



*Suffolk County  
Vector Control &  
Wetlands Management  
Long Term Plan &  
Environmental Impact  
Statement*

**Task 2: Law & Management Programs  
Part 1: Legal Issues Relating to Suffolk  
County Mosquito Control**

**DRAFT**

*Prepared for:*

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**SUFFOLK COUNTY VECTOR CONTROL AND WETLANDS MANAGEMENT  
LONG - TERM PLAN AND ENVIRONMENTAL IMPACT STATEMENT**

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## LIST OF ABBREVIATIONS AND ACRONYMS

APCP	Aquatic Plant Control Program
APHIS	Animal and Plant Health Inspection Service
APP	Aquatic Pesticide Permit
CCMP	Comprehensive Conservation and Management Plan
CDC	Centers for Disease Control and Prevention
CMP	Coastal Management Program
CPD	Coastal Programs Division
CWA	Clean Water Act
CZMA	Coastal Zone Management Act
DECA	Division of Enforcement and Compliance Assistance
DEIS	Draft Environmental Impact Statement
DHS	Department of Health Services
EA	Environmental Assessment
EAF	Environmental Assessment Form
ECL	Environmental Conservation Law
EEE	Eastern Equine Encephalitis
EIS	Environmental Impact Statement
Exec. Law	New York State Executive Law
FIFRA	Federal Insecticide, Fungicide and Rodenticide Act
FINS	Fire Island National Seashore
FONSI	Finding of No Significant Impact
FWP	Freshwater Wetland Permit
GEIS	Generic Environmental Impact Statement
LGWRP	Local Government Waterfront Revitalization Program
LISS	Long Island Sound Study
LWRP	Local Waterfront Revitalization Program
MAP	Mosquito Action Plan
MCC	Mosquito Control Commission
MCP	Mosquito Control Plan
NEP	National Estuary Program
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NOAA	National Oceanic & Atmospheric Administration
NPDES	National Pollutant Discharge Elimination System
NPS	National Park Service
NYSDEC	New York State Department of Environmental Conservation
NYSDOH	New York State Department of Health
OMWM	Open Marsh Water Management
PCB	Pesticide Control Board
PEP	Peconic Estuary Program
PHL	Public Health Law
RPA	Regional Permit Administrator
SCC	Suffolk County Charter
SCDHS	Suffolk County Department of Health Services

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SCDPW	Suffolk County Department of Public Works
SCVC	Suffolk County Vector Control
SEQRA	State Environmental Quality Review Act
SPA	Stream Protection Act
SPDES	State Pollutant Discharge Elimination System
SSER	South Shore Estuary Reserve
TWP	Tidal Wetland Permit
UPA	Uniform Procedures Act
USACOE	United States Army Corp of Engineers
USCG	United States Coast Guard
USDOT	United State Department of Transportation
USEPA	United States Environmental Protection Agency
USFWS	United States Fish and Wildlife Service
USGS	United States Geological Survey
WNV	West Nile Virus



## **Executive Summary**

Task Two of the Suffolk County Vector Control and Wetlands Management Long-Term Plan and Environmental Impact Statement Project was to generate discussion of management plans and guidance documents, laws, regulations, legal decisions, and programs, as they relate to vector control in Suffolk County. This Task Two, Part 1 Report addresses laws and regulations, as well as certain recent court decisions, which are directly relevant to the County vector control program.

The primary authority for a Federal government role in vector control is the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The US Environmental Protection Agency (USEPA) has been granted broad authority to enforce FIFRA to regulate the testing, marketing, and use of pesticides. New York State has been delegated general authority for regulation of pesticides within its borders, subject to USEPA oversight. However, USEPA retains authority over the labeling of pesticides, perhaps the most important component of pesticide regulation. USEPA also has authority to enforce the federal Clean Water Act (CWA), the statute which was enacted to protect the waters of the nation from pollution. The CWA has recently been the focus of several lawsuits, including one against Suffolk County, in which it has been argued that vector control, even if carried out in compliance with other federal laws such as FIFRA, may still violate the CWA. Depending on the activities proposed in the County vector control program, a number of Federal agencies such as the United States Army Corp of Engineers (USACOE) and the National Park Service (NPS) may be involved in permitting for the vector control program.

Both the State and Federal governments have enacted programs to protect and guide development in coastal areas generally, and in certain specific areas of the waters of Long Island. The key piece of Federal legislation is the Coastal Zone Management Act (CZMA), which essentially is a grant program which encourages coastal states, including New York, to develop and implement Comprehensive Coastal Management Plans (CCMPs). New York State has enacted a Waterfront Revitalization Law (“The Waterfront Law”), which in turn encourages local municipalities to establish their own waterfront revitalization programs. The Federal CZMA requires Federal agencies to carry out any activities within the state coastal zones (such as issuance of a permit) in a manner consistent with the policies of the state program. The New

York State Waterfront Law requires the State, when issuing any permit or taking an action in the coastal area, to be consistent with the policies of The Waterfront Law, and also with any Local Waterfront Revitalization Program (LWRP). These consistency determinations may be a factor in the planning and implementation of the County's vector control program.

The National Environmental Policy Act (NEPA) and its New York State counterpart, the State Environmental Quality Review Act (SEQRA) require environmental review of actions, such as permit issuance, by Federal, or State or local agencies, respectively. The issuance of Federal permits, such as the special use permits for the Fire Island National Seashore (FINS), may require environmental review pursuant to NEPA. Thus, although the goals of NEPA and SEQRA, to involve environmental considerations in agency decision-making and permitting, are similar, the environmental review of the vector control program will require attention to the different procedural requirements of each statute.

It is anticipated that New York State, through its Department of Environmental Conservation (NYSDEC), will be the main permitting authority for the County's vector control program. NYSDEC issues permits for pesticide use, and maintains detailed requirements for applicator certification, pesticide registration, and recordkeeping and reports. It is anticipated that the pesticide applications required by the County vector control program may take place in the vicinity of wetlands. NYSDEC has strict permitting requirements for activities, including pesticide applications, which take place in the vicinity of fresh water and tidal wetlands, as well as a specific permitting program for the application of pesticides directly to surface waters.

The New York State Public Health Law (PHL) is enforced by the New York State Department of Health (NYSDOH). The PHL authorizes local agencies, such as the County of Suffolk, to investigate and take measures necessary to protect the public health. This includes authority to undertake vector control activities. It is anticipated that the Suffolk County Department of Public Works (SCDPW) will be the County agency mainly responsible for Suffolk County Vector Control (SCVC) program, except for when a public health emergency is declared. In the event that an arthropod-borne disease is found to constitute a major public health threat, the direction of the vector control program would be under the control of the DHS. The SCDHS retains responsibilities for monitoring and prevention of human diseases, including those of

concern in the County vector control program throughout the duration of a County declared public health emergency.

Suffolk County has enacted a “No-Spray” program, requiring advance notification, and in some cases, limitations on the application of pesticides within Suffolk County. This no-spray list will be a factor in determining when and where the County will apply pesticides, at least in the absence of a public health emergency.

With respect to local municipalities, it is noted that a number of towns on Long Island retain ownership of bays and harbor bottoms and hold said lands for the benefit of town residents, as a public trust. In addition, a number of towns have wetlands codes which regulate activities within freshwater and tidal wetlands. A number of municipalities in Suffolk County have also enacted Local Governmental Waterfront Revitalization Programs (LGWRP), which may require consistency review for the issuance of certain permits.

## 1. Federal Authority

### 1.1 Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

#### 1.1.1 Statute

The FIFRA is a regulatory statute governing the marketing and use of pesticides and other designated classes of chemicals. FIFRA Section 24(c), §18, 2(h) (general statute: 7 U.S.C. §§ 136 to 136y) requires that pesticides sold in the United States be registered with the USEPA. USEPA accepts registration of a chemical only upon a finding that the chemical, when used in accordance with widespread and commonly recognized practice, will not generally cause unreasonable adverse effects on the environment (7 U.S.C. § 136a[c][3][5][D]). The USEPA Office of Pesticide Programs is charged with various responsibilities with regard to pesticide regulation, sale and use (<http://www.USEPA.gov/pesticides/about/aboutus.htm>).

