



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA :
 :
 v. :
 :
 NEW YORK CITY DEPARTMENT OF :
 ENVIRONMENTAL PROTECTION :
 :

No. 01 Cr. 0836 (CM)

TWENTY-SECOND REPORT OF COURT-APPOINTED MONITOR

USDS SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 3/20/09
--

A. Patrick Nucciarone
Suite 107
1540 Highway 138
Wall, New Jersey 07719
(732) 280-4800

(PN 7684)

Dated: March 16, 2009

<u>CONTENTS</u>	<u>page</u>
Executive Summary	1
Introduction	1
Monitor's Activities	2
Findings	3
A. <u>General</u>	3
B. <u>Environmental and Health and Safety Compliance Programs</u>	4
C. <u>Compliance with Environmental and Health and Safety Laws</u>	11
D. <u>Remediation of Contaminated Facilities</u>	16
E. <u>Summary</u>	17
Recommendations	18

REFERENCES

EH&S	Environmental Health & Safety
BEC	Bureau of Environmental Compliance
BEDC	Bureau of Environmental Design and Construction
BHRA	Bureau of Human Resources Administration
BWS	Bureau of Water Supply
BWSO	Bureau of Water and Sewer Operations
BWT	Bureau of Wastewater Treatment
DWQC	Drinking Water Quality Control
NYCDEP	New York City Department of Environmental Protection
OEHSC	NYCDEP Office of EH&S Compliance
OSHA	Occupational, Safety and Health Administration
State DEC	New York State Department of Environmental Conservation
State DOH	New York State Department of Health
USEPA	United States Environmental Protection Agency

EXECUTIVE SUMMARY

The NYCDEP reports that it has substantially completed the implementation of all but four EH&S compliance programs and continues efforts to complete the remainder. BWT reports correction of 89% of 30,776 regulatory compliance deficiencies found at its facilities and continues to reduce the number of overdue items without approved extensions. The EH&S Compliance Office has a support staff of 31 with its critical Risk Management Specialist position among the seven vacancies.

Audits of all NYCDEP facilities continue at a satisfactory pace. BWS and BWSO collectively report that 9,681 regulatory compliance deficiencies noted during facility audits (99% of the total) had been corrected by December 2008. Two agency-wide compliance initiatives, designed to ensure the prompt award of compliance-driven contracts and compliance with external consent decrees and judgments remain under review.

INTRODUCTION

The NYCDEP initially plead guilty on August 29, 2001 to criminal charges alleging violations of federal environmental laws for having released mercury-contaminated water into Rondout Reservoir in Sullivan County, New York without a permit and with having used PCB-contaminated equipment in Shaft 18 at the Kensico Reservoir in Westchester County, New York without authorization. As result of its plea, the NYCDEP was fined and placed on probation for a period of three years (subsequently extended to five years). The terms of its probation required the agency to develop and implement an effective program to prevent and detect violations of environmental and health and safety laws and submit to oversight by a Court-appointed Monitor.

On February 7, 2006, after entering a plea of guilty to having violated its probation by failing to prevent the discharge of thirty million gallons of raw sewage into the East River from a wastewater treatment plant in Brooklyn in 2003, the agency was resentenced and placed on probation until early 2009. Its current probation requires development and implementation of an effective compliance program for the entire agency; Monitor oversight continues. The Monitor is to file a written report at least every four months regarding his activities and the status of the NYCDEP's compliance program and of its adherence to both the terms of its probation and the provisions of environmental and employee health and safety laws. This submission constitutes the Monitor's Twenty-Second Report.

MONITOR'S ACTIVITIES

During this reporting period, I continued to evaluate the effectiveness of the BWT's EH&S compliance program by both visiting facilities and reviewing the results of audits and assessments by others. I also continued reviewing the NYCDEP's efforts to make more efficient its award of compliance-related contracts.

Sigma EH&S Solutions, L.L.C. assisted me in measuring the compliance status of BWT facilities and in evaluating the status of BWS' and BWSO's RMP/PSM regulatory program. Langan Engineering and Environmental Services, Inc. assisted me in evaluating progress made on BWT's efforts to identify and correct air emission, SPDES, stormwater and bulk storage compliance deficiencies. Mark Haulenbeek, L.L.C. assisted me in reviewing the compliance status of BWT's laboratories. The Bradlau Group, L.L.P. assisted me in conducting factual investigations. The four firms prepared a total of 30 reports to me during this period; a copy of each of those which includes information deemed helpful to the NYCDEP was provided to it.

