.wef.org.

Indianapolis to Transfer City Water/Wastewater to Public Trust

The City of Indianapolis entered into a memorandum of understanding March 10 to transfer the city's water and wastewater utilities to Citizens Energy Group, a public charitable trust that will operate like a not-for-profit. While negotiations on the final agreement continue, the city expects to receive more than \$425 million in connection with the transfer of the utilities to Citizens Energy Group, which would also agree to assume approximately \$1.5 billion of city debt related to waterworks and wastewater. Under the agreement, the city would receive \$262.6 million from Citizens (\$170.6 million paid at closing and \$92 million paid by Oct. 1, 2011), plus up to an additional \$50 million from the wastewater general fund that will remain with the city upon the transfer of the wastewater system.

Also, the proposed transfer would increase the annual "payment in lieu of property taxes" (PILOT) as a result of the significant capital spending associated with the wastewater system. The city would monetize the increase of PILOT payments in the form of a bond issuance with anticipated proceeds of up to \$140 million, with the proceeds used by the city to fund infrastructure improvements—and with Citizens assuming the obligation to pay the increased PILOT.

"With this agreement, I am rejecting private ownership of our water and wastewater system while embracing the benefits that come from private sector efficiency and expertise, and putting water and wastewater utilities under a public trust," Ballard said. Ballard said he intends to file legislation for the utility transfers with the Indianapolis City-County Council April 16. The

utility transfer also must be approved by the Board of Water Works, the Board of Public Works, and the IURC. Full approval is expected to take place in late 2010, Ballard said.

Mayor Signs New York City Council Bills on Water Dumping Fines, Green Codes

A pair of New York City Council bills signed March 18 by Mayor Michael R. Bloomberg (I) will establish civil penalties for illegal dumping into city waterways and set up a city interagency task force on implementing a “Green Codes” sustainability project. The first [bill](#) (Intro. No. 54-A), on illegal dumping, sets fines ranging from \$1,500 to \$10,000 for the first violation and \$5,000 to \$20,000 for each subsequent violation, the city said. It also expands the definition of illegal dumping to include objects discharged in or upon wharves, piers, docks, bulkheads, slips, and navigable waterways.

The second [bill](#) (Intro. No. 77) establishes an Interagency Green Team and an Innovation Review Board to streamline approvals for environmentally beneficial technologies, design and construction techniques, materials, and products. It is the first bill, the city said, to implement a set of city task force recommendations for a “Green Codes” project to integrate environmental sustainability considerations into code requirements ([41 ER 294, 2/5/10](#)).

Source: ?

III. Epa To Consider Ocean Acidification As A Possible Basis For Ocean Impairment

To settle a lawsuit brought by the Center for Biological Diversity (Center) challenging the State of Washington’s failure to list coastal waters as “impaired” under § 303(d) of the Clean Water Act (CWA) due to reduced pH, EPA is seeking input on the issue of ocean acidification and its relationship to climate change. There is a growing level of scientific consensus that ocean acidification results from the reaction of atmospheric carbon dioxide with seawater, lowering the pH of the ocean, and that, “unless there are dramatic changes in fossil fuel use, projected human-driven ocean acidification over this century will be larger and more rapid than anything affecting sea life for tens of millions of years.” As part of the March 2010 settlement with the Center, EPA is currently taking comments on whether and how to address ocean acidification under the CWA, a move that could ultimately lead to the regulation of land-based activities that result in carbon dioxide emissions. The settlement also commits EPA to issue guidance later this year regarding whether and how states should assess and respond to “impairments” of marine waters under the CWA.

This could lead to the requirement that States with ocean coasts (and perhaps Great Lakes) will have to evaluate those waters to see if they should be listed as “impaired” under CWA § 303(d). Such a listing would trigger the duty to establish a total maximum daily load (TMDL) for the water body. A listing based on ocean acidification, therefore, would require states to quantify and control the “load” of carbon dioxide to the water body, even when those sources are regional, if not global.

Source: [Marten Law Alert 4/1/10](#) and [75 Fed. Reg. 13,537 \(Mar. 22, 2010\)](#).