#### 1.1.2 Pesticide Labeling Requirements

An important component of FIFRA is pesticide labeling. Labels are issued by USEPA for each registered chemical, indicating the manner in which it may be used. The pesticide label is specific to the proposed use of a particular pesticide, and is the primary document for conveying general and technical information from regulatory agencies and pesticide manufacturers to mosquito control agencies, the agricultural community, the commercial service industry, and the general public. It is the one source where scientific review, regulatory oversight, and public policy are interwoven to achieve a common objective: to clearly and precisely convey information on handling, storing, applying, and disposing of pesticides in a manner conducive to good health and environmental stewardship. Pursuant to FIFRA (7 U.S.C. § 136a), separate registrations are required for each specific crops and insects on which the pesticide may be applied. (Sullivan, Environmental Law Handbook, 14<sup>th</sup> Edition, Ch.8, § 3.2 [Government Institutes, Inc. 1997]). The FIFRA label encapsulates the terms on which a chemical is registered, and its requirements become part of FIFRA's regulatory scheme. FIFRA makes it unlawful to use any registered pesticide in a manner inconsistent with its labeling (7 U.S.C. § 136j[a][2][G], No Spray Coalition, Inc. v. City of New York, 351 F.3d 602, 603 [2d Cir. 2003]).

Every pesticide must bear a label setting forth the information and use instructions specified by FIFRA and its regulations set forth at 40 CFR 156.10:

- Name, brand, and trademark under which the product is sold
- Name and address of the producer, registrant, or person for whom the product was produced
- Product Registration Number
- Producing Establishment Number
- Net Contents
- Warning or precautionary statements
- Ingredient Statement
- Use Classification
- Directions for use

Unlike the federal CWA (see section 1.2 below), FIFRA does not provide for citizen enforcement suits. This means that legal actions to enforce the law may be brought only by specified agencies of federal and state governments, not by private citizens or environmental groups (No Spray Coalition, Inc. v. City of New York, 351 F.3d 602 at 603).

FIFRA permits the states to “regulate the sale of any federally registered pesticide or device” in their various jurisdictions, “but only if and to the extent the regulation does not permit any sale or use prohibited by” (FIFRA 7 U.S.C. § 136v).

### 1.1.3 Pesticide Registration

Pesticide registration and classification procedures established by USEPA pursuant to FIFRA (40 CFR Part 152 to Part 180), set forth registration and classification application requirements and other procedures, and delineate the types of products that constitute “pesticides.” During the registration process, USEPA evaluates a variety of potential environmental and health effects which may result from use of the product. The manufacturer of the product proposed for

registration must provide data from tests of the product which have been conducted according to USEPA standards. A pesticide can be registered for use in every state, or the registration may be specific to only one state. In addition, USEPA may permit a registration for an Experimental Use Permit (required for field-testing of products still in the process of development); emergency exemptions for unregistered uses of a pesticide as when there is a severe agricultural pest problem, or a human health concern. In addition, with USEPA approval, a state may register a new product, or register an already-registered product for a new use. Where pesticides may be used on food or feed crops, USEPA also sets tolerances, noted as maximum pesticide residue levels, for the amount of the pesticide that can legally remain in or on foods.

#### 1.1.4 Worker Protection

Applicable regulations (40 CFR Part 156, Labeling Requirements for Pesticides and Devices, and 40 CFR Part 170, Worker Protection Standards) provide protection standards, and seek to protect employees from occupational exposure to agricultural pesticides. The Worker Protection Standards under 40 CFR Part 170 do not apply to governmental mosquito abatement programs. (*See Id.*) (<http://www.USEPA.gov/agricultural/awor.html>).

#### 1.1.5 Pesticide Transporters

Transporters of pesticides must observe regulations promulgated by USEPA pursuant to FIFRA (40 CFR Part 156), and also those of the United States Department of Transportation (USDOT) (49 CFR Part 172, Transportation of Hazardous Materials). Transporting containers must meet minimum standards for safety. Labeling requirements are very specific, and prescribe the required type size, contents, and placement of the label.

USDOT sets requirements for transporting hazardous wastes that have been adopted under FIFRA for transporting pesticides. Vehicles must be labeled, marked, and placarded in an easy-to-see manner. In addition, when pesticides are transported in a tank car or truck, a copy of the accepted label must be attached to the shipping papers and left with the facility receiving the delivery. USDOT requires safety training for transporters that include information about:

- Identification of hazardous materials

- Emergency response procedures
- Self-protection measures and accident prevention methods

Training must be given initially to new employees or employees who have changed positions and periodically to all other employees. Employers are responsible for providing training every three years for general awareness, specific job functions, and safety. (See BLR Environmental Compliance In Your State, Vol. II [Business & Legal Reports, Inc. 2003] at p. 34).

### 1.1.6 Pesticide Storage

According to 40 CFR Part 156, when pesticides are stored in bulk containers, mobile or stationary, a copy of the label must be attached to the container. Labels must include directions for use. (See BLR Environmental Compliance In Your State, Vol. II, 2003 at p. 34).

### 1.1.7 Applicator Certification

USEPA designates certain pesticides for restricted use and requires applicators of such pesticides to be certified (40 CFR Part 171). Registered “restricted use” pesticides are listed under 40 CFR Part 152.175. Applicators must take and pass an examination designed to demonstrate practical knowledge of the principles and practices of pest control and safe use of pesticides. (See BLR Environmental Compliance In Your State, Vol. II, 2003 at p. 34.1).

### 1.1.8 Personal Protective Equipment

Any person who performs tasks as a pesticide handler must use the clothing and personal protective equipment specified on the labeling for use of the product (40 CFR § 170.240). (<http://www.USEPA.gov/pesticides/label>).

## 1.2 Clean Water Act (CWA)

### 1.2.1 Statute

The principal law governing pollution of the nation’s waterways is the CWA. The purpose of the CWA, also known as the Federal Water Pollution Control Act, is to restore and maintain the chemical, physical and biological integrity of the waters of the nation (33 U.S.C. § 1251[a]).

The CWA provides for the regulation and protection of the nation's waters; and expresses a policy to permit state to "prevent, reduce and eliminate pollution, [and] to plan the development and use . . . of land and water resources ..." (33 U.S.C. §1251). The CWA authorizes USEPA to establish national, uniform technology-based effluent limitation guidelines for point sources of pollution discharging to "waters of the United States," broadly defined to include wetlands. Effluent discharge limitations are enforced through Section 402 (33 USC § 1342) of the CWA, the National Pollutant Discharge Elimination System (NPDES) permit program. This program is the primary regulatory mechanism of the CWA, requiring a permit for any discharge of a pollutant into navigable waters. Permitting authority for NPDES permits is delegated to New York State under the State Pollutant Discharge Elimination System (SPDES) permit program. (See Orrick, <http://www.savethepeconicbays.org/ccmp/download/appendixk.doc>, also see discussion below under New York State Authority at Section 2.13).

The CWA does not apply to agricultural non-point source pollution. A "point source" for the purposes of the CWA is any discernible, confined and discrete conveyance from which pollutants may be discharged (CWA § 502[14], 33 U.S.C. § 1362[14]).

The CWA forbids discharge of any pollutant from a point source into the navigable waters of the United States without a permit issued under the terms of the Act (No Spray Coalition, Inc. v. City of New York, 351 F.3d 602, 603 [2d Cir. 2003], 33 U.S.C. § 1311). The "discharge of any pollutant" is defined as "any addition of a pollutant to navigable waters from a point source" (33 USC § 1362). Pursuant to § 505 of the Act, any citizen may commence a civil action on his own behalf against any person who is alleged to be in violation of the standards or limitations of the CWA (33 USC § 1365).

### 1.2.2 National Pollution Discharge Elimination System (NPDES)

The NPDES is authorized under 33 U.S.C. §§ 1311 and 1342 of the CWA. The NPDES implements the prohibition of the CWA on unauthorized point source discharges by requiring a permit for every point source discharge of a pollutant to the waters of the United States (Sullivan, Environmental Law Handbook, 14<sup>th</sup> Edition, Ch.4, § 6.1 [Government Institutes, Inc. 1997]).



Pursuant to 33 USC §§ 1251 -1387, federal water quality standards are imposed on the states, and a large measure of enforcement authority to maintain said standards is delegated to state programs (Weinberg, McKinney's Practice Commentaries, Vol. 171/2, ECL § 17-0101). This includes New York's "SPDES" program. (See Section 2.13 below).

The issue of whether the CWA requires a NPDES permit for vector control programs which involve the application of pesticides in or near water has been recently examined by the EPA. In August 2003, the EPA published in the Federal Register an interim statement for public review of the EPA's interpretation of the CWA and FIFRA. This interim statement addresses jurisdictional issues under the CWA pertaining to pesticides regulated under FIFRA. Under this interpretation, the application of pesticides directly to waters of the United States in order to control pests, such as mosquito larvae, does not require a NPDES permit. (68 FR 48385-01). After consideration of the public comments submitted and received in response to the August 2003 interim statement, the EPA published in the Federal Register a February 2005 notice reaffirming its prior statement that pesticides applied to the waters of the United States by public health parties (including mosquito or other vector control districts and commercial applicators that serve these purposes) do not require a NPDES permit. (70 FR 5093).