In addition, I visited a number of BWT treatment plants, met with the NYCDEP Commissioner, staff and counsel and spoke with several NYCDEP employees about progress made and other issues.

Finally, I received a total of 17 communications by telephone, mail and e-mail during this reporting period. As required by the terms of the Plea Agreement governing my appointment, I maintain a record of each communication received and of actions taken in response. Some I referred to the NYCDEP or to other individuals after determining that I could not be of further assistance. The other communications were either resolved, required no follow-up or are undergoing further inquiry.

FINDINGS

A. General

The Plea Agreement creates numerous general obligations for the NYCDEP to meet as conditions of its probation. I have no specific findings to report concerning these general obligations except the following:

1. penalizing employees who furnish information

Provision 16 of the Plea Agreement prohibits the NYCDEP from penalizing those who provide information to the Monitor. Provision 10(C) requires the NYCDEP to ensure that no agency official, agent, consultant or employee is penalized for providing information concerning EH&S compliance to representatives of the government or the court (including the Monitor).

In response to certain findings of poor management practices, including retaliation against employees who raise concerns over EH&S issues, the NYCDEP has delivered a three-day Supervisory Management Training course to 445 managers and supervisors (40% of those deemed appropriate) and 126 training sessions on Anti-Retaliation and Employee Rights and Responsibilities for 3,136 employees (64% of the population). It also is engaged in a separate communications campaign and is gathering data created during employee performance evaluations which were to have taken into account employee adherence to EH&S objectives.

In a prior report, I recounted the details of one employee complaint of retaliation or intimidation by a supervisor at BWSO's North 15th Street Repair Yard who had copied personnel records of two employees who were scheduled to testify against him in a disciplinary proceeding and had harassed and threatened one of them. I await resolution of the NYCDEP's disciplinary action and will include its disposition in a future report. A number of other retaliation allegations remain under investigation or under review by NYCDEP management. The NYCDEP must continue its efforts to eradicate employee retaliation.

Current status: I await further information concerning employee retaliation allegations as well as corrective actions which were to have been taken after prior investigations. Upon receipt of this additional information, I will reevaluate the effectiveness of the NYCDEP's efforts to meet the objectives of Provisions 16 and 10(C).

B. Environmental and Health and Safety Compliance Programs

The Plea Agreement also requires the NYCDEP to develop and implement an effective EH&S Compliance Program for all of its bureaus and operations. The program is to include a permanent EH&S education component, a permanent EH&S compliance office and procedures designed to encourage the reporting of non-compliance, to sanction violators and to ensure the prompt award of contracts necessary to correct or prevent violations (Plea Agreement, Provisions 8 and 10). I discuss below progress made on meeting those obligations.

1. status of EH&S compliance programs

Development of the NYCDEP's compliance programs comprises four distinct phases: creation of written operating procedures, training of employees on those procedures, implementation of the procedures and audits of facility compliance with those procedures and with regulatory mandates.

a. BWT non-marine operations

The NYCDEP reports that development of BWT's EH&S Compliance Program for its non-marine operations was substantially complete in December 2008 except for final implementation of four of 36 subject matter areas. The status of the four remaining exceptions is as follows:

The Air Emission Program, which was targeted for completion in June 2007, awaits issuance of two Registrations from its sister bureau, BEC; both bureaus must also resolve issues concerning the permitting of old boilers critical data for which no longer exists. The Potable Water program, which was targeted for completion in May 2008, awaits contractor installation of 86 backflow prevention devices; accomplishment is anticipated by April 2009.

The High Voltage Electrical Safety Program, which was targeted for completion in June 2008, was delayed by the delivery of corrected labels and completion is now anticipated for April 2009. The Machine Guarding program, which was targeted for completion in August 2008, requires installation of safety guards around rotating equipment and was expected to be accomplished in January 2009.

Full implementation of the Chemical and Petroleum Bulk Storage programs will take years; with contractor assistance, BWT expects to have corrected 85% of the 1,100 identified deficiencies by April 2009 and the remainder within

the ensuing four years. Likewise, full implementation of the Legacy Assessment program, under which all BWT facilities will undergo investigation and sampling for the presence of residual asbestos, lead, mercury and PCB contamination, is not anticipated until 2013.

Regulatory compliance audits of BWS facilities performed by the agency's OEHS and outside contractors since 2006 have generated a universe of nearly 31,000 deficiencies; BWT reports correction of 89% of them, an increase of 7% since my October 2008 report to the Court.

b. BWT marine operations

The NYCDEP reports that development of its marine division EH&S regulatory compliance program is substantially complete except for the Marine Terminal Line Handling Program, which requires repositioning of above ground fuel lines at one facility in order to provide safe mooring; construction was expected to be completed by February 2009.

c. other bureau and office operations

The Plea Agreement requires the NYCDEP to have developed and implemented an effective EH&S compliance program for its six other bureaus and seven offices, which perform field inspections, code enforcement, laboratory analysis, engineering and construction management, vehicle maintenance and administrative support, by August 7, 2008. I addressed its reported status in my 21st Report; I await completion of an additional audit of one critical facility but under the terms of the Plea Agreement will not receive another progress report until June of 2009.

d. Audits

The NYCDEP's OEHS has a fully functioning audit team which monitors the agency's EH&S compliance by conducting audits at its various facilities on a regular basis. When necessary, it is assisted by outside audit firms. As of the end of December 2008, the NYCDEP had completed a total of 524 full and interim regulatory audits of BWS and BWSO facilities, nine interim verification audits of BWT treatment plants, seven full regulatory audits of BWT treatment plants and several of smaller facilities maintained by BWT and other bureaus and offices.

Compliance deficiencies found during audits are ranked, given corrective action deadlines and assigned to individuals responsible for their correction. Data is recorded

electronically and monitored by management. Our informal observations and reviews of audits conducted by OEHSC have found them satisfactory.

e. effectiveness of compliance programs

While the NYCDEP has accomplished much towards the development, training and implementation of its EH&S compliance programs, the terms of its probation also require those programs to be effective. Provision 9 establishes August 7, 2008 as the deadline for accomplishing that task. On January 16, 2009, I forwarded to the Court a separate report concerning the status of the NYCDEP's EH&S compliance program, both as of August 7, 2008 and as of its writing. It outlined several components of the compliance program which neither my consultants nor I were able to view as effective; I offer more recent comments on those components below.

Current status: With one open question, the NYCDEP's progress in the development of its EH&S compliance programs is satisfactory. The NYCDEP is to engage an outside contractor to conduct a thorough audit of the OEHSC audit program in the Spring of 2009; upon receipt of the contractor's final audit report, we will evaluate the effectiveness of the NYCDEP's required internal audit component. I await information concerning procedures in place to prevent violations of consent orders, which are required under Provision 8 (Special Condition Two of the February 8, 2006 Judgment); upon its receipt, I will evaluate it.

The RMP/PSM compliance program, which we evaluated as not yet effective when I recommended termination of my oversight jurisdiction over BWS and BWSO facilities in the Fall of 2006 and 2007, respectively, requires additional tasks. After observing audits of the program which are scheduled to occur in April 2009 and after reviewing the auditor's final reports, we will reevaluate the program. I have asked the NYCDEP to advise when it believes it has corrected compliance deficiencies at BWT facilities and BWS DWQC laboratories (the latter of which remained an open area of inquiry when I recommended termination of my oversight jurisdiction over BWS facilities in the fall of 2007); we will undertake verification reviews after those milestones are met and will then reevaluate the effectiveness of program management.

2. status of environmental compliance office

Provision 10(A) of the Plea Agreement requires creation of a permanent environmental compliance office. As of December 2008, the OEHS consisted of 31 (out of an approved allotment of 38) support personnel. This number reflects a gain of two employees since my last report. Vacancies include a Risk Management Specialist, a Legacy Project Engineer, four auditors and a compliance assistant.

Current status: The NYCDEP's RMP/PSM program, which is to ensure compliance with strict regulations governing four facilities which house large quantities of gaseous chlorine near public areas and residential neighborhoods, suffers from lack of a Risk Management Specialist; the OEHS has never been fully staffed.