The EPA is also proposing to revise the NPDES permit program regulations to incorporate the substance of the Interpretive Statement. The proposed revision would add a paragraph to 40 CFR 122.3's list of discharges that are excluded from NPDES permit requirements. The new paragraph would exclude applications of pesticides to waters of the United States consistent with all relevant requirements as described in the preceding paragraph. (70 FR at 5096).

In order to prove a violation of the CWA, the plaintiff must prove that defendant discharged a pollutant from a point source into the waters of the United States, without a CWA permit (33 USC § 1311[a]).

In Headwaters, Inc. v. Talent Irrigation District, 243 F. 3d 526 (9<sup>th</sup> Cir. 2001), the Federal appeals court reviewed the decision of the Oregon District Court, which held that such a permit was not necessary for the application of a FIFRA-approved pesticide by a local irrigation district. The Ninth Circuit reversed, holding that the fact that the registration and labeling of the pesticide pursuant to FIFRA, and the fact that the FIFRA approved label did not require a NPDES permit

for application in or near water, did not obviate the need for a permit. The case was remanded to the trial court for entry of a partial summary judgment in favor of the plaintiffs, and further proceedings as to damages (Headwaters, Inc. v. Talent Irrigation District, 243 F. 3d at 534). The parties subsequently entered into a consent judgment settling the matter. Pursuant to the decree, the defendant irrigation district agreed to, inter alia, obtain a NPDES permit, or “otherwise abide by all applicable CWA requirements” prior to any further application of pesticides to its canals and related systems (Consent Decree, District Judge A. Aiken, February 22, 2002).

In No Spray Coalition, Inc. v. City of New York, 2002 U.S. Dist. LEXIS 13919 (S.D.N.Y. 2000), a coalition of environmental groups and individuals brought a citizen’s suit in the Federal District Court against the City of New York under the CWA, seeking to enjoin the City from spraying mosquito pesticide in a manner that could allow the pesticide to enter navigable waters, without a permit. Plaintiffs argued, inter alia, that the spraying constituted the discharge of a pollutant into navigable waters in violation of the CWA, and that the defendant City had violated the New York SEQRA (see discussion at Section 2.9 below) by commencing its vector control program without first promulgating an Environmental Impact Statement (EIS). The District Court held that FIFRA was established to provide the primary regulatory scheme governing the use of pesticides, and that the application of the CWA to the City’s pesticide application program would frustrate congressional intent. The court observed that FIFRA did not provide a private right of action (a “citizen’s suit”), and dismissed most of plaintiffs’ claims. Plaintiffs were permitted, however, to proceed with discovery regarding their claim that the City had sprayed pesticide directly over open water, such as rivers and bays (the FIFRA label for said pesticide permitted its use over “swamps and marshes”) and that spraying in violation of the FIFRA label would violate the CWA. The same court had occasion to address this issue in its second decision, No Spray Coalition, Inc. v. City of New York, 2002 U.S. LEXIS 22936 (S.D.N.Y. 2002). The District Court held that a CWA citizen’s suit was not available under the circumstances presented, where plaintiffs had presented only evidence of technical violations of the terms of the FIFRA labels. Finding that there had been no “substantial” violation of the regulatory scheme of FIFRA, the District Court dismissed the case. The court reasoned that in such circumstances FIFRA’s non-allowance of citizen’s suits would take precedence over the CWA’s allowance of enforcement by citizen’s suit. The District Court expressed its concern that

to hold otherwise would, in effect, permit a citizen's suit for a violation of FIFRA by means of a lawsuit under the CWA, where Congress had not so intended.

On appeal, the Second Circuit Court of Appeals held that the trial court was in error in concluding that under the circumstances presented a citizen's suit pursuant to the CWA was not available. The Court of Appeals rejected the conclusion of the District Court that the CWA's citizen suit provision becomes inoperative when the CWA violation is less than a substantial violation of FIFRA, noting its concern as follows:

“The question in this case is not whether to read into FIFRA a remedy Congress eliminated from it. The question is rather whether to eliminate from CWA a remedy which it expressly provides, merely because another related statute does not provide similarly such a remedy” (No Spray Coalition, Inc. v. City of New York 351 F.3d at 605).

On this issue alone, the Court of Appeals reversed the decision of the trial court in December of 2003, and remanded the case for further proceedings (No Spray Coalition, Inc. v. City of New York, 351 F.3d 602 [2d Cir. 2003]). The City subsequently filed a motion for summary judgment on the grounds that, *inter alia*, the atmospheric emission of pesticides did not constitute a “discharge;” pesticides applied atmospherically do not constitute “pollutants;” and that the pesticide spray apparatus on aircraft and land vehicles are not “point sources” within the meaning of the CWA. The Plaintiffs cross-moved for summary judgment. The District Court denied both parties motions for summary judgment, in that issues of material fact were still under dispute. (2005 WL 1354041). This litigation is currently pending. (00 Civ. 5395).

In Altman v. Town of Amherst, 190 F.Supp.2d 467 (W.D.N.Y. 2001), the plaintiffs argued that the spray equipment used to apply pesticide in wetlands areas for a town mosquito control program was a “point source” of pollutant discharge and that a NPDES or a SPDES permit was required pursuant to the CWA. The District Court for the Western District of New York granted the defendant's motion to dismiss. On appeal, the Court of Appeals for the Second Circuit stated that “until the (US)EPA articulates a clear interpretation of current law – among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for NPDES permits (*i.e.*, a SPDES permit in Amherst) – the question of whether properly used pesticides can become pollutants that violate the CWA will remain open” (Altman

v. Town of Amherst 47 Fed.Appx. 62, 67, 2002 U.S. App. LEXIS 20498, at 14-15). The Court vacated the trial court's decision and remanded the case for further proceedings, including discovery. In addition, the Court afforded the plaintiffs an opportunity to serve an amended complaint against agencies of the United States and New York State, stating that "participation by the USEPA ...in any way that permits articulation of the (US)EPA's interpretation of the law...would be of great assistance to the courts" (Altman v. Town of Amherst at 15).

An amended complaint was filed by plaintiffs naming the United States, USEPA, and NYSDEC as defendants. That amended complaint was eventually dismissed against the United States and USEPA, and the matter is proceeding in the District Court for the Western District of New York with respect to the other defendants. (See Scheduling Order of Magistrate Judge L. Foschio, January 19, 2005).

USEPA addressed the question posed by the Second Circuit in Altman in its "Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA" (OW-2003-0063; FRL-7542-9), which concluded that the application of pesticides directly to the waters of the United States for purposes of larvae control, or over waters of the United States for adult mosquito control does not require NPDES permits if the pesticides are applied consistent with all relevant requirements of FIFRA. The Interim Statement and Guidance was published in the Federal Register for public comment, in 2003 (FR Vol. 68, No. 156, pgs. 48385-48388). In February, 2005, USEPA published notice of its interpretive statement "Application of Pesticides to Waters of the United States in Compliance with FIFRA" and a proposed rulemaking in connection therewith (FR Vol. 70, No. 20, pgs. 5093-5100).

The Interpretive Statement is substantially similar to the Interim Statement and Guidance. It now addresses applications of pesticides to control pests other than mosquitoes, and applications to control pests "near water," as well as those over water. Summarized briefly, the Interpretive Statement advises that "the application of a pesticide to or over, including near, waters of the United States consistent with all relevant requirements under FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the CWA in the following circumstances:

1. The application of pesticides directly to the waters of the United States in order to control pests...”
2. The application of pesticides to control pests that are present over waters of the United States, including near such waters, that results in a portion of the pesticides being deposited in the waters of the United States...”

Interpretive Statement, FR Vol. 70, No. 20, pg. 5098.

An application of a pesticide in compliance with its FIFRA label would not require a CWA permit, since, under USEPA’s interpretation of the CWA, a properly applied pesticide, used for its intended purpose, would not be considered “chemical wastes” or “biological materials” within the meaning of CWA § 502(6) (33 USC 1362), and thus would not be a “pollutant.” The discharge of a non-pollutant would not require a permit under the CWA. However, applications of pesticides in violation of the requirements of FIFRA would be subject to enforcement under FIFRA and the CWA. (Id., at 5098). In addition, USEPA also proposes a revision to the NPDES program regulations (40 CFR § 122.3), to incorporate the substance of the Interpretive Statement. (Id., at 5096). USEPA solicits comments on this through a proposed rule in the Federal Register. (Id., at 5098). Finally, USEPA’s Interpretive Statement references and makes available an opinion of the agency’s general counsel, which discusses and reconciles the Interpretive Statement and proposed rulemaking with the position previously taken by USEPA in *amicus* briefs filed with the courts in the Headwaters and Altman cases. (See Memorandum of USEPA General Counsel Ann R. Klee, “Analysis of Previous Federal Government Statements on Application of Pesticides to Waters of the United States in Compliance with FIFRA,” January 24, 2005).