3. status of disciplinary programs

Provision 10(B) of the Plea Agreement requires the NYCDEP to effectively sanction violators of laws, policies and standards and to encourage those who report such violators. The NYCDEP has attempted to meet this objective with four specific actions.

An August 1, 2006 Staff Development and Communication Plan was created in order to increase training and communication on the incorporation of EH&S objectives into work practices, to encourage employees to offer suggestions and concerns about both unsafe work conditions and failures to observe EH&S initiatives and to improve management acceptance of employee concerns. The NYCDEP reports that all managers, 40% of its supervisors and 64% of its non-supervisory employees have so far received training on management skills and employee rights and responsibilities. The NYCDEP also conducts communications campaigns, circulates newsletters on EH&S issues, measures EH&S compliance as part of employee performance and publicly awards employees with strong EH&S records.

An EH&S Employee Concerns Program sponsors a confidential, toll-free 24-hour "hotline" for employees, which refers to an outside investigator complaints which relate either to directions to perform work believed to constitute a violation of probation or of an EH&S law, or to retaliation for reporting an EH&S concern. Logs of the Employee Concerns Hotline record 26 inquiries or complaints between August 1 and December 7, 2008, including fifteen concerning unsafe working conditions (three of which remain open and one of which was referred to an outside

investigator) and four alleging retaliation (all of which remain open and were referred to an outside investigator). By way of contrast, I received 29 employee complaints during the same period, four of which alleged a fear of retaliation.

The EH&S Disciplinary Committee is to review employee failures to follow EH&S procedures and actions taken by the agency's Office of Disciplinary Counsel in order to identify the need for additional training, equipment or resources. I have not yet received minutes of its September 2008 meeting.

The Office of Disciplinary Counsel pre-existed the agency's EH&S initiatives and is not limited to EH&S-related matters. It processed or resolved charges of EH&S infractions by five employees within this reporting period. One BWT employee was charged with failing to log a pH reading and another with failing to properly record an influent reading; neither was resolved by December 2008. A BWSO manager forfeited two days' pay for failing to wear a safety helmet at a work site and two BWT employees each forfeited two days' pay for failing to follow procedures during a chlorination interruption and failing to provide instructions concerning a sampling event.

Despite these efforts, weaknesses in current management systems designed to meet the objectives of Provision 10(B) exist. Two examples serve to illustrate. In one, a contractor performing remedial work at a BWS facility moved NYCDEP equipment to its own workplace where it sandblasted contaminated paint from the equipment and then returned the contaminated paint and sand mixture to the BWS facility. The activity triggered questions about the legality of transporting contaminated substances and about the role of BWS personnel in decisions which may have violated state law. Because of the implications, the NYCDEP referred the matter to an outside investigator and instructed its own personnel to refrain from inquiring about the incident. While apparently correct, the application of those two decisions has thus far resulted in a 17-month hiatus during which BWS management is unable to determine whether modifications to internal procedures, enhanced training or personnel action may be necessary in order to prevent recurrence.

The other example was cited in the Addendum of my 18th Report to the Court, dated October 29, 2007, at pages 18-19. I there recounted an allegation of unsafe work conditions in the late Fall of 2005. That incident was also referred to an outside investigator, who found that a work crew had been forced to repair a street main in an inadequately protected hole (OSHA regulations require holes of a certain depth to be shored against wall cave-in) and, significantly, that the work crew supervisor

had lied to the investigator about the depth of the hole. The NYCDEP Commissioner recommended disciplinary action which ended without sanction 10 months after the incident.

Because this episode occurred amidst allegations that supervisors were immune from disciplinary action, the outside investigator was then asked to review the integrity of the proceeding. He found the disciplinary proceeding to have been flawed because it failed to charge the crew supervisor with lying and because it accepted inaccurate calculations about the depth of the hole. His finding resulted in a second Commissioner recommendation for disciplinary action. Resolution was not reached until last December, three full years after the incident. I have not yet reviewed the record of its resolution, which again ended without sanction, but was advised simply that the Acting Commissioner did not have confidence in the appropriateness of disciplinary action.