### 1.2.3 National Estuary Program (NEP)

The National Estuary Program (NEP), 33 U.S.C. § 1330, was authorized in 1987 under amendments to the CWA. The NEP “allows a governor or (US)EPA to nominate a nationally significant estuary, and request a management conference to, among other things, ‘develop a CCMP that recommends priority corrective actions and compliance schedules addressing point and nonpoint sources of pollution to restore and maintain the chemical, physical, and biological

integrity of the estuary.’” (See J.B. Ruhl, Article: Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different? [hereinafter “*Biodiversity*”], 66 U. Colo. L. Rev 555, 644 [1995] [quoting 26 U.S.C. § 1330{b}]). The purpose of the NEP is to promote planning and management for nationally significant estuaries threatened by pollution, overdevelopment, or overuse. (Sullivan, Environmental Law Handbook, Ch. 4, § 8.2 [Government Institutes 1997]). The decision of whether to convene such a conference is left to USEPA and “‘must be based on such factors as pollutant loads, ecosystem assessment,’ and ‘the impact of nutrients, sediments, and pollutants on water quality, the ecosystem, and designated or potential uses of the [estuary]’” (*Biodiversity*, 66 U. Colo. L. Rev. at 645 [quoting 26 U.S.C. § 1330{j}]). Under the NEP, USEPA is permitted to “‘extend grants for research of those factors and administration of a plan, and the federal government then must commit to cooperate by carrying out its actions in a manner consistent with the plan” (*Biodiversity*, 66 U. Colo. L. Rev. at 644).

#### 1.2.4 Peconic Estuary Program (PEP)

The Peconic Estuary Program (PEP) was created pursuant to the NEP. PEP promulgated its CCMP, which was formally approved by USEPA and the Governor of New York, in 2001. The CCMP sets forth management goals regarding the Estuary. The CCMP advocates a policy of no new mosquito ditching, and the abandonment of mosquito ditches which have filled in naturally, as well as a reduction in pesticide use within the area of the Peconic Estuary. (See Peconic Estuary CCMP 2001, available on the website for the PEP).

### **1.3 Coastal Zone Management Act (CZMA)**

The CZMA, Sections 302-319 (16 U.S.C. §§ 1451, et seq.), provides for the assistance of states in preserving the waters in the coastal zone, by, among other means, aiding in the development of land and water use programs for the coastal zone (16 U.S.C. §§ 1452). The CZMA established a Federal policy to preserve, protect, and where possible, to restore or enhance, the resources of the nation’s coastal zone. Regulations for the implementation of the CZMA have been established at 15 CFR, Subtitle B, Chapter IX, Subchapter B, Parts 930 and 923.

The CZMA is administered at the federal level by the Coastal Programs Division (CPD) of the National Oceanic and Atmospheric Administration's (NOAA) Office of Ocean and Coastal Resource Management.

The CZMA makes Federal financial assistance available to any coastal state that is willing to develop and implement a CCMP. The state's proposed management program is subject to review and approval by the Federal Secretary of Commerce (16 U.S.C. § 1455). The CZMA requires Federal agencies to carry out any activities that affect any land or water use or natural resource of the coastal zone in a manner consistent with the policies of state Coastal Management Programs (CMPs). The Act forbids Federal agencies from approving proposed projects that are inconsistent with a state's CMP. Applicants for Federal permits to conduct an activity affecting land, water or natural resources of the coastal zone must provide the permitting Federal agency with certification that said activity complies with the state program. The certification must also be provided to the state (16 U.S.C. § 1456). Regulations that implement the consistency provisions of the Act are set forth at 15 CFR Part 930. State participation in the CZMA is voluntary, and New York State is a participant. (See discussion of New York's Waterfront Law at Section 2.15 below).

An objective of the CZMA is also to control non-point pollution sources that affect coastal water quality (<http://www.USEPA.gov/agriculture/lzma.html>, "Summary of Coastal Zone Act and Amendments").

As noted above, the CZMA requires Federal agencies to obtain a consistency determination from the appropriate state agency before final approval of a major Federal activity within the jurisdiction of a state CMP, declaring that the proposed project is consistent with that program (16 USC § 1656[d]). As discussed at Section 2.14 and Section 4.3 below, both New York State and various municipalities in Suffolk County have enacted a CCMP with respect to coastal areas (those approved for municipalities are known as LWRPs). Consistency review for applications in these areas may be required of the permitting agency.

#### **1.4 National Environmental Policy Act (NEPA)**

The NEPA, 42 U.S.C. §§ 4321, *et seq.* provides for the preservation of environmental concerns in existing and future statutes, “‘indirectly’ requires that federal agencies weigh environmental considerations into their policies,” and is considered the parent statute of the New York SEQRA, though SEQRA also “contains a substantive component compelling environmental compliance in decision-making.” (See Todd Gregory Monahan, *Comment: Seeking the Spirit of SEQRA from Beneath the Paperwork*, 65 Alb. L. Rev. 539, 543-544 [2001]). SEQRA is further discussed below at Section 2.9.

The purpose of NEPA is to ensure that environmental factors are given consideration in decision-making by Federal agencies. The effectiveness of NEPA stems from its EIS requirement that Federal agencies must consider the environmental effects of, and alternatives to, all proposals for major Federal actions that significantly affect the quality of the human environment. (Sullivan, *Environmental Law Handbook*, 14<sup>th</sup> Edition, Ch. 12, § 1.0 [Government Institutes, Inc. 1997], 42 U.S.C. § 4332 [C]). Similar to SEQRA, NEPA requires that agencies review proposed actions by means of an environmental assessment (EA), to determine whether an EIS will be necessary. If no EIS is required, the agency may promulgate a Finding of No Significant Impact (FONSI), and is then free to proceed with the action.

In the event that a Federal permit is required for a vector control project, NEPA’s environmental review requirements must be observed. A general comparison of the environmental review requirements of NEPA and SEQRA is set forth below at § 2.9.2.



## 2. New York State Authority

### 2.1 Environmental Conservation Law (ECL)

New York State's Environmental Conservation Law (ECL) contains a broad grant of authority to its DEC to regulate matters relating to vector control, including pesticide regulation, water pollution control (ECL § 15-0313), protection of streams from dredging and other activities (ECL § 15-0501), wild, scenic and recreational rivers (ECL § 2701), and the granting of permits for pesticide spraying in and around wetlands and waterways (ECL § 15-0313, ECL Article 25, and Article 24). The ECL specifically states that the sovereign power to regulate and control water resources is vested exclusively in the State, except to the extent of any delegation of power to the United States (ECL § 15-0103(1)).

In general, New York's regulatory scheme for pesticides mirrors the Federal regulations, predominately FIFRA, for pesticide management. New York State has received USEPA approval of its enforcement program pursuant to § 26 of FIFRA (7 USC § 136w-1), and thus exercises primary enforcement responsibility. (See ECL §§ 17-0801, *et. seq.*) NYSDEC administers and enforces regulations relating to pesticides in New York, pursuant to authority set forth in Articles 15, 33 and 71 of the ECL.

Article 8 of the ECL sets forth the State's environmental review law, similar to NEPA (Section 1.4 above). The New York SEQRA is discussed at Section 2.9 below.

Article 15 of the ECL (also known as the Water Resources Law), in pertinent part, sets forth certain powers and responsibilities of NYSDEC with respect to control of water pollution. NYSDEC is empowered to adopt rules and regulations governing the direct application of pesticides to or in surface waters, and to establish a permitting program for such applications (ECL § 15-0313[4], also see discussion below regarding 6 NYCRR Part 329). Title 5 of the ECL, known as the Stream Protection Act (SPA), requires a NYSDEC permit before, *inter alia*, altering a streambed (ECL § 15-0501), or excavating or filling below the high water mark of any navigable waters (ECL § 15-0505). In this way, the SPA is the state equivalent to the authority wielded by the USACOE to issue permits to dredge or fill, pursuant to Section 404 of the CWA.

Article 33 of the ECL regulates the registration, commercial use, purchase, and application of pesticides, and vests jurisdiction exclusively in the Commissioner of NYSDEC (ECL § 33-0301 and § 33-0303, also see discussion below regarding 6 NYCRR Part 326).

## **2.2 Pesticide Regulations**

Pursuant to its authority under the ECL, NYSDEC has promulgated regulations for pesticide use. These are set forth at Parts 320 through 329 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR Parts 320-329).

Specific regulations governing the use of pesticides for mosquitoes and similar pests are set forth at Part 329 thereof (Use of Chemicals for the Control or Elimination of Aquatic Insects, 6 NYCRR Part 329).

### **2.2.1 Pesticide Applicator Certification Requirements**

New York State requires commercial applicators engaged in the application of pesticides to be certified by NYSDEC (6 NYCRR §§ 325.11, 325.12 and 325.19). To be eligible for commercial certification, the applicator must have the required experience as a technician, apprentice, private applicator, or in pesticide sales. Eligible applicators must take and pass a core examination designed to demonstrate knowledge of pest management, label requirements, safe usage of pesticides, worker safety, prevention of groundwater contamination, and storage and disposal rules before they can be certified. Every commercial pesticide applicator must then take a specialized exam to demonstrate practical knowledge of relevant rules in each respective field. New York has an examination that is required for all applicants of restricted use pesticides. Upon passing the required examination and payment of the appropriate certification fees, NYSDEC will issue a certification identification card to the applicator. The card specifies the categories of the certification and is valid for three years. In order to renew the certification after three years, the applicator must pay the appropriate fee and have a history of satisfactory performance. If the applicator's certification has been expired for more the three years, the testing procedure must be repeated. (See BLR Environmental Compliance In Your State, Vol. II, 2003 at p. 35).

## 2.2.2 Restricted Use Pesticides

Restricted use pesticides may only be handled, sold, purchased, used or distributed by persons certified to do so by the NYSDEC (6 NYCRR Part 326). The list of restricted use pesticides is located in 6 NYCRR § 326.2. Restricted use pesticides can only be used in conformity with labels registered with NYSDEC and only in concentration levels described, as the Commissioner of NYSDEC – the officer vested with the authority to classify the pesticides for the purposes of regulation (see 6 NYCRR, Part 326) - has deemed those pesticides to be deserving of regulation. (See Matter of Ames v. Smoot, 98 A.D.2d 216, 221-222, 471 N.Y.S.2d 128 [2d Dep’t 1983]).

## 2.2.3 Pesticide Product Registration

The registration of pesticides in New York is regulated under Article 33, Title 7, of the ECL and Article 11 of the New York State Agriculture and Markets Law. Implementing regulations are set forth at 6 NYCRR Part 326. The ECL requires every pesticide used, distributed, sold, or offered for sale to be registered with NYSDEC (ECL § 33-0701).

ECL Article 33 is modeled after FIFRA, and “expressly asserts the need for uniformity” in the regulation of pesticides (Matter of Ames v. Smoot, 98 A.D.2d 216, 219, 471 N.Y.S.2d 128 [2d Dep’t 1983] [examining ECL Article 33 and holding that the State intended to preempt local governments from engaging in the regulation of pesticides]; Long Island Pest Control Ass’n v. Town of Huntington, 72 Misc. 2d 1031, 341 N.Y.S.2d 93 [Sup. Ct. Suffolk County 1973] [striking down an ordinance of the Town of Huntington that had purported to vest the authority to regulate pesticides with a local “Pesticide Control Board” {PCB}], aff’d, 43 A.D.2d 1020, 351 N.Y.S.2d [2d Dep’t 1974]).

Prior to their sale and use, pesticides must be registered pursuant to 6 NYCRR Part 326, and the Product Registration must be in effect on the date of each pesticide use. The registration period is two years (ECL § 33-0701). The statutory scheme implies that registration is required of the manufacturer and/or importer of the pesticide. The Bureau of Toxic Substance Assessment of the NYSDOH, Center for Environmental Health, assists NYSDEC in evaluating pesticides for registration under certain circumstances. Registration of a pesticide under Federal law may exempt the product from State registration requirements where the Commissioner of NYSDEC

deems appropriate (see e.g., ECL § 33-0701), although, generally, New York State's registration requirements also apply.

Vector control chemicals are not exempt from State requirements and are, in fact, specifically implicated in many cases in the ECL as "restricted use" pesticides. (See e.g., 6 NYCRR Part 326 [setting forth restricted use pesticides]).

#### 2.2.4 Pesticide Labeling Requirements

All labels must adhere to Pesticide Labeling Requirements, which are set and approved by USEPA under FIFRA. (See 7 U.S.C. §§ 136, et seq). Unlike other sections of FIFRA regarding pesticides, the labeling of pesticides is expressly preempted by FIFRA. (See ECL §§ 17-0801, et. seq). Although the states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required" under FIFRA, (see 7 U.S.C. § 136v[b]), the states may regulate the sale and use of pesticides, so long as such regulation is more stringent than Federal regulations. (See 7 U.S.C. § 136v[a]).

NYSDEC will interpret label requirements when necessary.

#### 2.2.5 Pre-Application Label Information Notification

Pesticide applicators must provide a statutorily prescribed form of notification to those who may be affected by application of pesticides, depending on the environment within which the pesticides may be applied (ECL § 33-0905, also see 6 NYCRR Part 325). This applies generally to commercial applicators of pesticides.

#### 2.2.6 Record keeping and Reports

Each agency that applies pesticide and each business offering, advertising or providing the service of commercial application of pesticides are governed by the reporting requirements of 6 NYCRR 325.25. (See 6 NYCRR § 325.23).

An agency is defined under ECL § 33-0101(4) as any State agency, municipal corporation, etc. Agencies that apply pesticides are required to register with NYSDEC.

Daily Use Records must be kept and created contemporaneously with the time of application. ECL § 33-1205 requires commercial applicators to maintain records containing various types of information including the following:

- USEPA registration number
- Name of each product used
- Quantity of each product used
- Dosage rates
- Methods of application
- Target organisms
- Date and place of each application.

These records must be maintained for a period of three years and must be made available for inspection upon request by NYSDEC. Annual Reports must be filed no later than January 15 of each year and must account for every instance of pesticide use during the previous calendar year (per the Pesticide Reporting Law, ECL Article 33, Title 12). These reports must be filed on forms provided by NYSDEC.

In addition, “every person who sells or offers for sale restricted-use pesticides to private applicators must issue a record to the private applicator of each sale of a restricted-use pesticide used in agricultural crop production to such applicator. Seller’s records of sale and annual reports to NYSDEC shall include: the USEPA registration number; product name of pesticide purchased; quantity of pesticide purchased; date purchased; location of intended application by address (including five-digit zip code) or by town or city of address is unavailable.” (For more information on recordkeeping, see <http://www.envirocancer.cornell.edu/Newsletter/General/v2i1/pestUse.cfm>).

### 2.2.7 Commercial Lawn Application Contracts

Commercial Lawn Application Contracts are required of anyone engaging in the commercial application of pesticides. The contracts must be certified by the NYSDEC (ECL § 33-0905[1]).

The law requires commercial applicator to enter into a written contract with the owner of the property for whom the application will be made. The contract shall contain the information set forth in the statute. (See e.g., ECL § 33-1001). Such a contract is required when providing a barrier or perimeter delivery of mosquito adulticide. It is not required when applying adulticide by ultra-low volume aerosol or fog delivery or when applying larvicide or pupicide to surface waters. It is not required when the application is made by or on behalf of a governmental agency. (See 6 NYCRR Part 325, § 325.40).

### **2.2.8 Visual Notification**

Visual notification consists of the placement of clearly visible signs or placards at the site of a pesticide application. Visual notification is required of any pesticide applicator or business performing a commercial lawn application. It is required when providing a barrier or perimeter delivery of adulticide, but not required when applying adulticide by ultra-low volume aerosol or fog delivery, or when applying larvicide or pupicide to surface waters (ECL § 33-0101). Visual notification is required when an application is made by or behalf of an agency when the application is made within 100 feet of a dwelling, public building or public park. (See 6 NYCRR § 325.40).

## **2.3 Freshwater Wetlands Permits**

Article 24 of the ECL sets forth activities in or adjacent to freshwater wetlands which require a NYSDEC permit. NYSDEC regulates activities in freshwater wetlands of over 12.4 acres in size, and these wetlands are depicted on an official map promulgated by the Department (ECL § 24-0301). Wetlands of less than twelve and four-tenths (12 and 4/10) acres in size having unusual local importance may also be mapped and regulated by NYSDEC upon determination by the NYSDEC Commissioner, pursuant to criteria set forth in ECL § 24-0301(1) and 6 NYCRR § 664.7(c). Permits are issued pursuant to the Uniform Procedures Act (UPA) of ECL Article 70.

Regulated activities include draining, dredging, excavation, pollution, or any activity which impairs the functions of a wetland or any benefits derived therefrom (ECL § 24-0701[2]).

The regulations promulgated pursuant to ECL Article 24 for regulated activities, including pesticide use and habitat modification, appear at 6 NYCRR Part 663. Public health activities,

orders and regulations of NYSDOH are excluded from the definition of regulated activities (ECL section 24-0701[5], 6 NYCRR § 663.2 [z][3]). Permits are often required for activities associated with vector control, such as draining or excavation, regardless of whether an ECL Article 15 Aquatic Pesticide Permit (APP) is required. (See discussion regarding issuance of APPs at Section 2.4 below).