At least two other employee concerns investigations appear to have consumed inordinate amounts of time to conclude. One concerned the cause of a fire during demolition work at a BWT wastewater treatment plant; it took nearly two years to conclude that it most likely resulted from inadequate management of a contractor's cutting operations and to develop corrective actions designed to minimize recurrence. The other concerned allegations of unsafe working conditions during the reading of consumer water meters; a year was consumed in the investigation and in the recommendation to increase communication to staff.

In another effort to dispel allegations of inequities in the imposition of sanctions and about the comparatively inequitable treatment of employees and their supervisors, NYCDEP management embarked on a mission to standardize guidelines for the conduct of disciplinary proceedings. After awaiting the final version of those guidelines, I was advised in December that the effort had been abandoned.

Current status: The NYCDEP has undertaken significant measures designed to communicate EH&S initiatives and encourage their incorporation into daily work habits. It also has undertaken measures to more effectively sanction violators and encourage reporting, but its efforts have yielded mixed results. An increasing number of employees appear to feel comfortable reporting concerns and violations of EH&S practices to the Employee Concerns Hotline. Moreover, it appears that NYCDEP management satisfactorily addresses concerns which it is equipped to resolve (training issues, equipment problems, unsafe working conditions, employee smoking, personnel grievances and the like).

Employee concerns which allege either violations of law or retaliation, however, are referred to an outside investigator and are reviewed both by an outside committee and by senior management before the Commissioner renders a decision concerning their resolution. This process creates an appearance of integrity and impartiality which serves the critical purpose of instilling employee confidence, but also often results in extraordinary delays which preclude meaningful feedback to those who are aware of the incident, an important ingredient in the overall objective of encouraging employee confidence in the process.

The NYCDEP's procedures should improve with at least two modifications: One, shorter time frames between allegation and resolution, and frequent communication about progress, will serve to both improve confidence in the reporting system and dispel suspicions about management decisions. Two, while it is important to avoid interference with ongoing investigations, the NYCDEP should develop a means of allowing staff to learn whether internal procedures require modification during the pendency of an investigation. Without that ability, both the likelihood of recurrence and the risk of staff disengagement increases.

I will reevaluate the NYCDEP's efforts to meet the objectives of Provision 10(B) in light of recent decisions to abandon the disciplinary proceeding against the BWSO supervisor who lied to an outside investigator and revisions to disciplinary guidelines.

4. status of EH&S contract award procedures

Provision 10(D) of the Plea Agreement requires the NYCDEP to develop and implement procedures designed to ensure the prompt award of contracts necessary to prevent or correct EH&S violations. I addressed progress made towards achieving this objective and certain potential weaknesses in my January 16, 2009 report on the status of the NYCDEP's EH&S Compliance Program, at pages 2 through 4.

Current status: Our evaluation of procedures developed to ensure the prompt award of certain contracts under Provision 10(D) continues.

5. status of other efforts to achieve EH&S compliance

Training activities required by the NYCDEP's EH&S compliance programs, as well as for competency and license

qualification, are being managed and coordinated with the aid of an automated web-based software program. The NYCDEP is developing a supplemental system which will alert employees and their supervisors when mandatory training is due and when it is scheduled; finalization awaits the assistance of a contractor who may be retained by the summer of 2009.

The Executive EH&S Oversight Committee convenes each month in order to track progress on accomplishing EH&S initiatives and to discuss resolution of impediments. According to minutes of monthly meetings held between August and December 2008, inclusive, the Committee addressed metrics concerning EH&S performance during the first three quarters of 2008. BWS, BWSO and BWT all reported a decrease in open compliance deficiencies and in requests for extension for their completion. BWSO and BWT reported significant decreases in injuries and lost hours; BWS reported marked increases in both, largely due to motor vehicle accidents and lifting injuries. BEDC and BWT reported fewer spills, while BWS and BWSO reported more; the majority of spills occur because of leaking hydraulic lines on vehicles and equipment. BWT reported an increase in NOV's received and adds that it completed replacement of all mercury manometers.

C. Compliance with Environmental and Health and Safety Laws

The parameters of my jurisdiction to monitor and oversee the NYCDEP's compliance with environmental and health and safety requirements appear at Provisions 8, 9, 11(A) and 18 of the Plea Agreement. Compliance deficiencies noted during facility visits, including audits and inspections by OEHS, its outside contractors, my consultants and me, are incorporated within a central database. The most recent Commissioner's Monthly EH&S Compliance Progress Report advises that 55 compliance deficiencies found at BWS and BWSO facilities (a decrease of 56 since my last report) and 2,666 at BWT facilities remain incomplete.