A permit applicant must demonstrate that the proposed project is in compliance with the policies and provisions of Article 24 (ECL § 24-0703[4]). The permit requirements for the application of pesticides to freshwater wetlands and adjacent areas, and the compatibility of said activities with the functions and benefits of freshwater wetlands, are addressed at 6 NYCRR § 663(4). Additional guidance regarding the issuance of permits, and the circumstances under which a permit can be issued for activities which are deemed to be incompatible with the functions and benefits of freshwater wetlands, are discussed at 6 NYCRR § 663.5.

Freshwater Wetland Permits (FWPs) are issued pursuant to the UPA, which authorizes public agencies to undertake emergency actions if prior notification (and, presumably, consultation) with NYSDEC is impossible (ECL Article 70).

If regulated freshwater wetlands or nearby areas are potential target sites for an application of larvicide, pupicide, or adulticide, the applicator or health department employee who will be responsible for administering such pesticides is responsible for contacting the appropriate NYSDEC Regional Permit Administrator (RPA) to pursue compliance with Article 24, 6 NYCRR Parts 621 and 663.

## **2.4 Tidal Wetlands Permits**

Article 25 of the ECL sets forth activities in tidal wetlands which require a NYSDEC permit. Tidal wetlands are defined in Article 25 to include not only areas currently subject to the tide's ebb and flow, but also areas "formerly connected" to tidal waters (ECL § 25-0103).

Pesticide use and habitat modification are subject to Tidal Wetland Permits (TWP) under ECL Article 25, 6 NYCRR Part 661. Permits are issued pursuant to the UPA, ECL Article 70. A permit applicant must demonstrate that the proposed project is in compliance with the policies and provisions of Article 25 (ECL § 25-0402).

The Tidal Wetlands regulations note that activities, orders and regulations of units of local government with respect to public health are excluded from regulation, where the same are conducted in accordance with ECL section 25-0401 (6 NYCRR § 661.5[b]2).

The ordinary maintenance and repair of mosquito control ditches are also excluded from permit requirements (6 NYCRR § 661.5[b]21).

Finally, the regulations note that the use or application of any pesticide, where otherwise authorized by law, does not require a permit pursuant to ECL Article 25 (6 NYCRR § 661.5[b]55). Thus, where an ECL Article 15, Part 329, APP is required and has been issued; a permit under this article is not required.

If regulated tidal wetlands or nearby areas are potential target sites for an application of larvicide, pupicide, or adulticide, the applicator or health department employee who will be responsible for administering such pesticides is responsible for contacting the appropriate NYSDEC RPA to pursue compliance with ECL Article 25, 6 NYCRR §§ 621 and 661.

## **2.5 Aquatic Pesticide Permits (APPs)**

Pursuant to ECL Article 15, § 15-0313, NYSDEC is authorized to permit and regulate the application of pesticides directly to or in surface waters. Regulations for this purpose are set forth at 6 NYCRR Part 329. A permit issued for such purpose is known as an APP. A permit is required if a mosquito larvicide or pupicide is to be used in or over any state surface waters, except for surface waters that meet all four of the following criteria:

1. The waters lie wholly within the boundaries of lands privately owned or leased by the individual making or authorizing treatment;
2. The waters measure one acre or less in size;
3. The waters have no outlet to other surface waters; and
4. The waters are temporary ponds, or are ponds that do not contain fish.



Any surface waters that do not satisfy all four of these criteria – including snow melt ponds, sumps, recharge basins and man-made ornamental ponds – are subject to the law’s APP requirements (<http://www.health.state.ny.us/nysdoh/westnile/final/appendix.htm>).

If an application for the use of pesticides concerns the waters of any public water supply, NYSDEC must consult with NYSDOH (6 NYCRR § 329.4[b][3]).

A list of the pesticides authorized for Aquatic Pesticide use is set forth in the regulations at § 329.6, however the use of pesticides not so listed may be permitted by NYSDEC when their use will conform with the purposes and intent of the law and regulations (6 NYCRR § 329.7).

## **2.6 Temporary Revocable Permits**

Temporary Revocable Permits are regulated by 6 NYCRR Part 190 and are handled together with APPs. The NYSDEC Regional Natural Resources Supervisor signs the APP, which incorporates any specific provisions governing the proposed action.

If the action is not subject to Article 15 Part 329 and does not require an APP, or the proposed use will be in or over state lands under NYSDEC’s jurisdiction, the applicator must contact the NYSDEC Regional Land Manager to discuss making application for a revocable permit for the temporary use of state land.

## **2.7 Enforcement**

Either NYSDEC or the New York State Attorney General may investigate complaints of violations of the pesticide use and labeling requirements (ECL 33-1301); penalties for violations can be assessed pursuant to ECL § 71-2907.

## **2.8 Emergency Authorization Procedures**

Emergency authorization procedures for the issuance of permits and authorizations by the NYSDEC are covered in the New York State UPA, Article 70 of the ECL. Implementing regulations are set forth at 6 NYCRR Part 621.

An emergency is defined as a natural or accidental human-made event which presents an immediate threat to life, health, property, or natural resources (ECL § 70-0105, 6 NYCRR § 621.1[g], § 621.12). Emergency authorizations may allow the permit applicant to avoid some permit and regulatory requirements, but are limited to the specific county or other area affected by the emergency and apply only to the first season in which the emergency occurs (NYSDOH, West Nile Response Plan 2001, Exhibit E [Environmental Laws. Rules and Regulations]).

The existence of a public health emergency will affect the approval process and conditions for FWP's (ECL Article 24), Tidal Wetlands Permits (ECL Article 25), and the requirements for environmental review of actions required under SEQRA. Neither an EIS nor a negative declaration pursuant to SEQRA must be filed in order for an agency to undertake an activity where an emergency exists (see 6 NYCRR § 617.5[b][33] and discussion of SEQRA below), although a public agency would be well advised to first establish a record supporting its decision to undertake the activity.

## **2.9 State Environmental Quality Review Act (SEQRA)**

Under certain circumstances, mosquito surveillance and control activities are subject to environmental review under the requirements of the New York SEQRA. This Act is set forth in Article 8 of the ECL, and implementing regulations for SEQRA are located at 6 NYCRR Part 617.

SEQRA applies to any public agency that has the authority to issue a discretionary permit or other type of approval for an action, or if the agency funds or directly undertakes the action. Where there is more than one governmental agency involved in issuing permits or approvals for a particular action, the agency principally responsible for undertaking, funding or approving an action is designated the "lead agency." This lead agency will then have the primary responsibility for ensuring that SEQRA is observed, and that any required studies are undertaken in compliance with its provisions (6 NYCRR § 617.6).

### **2.9.1 Generalized SEQRA Procedures**

SEQRA requires that governmental agencies review and consider the environmental impacts of an action prior to undertaking, funding or approving the action (ECL § 8-0109). "Actions" are

broadly defined at ECL § 8-0105, and under appropriate circumstances, may include vector control programs and the issuance of governmental permits for such programs. Certain categories of actions which are not subject to SEQRA's environmental review requirements are denoted as "Type II" actions. These include actions undertaken on an emergency basis for the protection of life, health, property, or for the preservation of natural resources (6 NYCRR § 617.5[b][33]), acts of the New York State Legislature, courts and the State Governor (6 NYCRR § 617.5[b][37]), and routine or continuing agency administration and management (6 NYCRR § 617.5[b][20]).

The governmental agency must take a "hard look" at the environmental impacts of the proposed action (H.O.M.E.S. v. New York State Urban Dev. Corp] [69 AD2d, 222, 418 NYS2d 827 {4<sup>th</sup> Dept. 1979}]). If the agency finds that environmental impacts are not significant through its review of an Environmental Assessment Form (EAF), then the agency may issue a "negative declaration," and undertake, fund or approve the action without further proceedings under SEQRA. In the event that an action may have significant environmental impacts, the governmental agency must prepare or cause to be prepared, and present for public comment, an EIS. In the EIS, environmental impacts are reviewed, and alternatives to the proposed action are considered. The agency must then promulgate findings regarding the proposed action and its environmental impacts. This completes the SEQRA review process. The agency may then undertake, fund or approve the action (ECL § 8-0109, 6 NYCRR § 617.11). Further information on SEQRA is available in the "SEQRA Handbook," a publication of NYSDEC. This document may be obtained from the NYSDEC website at <http://www.dec.state.ny.us>.

## 2.9.2 Key Differences between SEQRA and NEPA

Although SEQRA was modeled on NEPA, there are differences between the two statutes. The principle difference is that SEQRA explicitly requires agencies to integrate environmental considerations into their decisions. While NEPA "only indirectly requires that federal agencies weigh environmental considerations into their policies, and develop decision making methodology, SEQRA contains a substantive component compelling environmental compliance in agency decision-making." (See Todd Gregory Monahan, *Comment: Seeking the Spirit of SEQRA from Beneath the Paperwork*, 65 Alb. L. Rev. 539, 544 [2001]). While NEPA has been interpreted as a set of essentially procedural requirements, the "express references to agency

decision-making in SEQRA reflect an intention by the legislature to impose both procedural and substantive requirements” (Neil Orloff, SEQRA: New York’s Reformation of NEPA, 46 Alb. L. Rev. 1128, 1132 [1982]). Compare and contrast the directive set forth in SEQRA, New York ECL Sections 8-0103(7) and 8-0103(9) with that of NEPA, 42 U.S.C § 4332(2)(B).

Another significant difference is in the breadth of jurisdiction: NEPA applies only to Federal administrative agencies, while SEQRA applies to many agencies at the State and local level, including local legislative bodies (acts of the New York State Legislature, courts and the Governor are excluded) (42 U.S.C § 4332; ECL § 8-0105, 6 NYCRR § 617.5[37]).

Finally, the threshold for requiring an EIS under SEQRA is much lower under SEQRA: an EIS will be required for any action which “may” have a significant impact on the environment (ECL 8-0109[2]); while a NEPA EIS is required for actions “significantly affecting” the environment (42 U.S.C 4332[C]; Gerrard, Ruzow, Weinberg, Environmental Impact Review in New York, Ch. 8, § 8.03 [LexisNexis {Mathew Bender} 2004]).

In the event that Federal permits or approvals are required for a vector control project, one or more Federal agencies may have the status of “involved agencies” in the environmental review for the project pursuant to SEQRA (6 NYCRR § 617.2[s]), and the procedural and substantive requirements of both statutes must be observed.

## **2.10 New York State Public Health Law (PHL)**

The New York State PHL, inter alia, authorizes agencies to investigate and ascertain the existence and causes of disease outbreaks, including vectors, and to take measures necessary to protect the public health. The NYSDOH enforces compliance with the PHL. The powers and duties of NYSDOH are set forth in Article 2, § 201 of the PHL. Among these are the supervision of local boards of health and health officers, (PHL § 201[a]), supervision of the reporting and control of disease (PHL § 201[c]), controlling the pollution of waters of the state (PHL § 201[l]), controlling and supervising the abatement of nuisances likely to affect public health (PHL § 201[n]), and advising any local unit of government in the performance of their duties and regulate financial assistance granted by the state in connection with public health activities (PHL § 201[o]). The Bureau of Toxic Substance Assessment of NYSDOH, Center for

Environmental Health, assists NYSDEC in evaluating pesticides for registration when the product contains new active ingredients, or when the pesticide has a major change proposed for its use pattern or major change in labeling.

PHL Article 16, sections 1601-1609, established a PCB within NYSDOH. The Board was charged with the duty to formulate over-all policy in the state's programs regarding pesticides and to coordinate state efforts to control the use of pesticides. Although this Article is still set forth in published compilations of state law, the powers of the Board have been transferred to the NYSDEC, and the Board has been abolished (ECL § 3-0301). Suffolk County has not established a pesticide control board. Questions by members of the public regarding pesticide control are referred to the National Pesticide Review Hotline at 1-800-858-7378.

PHL Article 15 §§ 1500-1502 et seq., authorizes a county to form a Mosquito Control Commission (MCC), and sets forth the powers and duties of said commission. The commission may use appropriate means to suppress mosquitoes, with the limitation that said measures "shall not be injurious to wildlife" (PHL sec. 1525[2]). In Suffolk County, mosquito control was a function of the Suffolk County MCC (Yannacone v. Dennison, 55 Misc. 2d 468 [Sup. Ct. Suffolk Co. 1967]). That Commission is still referenced in the Suffolk County Charter (SCC), but is no longer active. (See Section 3.1 below).

PHL Article 15, §1500(2), sets forth that "[a]ny accumulation of water in which mosquitoes are breeding or are likely to breed, is hereby declared to be a nuisance."

PHL Article 6, § 611, and the regulations set forth at 10 NYCRR Part 44, govern State aid and sets forth the amount of reimbursement a county or municipal agency is entitled to for engaging in a mosquito and vector control program approved by NYSDOH. NYSDOH may distribute State aid for "approved vector surveillance and control programs" as prescribed by 10 NYCRR § 44.30 (Eligibility for State Aid).

10 NYCRR Part 44 also outlines the procedure by which a public health threat may be declared. A public health threat of an arthropod vector-borne disease based on current activity shall be determined by

- 1) the presence of human vector-borne disease or the presence of disease-specific etiologic agents in a known or suspected vector-borne disease (10 NYCRR 44.51), and,
- 2) in evaluating the existence of a public health threat, the commissioner shall assess the risk to human health by taking into account the etiologic agent, the vector species, the size of the specific and secondary vector populations, the vectors' physiological age, density and proximity of human population, the time of year and weather conditions. (10 NYCRR 44.51).

If and when a locality believes that an arthropod-borne disease should be designated as a public health threat, localities should document the information and immediately notify the county health commissioner, who shall inform the Commissioner of Health. The person notifying the Commissioner of Health must also send a copy of the notification to the Commissioner of Environmental Conservation. (10 NYCRR 44.51(b)).

NYSDOH has compiled a comprehensive public information website on the WNV epidemic. ([http://www.health.state.ny.us/diseases/west\\_nile\\_virus/](http://www.health.state.ny.us/diseases/west_nile_virus/)).

NYSDOH has set forth its policy recommendations for vector control in a manual prepared by the NYSDOH entitled "Environmental Laws, Rules and Regulations Relating to Mosquito Control in New York State – Pesticide Use, Habitat Modification, Fish Stocking and Wildlife Collection," annexed as Appendix E to the 2000 West Nile Virus (WNV) Response Plan. That manual advises that where a public health emergency exists, the agency proposing to conduct regulated mosquito control activities is charged with evaluating the impacts associated with regulated activities in a stepwise fashion, i.e., by employing the course of action which will avoid or have the least impact to wetlands, or employing alternative courses of action that minimize impacts. In certain cases, NYSDOH will recommend mitigation of damages where vector control activities cause a severe impact on wetlands. NYSDOH further advises in the manual that habitat modification is a "last resort," and that such an activity is inconsistent with the ECL and, in nearly all cases, can be avoided through the use of less harmful alternate activities (<http://www.health.state.ny.us/nysdoh/westnile/final/appendixe.html>).

## **2.11 State Pollution Discharge Elimination System (SPDES)**

The SPDES is the New York State counterpart to the NPDES. Article 17 of the ECL (ECL §§ 17-0101, et seq.) sets forth the regulatory scheme for state control of water pollution, and Title 8 thereof (ECL §§ 17-0101 through 17-0831) regulates the issuance and enforcement of SPDES permits. Pursuant to 33 USC §§ 1251 -1387, authority is delegated to the states which have federally approved SPDES programs. Under this statutory scheme, New York is expected to administer its own state program, and to be primarily responsible for enforcement, subject to USEPA supervision (Weinberg, McKinney's Practice Commentaries, Vol. 171/2, ECL § 17-0815).

## **2.12 Waterfront Revitalization of Coastal Areas and Inland Waterways Law (The "Waterfront Law")**

The Waterfront Law is set forth at Article 42 of the New York State Executive Law (Exec. Law), Sections 910 et seq. The law was enacted in response to concerns regarding the pressures of population growth and economic development on the State's coastal areas and inland waterways, and is intended to "achieve coordinated policy and planning for the use of the state's coastal resources and to ensure the proper balance between natural resources and the need to accommodate the needs of population growth and economic development" (Robinson, New York Environmental Law, Ch. 4, § 4.23 [New York State Bar Association 1992]; § ECL § 910). Regulations for the implementation of the Waterfront Law are set forth at 19 NYCRR Part 600 and 601.

### **2.12.1 New York State Coastal Management Program (CMP)**

The Waterfront Law is the foundation for the New York State CMP. The Coastal Area itself is a defined geographic area, including Long Island Sound and the Atlantic Ocean, and their connecting water bodies, bays, harbors, shallows and marshes (Exec. Law § 911). The Coastal Area is depicted in a map on file in the office of the New York State Secretary of State, and said map is also provided to any county and local government which has any portion of its jurisdiction within the boundaries of the Coastal Area (Exec. Law § 914).

Regulations for the guidance of State agencies in following the Waterfront Law with respect to actions within the Coastal Area are set forth at 19 NYCRR Part 600. The term “actions” is defined at § 600.2(b) by reference to the SEQRA regulations set forth at 6 NYCRR Part 617.2. “Actions” which require New York State funding, state permits, or are directly undertaken by the state must be consistent with the policies and goals of the Waterfront Law, and also with any state-approved LGWRP (19 NYCRR § 600.3[b] and [c]). (See Section 4.3 below for a discussion of LGWRPs). Policies for the Coastal Area in general are set forth at 19 NYCRR § 600.5, and in evaluating proposed actions against these policies, state agencies are advised to consider the coastal policy explanations and guidelines contained in the approved New York State CMP document.