As of December 2008, both BWS and BWSO had corrected 99% of the deficiencies found during audits and assessments and BWT had corrected 88%. These statistics reflect satisfactory efforts to identify and correct compliance gaps, although BWT may still be challenged by an inability to make all corrections within agreed timeframes and to sustain corrections once made.

Sigma EH&S Solutions and I revisited the remaining four of the 14 BWT wastewater treatment plants during this reporting period for the purpose of measuring both progress made on addressing compliance deficiencies identified during previous

audits and diligence in the task of maintaining compliance. We visited each equipped with a list of selected compliance deficiencies and verified their then current status. All treatment plants had made significant progress in correcting EH&S regulatory compliance deficiencies noted during earlier audits; our last four visits indicate that an average of 87% of previously-noted compliance deficiencies had been corrected.

During this reporting period, I also reviewed reports of the OEHS full regulatory audits of two BWT wastewater treatment plants. These reports, which concern audits performed from June through November 2008, identify a total of 652 regulatory compliance deficiencies. The Red Hook plant appears most challenged by the improper handling and storage of hazardous materials (52 deficiencies) and the Newtown Creek plant by the improper storage of hazardous materials (36 deficiencies), confined space entry requirements (29) and hazardous waste regulations (16).

1. permits

The NYCDEP maintains an automated information management system which is designed to alert managers to impending permit expirations and permit compliance obligations. It is fully operational for both BWS and BWSO, but necessary data has been entered into the system for only four of the fourteen BWT wastewater treatment plants.

BWT engaged an outside contractor to audit the status of its operations' compliance with environmental regulations and existing permits. As a result of that audit and subsequent reviews, the bureau identified 558 air emission-related regulatory compliance deficiencies concerning the lack of required equipment registrations or permits. Of the 558, 309 (55%) had been completed by mid-November 2008; of the 249 which remained open, 131 had passed beyond their assigned date for completion. BWT is still attempting to resolve its inability to furnish required installer certifications and operating specifications on permit applications for equipment that was installed years ago. As of December 2008, BWT had completed all necessary applications and was awaiting issuance of two registrations from its sister bureau.

My January 16, 2009 report includes a discussion of the status of the NYCDEP's efforts to bring into regulatory compliance the 23 analytical laboratories maintained by the BWT. As explained in that report, the NYCDEP has reassigned fecal coliform testing formerly performed by its fourteen in-plant

laboratory workstations and has petitioned the State for relief from burdensome laboratory certification requirements for the remaining tests performed at those workstations. If successful, those workstations generally will be in compliance; if unsuccessful, they will continue to fail to meet laboratory certification requirements imposed by SPDES permit conditions.

Based on our visits during this reporting period, BWT's other laboratories, which perform more sophisticated analyses, had corrected an average of only 68% of the regulatory deficiencies found during 2007 compliance audits conducted by a contractor engaged by the NYCDEP. On my behalf, Mark Haulenbeek, L.L.C. visited two BWT Process Control Laboratories and three BWT Special Projects Laboratories during this reporting period and found that none had corrected more than 76% of them; overall, 139 deficiency items remained open, which equates to 28 per lab and to a total of 250 for all nine non-workstation facilities. The NYCDEP recently reported that nearly all deficiencies found at its non-plant workstation laboratories have been corrected.

My January 16, 2009 report also mentioned that BWS' Drinking Water Quality Control Laboratories have undergone audits by an NYCDEP contractor; we have begun review of preliminary audit reports and will evaluate progress made on correcting deficiencies after we have received the contractor's final reports and the NYCDEP's plans for correcting deficiencies found.

2. spill response

Although the NYCDEP continues efforts to minimize spills and releases of hazardous substances, they continue. For the first three quarters of 2008, BWS reported a 100% increase over the comparable period for 2007; most occurred from leaking valves and gauges on stationary equipment and 60% consisted of a gallon or less. In order to discern root causes and minimize future spills, BWS is reevaluating its equipment inspection and preventative maintenance programs. BWSO also reported nearly a 100% increase during the same period. BWT, which accepts some 3,800 fuel and sodium hypochlorite deliveries each year, reported a modest increase; it has shortened its equipment preventative maintenance schedules in order to reduce those occurring from engines and equipment. BEDC, which oversees contractor construction, reports a decrease in spills, most of which occur from contractor equipment failure. BEDC requires contractors to include preventative maintenance schedules when they initiate work and to adhere to them during the construction project.

3. hazardous materials storage and handling

OEHSC audit reports of BWS and BWSO facilities which I reviewed during this reporting period found a total of 19 regulatory compliance deficiencies concerning the improper storage and handling of hazardous materials at eight of the 22 facilities visited; seven of the 17 deficiencies were found at the BWS Grahamsville Wastewater Treatment Plant alone.

A November 2007 report by an outside contractor as well as subsequent audits and internal reviews identified some 1,192 corrective actions that were required to bring BWT's bulk storage of chemicals and petroleum products into full regulatory compliance. BWT reports that by January 20, 2009 it had corrected 810 of them (68%, an increase of 9% since my last report) and that it missed the targeted deadline for correcting 74 of the 382 which remain open (19%, an increase of 9% since my last report). BWT reports that it is requesting extensions for all but nine of the 74; although several deficiencies were first discovered in early 2007, most were of more recent vintage.

OEHSC reports of the full regulatory compliance audits performed at two BWT facilities which I reviewed during this reporting period found 52 and 36 deficiencies, respectively, concerning hazardous materials handling at the Red Hook and Newtown Creek wastewater treatment plants. My January 16, 2009 report includes comments on the current status of the NYCDEP's compliance with stringent RMP/PSM program requirements which apply to two BWS and two BWSO chlorination facilities, which has for years posed a challenge to the NYCDEP. Three significant objectives of its August 1, 2006 RMP/PSM Management Plan remain unfulfilled: an internal audit of one critical program element, a third-party compliance audit of all program elements and adequate staffing.

4. hazardous waste management

OEHSC audit reports which I reviewed during this period continue to reflect a generally acceptable record of compliance with hazardous and universal waste handling requirements at most BWS and BWSO facilities, but not at wastewater treatment plants. Fourteen compliance deficiencies were found at five of the 22 BWS and BWSO facilities visited, including ten at the Mahopac and Grahamsville wastewater treatment plants alone. While only four such deficiencies were noted at BWT's Red Hook treatment plant complex, 20 were noted at the Newtown Creek plant complex.

5. health and safety requirements

OEHSC audit reports of 19 BWS facilities which I reviewed during this reporting period found a total of 112 compliance deficiencies concerning other health and safety measures, 34 of them (35%) at the Grahamsville Wastewater Treatment Plant, 17 at the Port Jervis Treatment Plant, 15 at the Mahopac Treatment Plant and 12 and 11, respectively, at two administrative offices in Westchester County. Audits of 13 BWSO facilities found 19 deficiencies, over half of them at the Douglastown Pump Station and the Queens North Sewer Maintenance facility. Statistics continue to suggest the need for improved communication with and oversight of specific facilities.

Audits of BWT facilities suggest considerable work to be accomplished. Two late 2008 audit reports of the Red Hook and Newtown Creek wastewater treatment plants found some 250 failures to adhere to regulatory deficiencies concerning general health and safety requirements at each. I will note that this quantity is substantially lower than that in past audits and that the audits themselves were conducted in the summer and fall of 2008; BWT continues to correct deficiencies at a commendable pace, which suggests that current numbers may be more encouraging.

Unlike BWS and BWSO, BWT has been engaged in serious efforts to correct compliance deficiencies for just three years. BWT must continue efforts to correct identified deficiencies and all bureaus must continue training of and communication to facility personnel in order to prevent lapses into pre-probation behavior.

Current status: My January 16, 2009 Report to the Court included findings concerning certain weaknesses in implementation of the NYCDEP's EH&S compliance program. As I indicated, those findings were based on visits and observations made throughout 2008 and on reviews of data from that period. BWT reports that as of the end of February it had corrected 89% of 30,776 regulatory compliance deficiencies and had reduced to 706 the number of overdue items for which extensions had not been justified to OEHSC. We will verify that reported progress, as well as the status of reported improvements made in the operation of both BWT's and BWS' DWQC laboratories, and will include in my next report the results of our evaluation.

BWS and BWSO have been addressing regulatory compliance deficiencies for over seven years and should enhance their efforts to reduce spills and releases as well as facility lapses in the handling of hazardous materials and wastes. BWS, BWSO and BWT must continue to train, audit and communicate with facility

personnel in order to minimize the number of recurring non-compliance items in order to preclude slippage into pre-probation behavior. We will continue to evaluate the NYCDEP's management of its RMP/PSM program and of other EH&S regulatory compliance schemes and will include in my next report the results of our evaluation.

D. Remediation of Contaminated Facilities

The status of the NYCDEP's efforts to address residual contamination at its facilities is as follows:

1. Legacy Assessment Program

The NYCDEP's final four CAP programs relate to its Legacy Assessment Program under which an outside consulting firm was engaged to evaluate residual asbestos, lead, mercury and PCB contamination at all BWS and BWSO facilities. The facility assessments identified a total of 3,350 recommended corrective actions ranging from posting of warning signs to removal of hazardous substances. Progress on implementing those corrective actions is being measured during OEHS facility audits. At 150 facilities audited through December 2008, 521 of the 1,581 corrective actions recommended for those locations (33%) had been accomplished, which is the same percentage cited in my last report.

As of December 2008, the NYCDEP had awarded a construction management contract for remediation of contaminated paint at 16 BWS facilities, but had not yet initiated bid solicitation for the actual work. Similar work at one BWSO facility is underway and scheduled for completion by 2009. Interim abatement at remaining BWSO facilities is being accomplished, but final remediation is targeted for a capital project which the bureau hopes to commence later this year. In addition, preliminary work on the conduct of Legacy Program assessments at all other bureau and office facilities has begun. That work will include eight BWS facilities which were not previously assessed because they were either inaccessible or scheduled for rehabilitation.

2. Other remedial projects

The NYCDEP reports that it has addressed historic mercury contamination found in numerous BWSO sumps and drains several years ago.

Current status: Remedial work continues, albeit at a pace which industry and most regulators would view as in need of improvement. I have on numerous occasions shared with the Court the NYCDEP's explanations that delays result from budgetary issues, inefficiencies in the contract award process and inadequate controls over the selection and management of contractors.

E. Summary

BWS and BWSO each has in place the components of an effective compliance program, but must enhance efforts to improve adherence to its objectives and prevent slippage. BWT has made significant progress in identifying and correcting regulatory compliance deficiencies and in implementing and training its employees on compliance program components, but also must enhance efforts to maintain compliance.

Although it lacks one critical position (Risk Management Specialist) and has never been fully-staffed, the agency maintains a functioning compliance office and has in place automated regulatory compliance monitoring systems for most but not all of its operations.

The NYCDEP's efforts to meet its obligations to implement procedures which will ensure the prompt award of contracts necessary to correct or prevent violations and those which are designed to ensure compliance with the terms of consent decrees are still under review.

The NYCDEP's short-term goals should be to:

1. continue efforts to ensure that facility personnel fully adapt their daily work practices to accommodate EH&S compliance obligations;
2. improve management oversight of the timely correction of compliance deficiencies; and
3. reduce the amount of time consumed by the processing of employee concerns, increase meaningful feedback communications with complainants and accommodate management's need to know whether procedural or personnel changes are warranted during the pendency of factual investigations and senior management consideration of concerns and corrective actions.

Its long-term goals should be to:

1. reduce the number and impact of spills and releases due to carelessness and equipment failure;
2. minimize compliance deficiencies due to the failure of facility personnel to observe continuing compliance obligations; and
3. ensure the equitable application and positive reinforcement value of disciplinary measures taken against employees for EH&S infractions.

RECOMMENDATIONS

My Third Report included five Recommendations. I am not prepared to report that response to the fifth (management of contract delays) is complete.

I offer the following additional recommendation:

As explained at page 10 above, the NYCDEP should modify its Employee Concerns and Disciplinary procedures to ensure prompt resolution, meaningful contact with complainants and, contemporary feedback to bureau management in order to allow emplacement of necessary modifications to procedures or personnel.

Respectfully submitted,



A. Patrick Nucciarone, Monitor
New York City Department of
Environmental Protection

March 16, 2009