SEQRA regulations require that all Draft Environmental Impact Statements (DEISs) for a state agency action in the Coastal Area must include a discussion of the action’s consistency with the applicable coastal policies set forth in 19 NYCRR 600.5, or when the action is in an approved LGWRP area, the action’s consistency with the local program’s policies. Thus, a State permit for vector control activities within the Coastal Area or, in the jurisdiction of an approved LGWRP, will require consistency review as a component of the DEIS. In the absence of a local law imposing a duty on a local agency (such as the County) to review its own actions for consistency, however, the LGWRP will not impose any additional duty on the local agency (6 NYCRR § 617.9[b][5][vi]). SEQRA is discussed at Section 2.9 above.

### 2.12.2 Long Island Sound Coastal Area

Special policies for the Long Island Sound area are set forth at 19 NYCRR § 600.6, and the reader is referred therein to the Long Island Sound CMP document for guidance in determining whether an action in the Long Island Sound Coastal Area is consistent with the policies. In 1985, the Long Island Sound Study (LISS) was initiated in order to examine the problems confronting the Long Island Sound. The LISS began “as a result of a congressional appropriation for USEPA and the coastal states of Connecticut and New York to assess the water quality of the Sound.” (See Powers, *Article: Reducing Nitrogen Pollution on Long Island Sound: Is There a Place for Pollutant Trading* [hereinafter “*Pollutant Trading*”], 23 Colum. J. Env’tl L. 137, 143 [1998]). After the CWA Amendments of 1987 were enacted, the Long Island Sound was selected to participate in the NEP (see Section 1.2.2.2 above), and the LISS



Management Conference, which included Federal, state and local officials, representatives of industry, public interest groups, and academic institutions, was formed, and charged with the task of assessing the condition of the Sound, identifying the cause of problems, and developing a comprehensive plan to remedy those problems. (See Pollutant Trading, 23 Colum. J. Env't'l L. at 143, n. 19). The LISS today is a cooperative effort of researchers, user groups, and regulators which seek to implement the Long Island Sound CMP.

The LISS website reports that researchers at the Marine Sciences Center, Stony Brook University, are conducting research regarding the possible impacts of pesticides commonly used on mosquito control programs on lobster larvae and juvenile lobsters. The research is funded by the New York/Connecticut Sea Grant Long Island Sound Lobster Initiative (<http://www.longislandsoundstudy.net>). This work has been reported on in Task 3, Book 8, Part 2.

### 2.12.3 South Shore Estuary Reserve (SSER)

The South Shore Estuary Reserve (SSER) was established by Article 46, §§ 960 through 970-a of the Exec. Law (the South Shore Estuary Reserve Act), to permit the management of said area as a single integrated estuary (ECL § 960). The South Shore Estuary Reserve Council, with the assistance of the State Division of Coastal Resources, promulgated a CCMP for the Reserve in 2001. Significantly, the Act states that “nothing herein shall affect the police powers, local planning powers... or authority to regulate any activity by ...counties within the reserve...” (Exec. Law § 970).

### **3. Suffolk County Authority**

#### **3.1 Department of Public Works**

As noted at Section 2.10 above, vector control was a function of the Suffolk County MCC, pursuant to § 1520 of the State PHL (Yannacone v. Dennison, 55 Misc. 2d 468 [Sup. Ct. Suffolk Co. 1967]). That Commission is still referenced in the SCC at § C8-2(I), but is no longer active. Amendments to the County Charter in 1973 established the SCDHS. These amendments continued the existence of the Suffolk County Health District, noting therein that the Commissioner of the Department would be the chief administrative officer of the District, and that any reference of the New York State PHL to a local commissioner of health and/or a local department of health would be deemed to refer to the newly formed Department or its Commissioner, as appropriate. The Commissioner was to be a County Health Commissioner within the meaning of Article 3, Title III, of the PHL (SCC § C9-1, § C9-2; L.L. No. 25 of 1973). Subsequently, vector control activities were the responsibility of the Division of Public Health in the DHS.

However, in 1992, amendments to Sections C8-2 and C8-4 of the SCC established the SCVC as part of the SCDPW and authorized the Division to “use every means feasible and practical” to suppress mosquitoes and other arthropods (SCC § C8-2, § C8-4; L.L. No. 16 of 1992). That Local Law also noted as follows:

“(A)lthough the authority for the county to establish a vector control program is contained within the New York State PHL, this law does not mandate that vector control activities be performed under the auspices of the local Health Department. However, in the event that an arthropod-borne disease is found to constitute a major public health threat, the DHS shall directly supervise vector control” (L.L. No. 16 of 1992, Section1 ).

SCVC is responsible for controlling mosquito infestations that are of public health importance, pursuant to the powers granted to the County under the PHL. In the event of a vector control emergency, “as defined” by the Commissioner of Health Services, the direct supervision of vector control shall be by the DHS (SCC § C8-2[Y], L.L. No. 16 of 1992).

### **3.2 Department of Health Services**

The SCDHS is responsible for monitoring and prevention of human diseases, including those borne by mosquitoes such as WNV and Eastern Equine Encephalitis (EEE). The Department monitors the blood supply, handles reports of WNV and EEE infected birds and horses, and responds to health emergencies through its Division of Public Health. In the event that an arthropod-borne disease is found to constitute a major public health threat, the vector control program would be under the control of the DHS (SCC, § C8-2[y], L. L. No. 16 of 1992).

SCDHS, Division of Environmental Quality, through its Office of Ecology, manages a number of water quality and restoration programs that involve wetlands managed by the Division of Vector Control. The Office of Ecology is involved in the PEP, and is the major County participant in the SSER.

### **3.3 No Spray List**

Suffolk County's No Spray List permits Suffolk County residents to register with SCVC to exclude their property from applications of adult mosquito control chemicals (i.e., aerosol and fog applications), but not larval control (i.e., application to water that breeds mosquitoes) or pesticide applications that are administered during a public health emergency. The list is compiled annually. Once a household is on the list, SCVC is required to make good faith effort to exclude the premises from pesticide application, by stopping adulticide spraying from its trucks within 150 feet of either side of said property (Suffolk County Code Part V, Ch. 848, Article 1 [Suffolk County Legislature Resolution No. 482-2001] [<http://www.co.suffolk.ny.us/webtemp3.cfm?dept=9&id=81>]).

In addition, during the 2001 calendar year (the year during which the law became effective), the no spray law only permitted residents to exclude their property from grounds applications, not aerial applications. (See Id).

To be placed on the SCVC registration list, residents must complete and forward a "no spray request form" to SCVC. In registering under the no spray law, a resident may deprive neighboring property owners of the benefit of pesticide applications, as spraying will stop within a predetermined distance of the registrant's property.

## **4. Local Municipal Authority**

### **4.1 Town-owned Bays and Harbor Bottoms**

A number of towns within Suffolk County were originally formed pursuant to Colonial-era charters, or “patents.” These patents may grant ownership of the bays and harbor bottoms to the towns, to be held in the public trust, and administered by elected town “trustees” (Knapp v. Fasbender, 1 N.Y.2d 212 [1956]; see e.g., the Dongan Patent of Brookhaven Town, or the Andros Patent of the Town of Southampton). Further information regarding these patents is available in a book by W. Keith Kavanaugh, entitled “Vanishing Tidelands: Land Use and the Law, Suffolk County, NY 1650-1979” (New York Sea Grant Institute, 1980).

### **4.2 Town Wetlands Codes**

In addition, a number of towns within Suffolk County have asserted jurisdiction over building and development activities in wetlands within their borders pursuant to the ECL (ECL § 24-507, § 24-509; see e.g., Brookhaven Town Code Chapter 81). In the event that a major vector control project was undertaken by Suffolk County, involving the creation of new vector control ditches or other excavation, it is possible that the towns in which said activities were planned would seek to be involved in the environmental review and permitting process (but see e.g. opinion of the New York State Comptroller, concluding that a town could not use its police power to deny access to lands within its jurisdiction by a county mosquito control program, due to the powers invested in the county under the PHL. 1967 Op. St. Compt. File # 316). At present, however, the towns defer to NYSDEC and Suffolk County jurisdiction as the main permitting authorities in the area of vector control.

### **4.3 Local Government Waterfront Revitalization Program (LGWRP)**

Pursuant to New York State law, any local government, or two or more local governments within the Coastal Area, acting jointly, may submit a LGWRP to the Secretary of State for approval (New York State Exec. Law § 915). The LGWRP is intended to augment the New York State Coastal Policies to reflect local conditions and concerns, and to be consistent with said Policies.

A local government may also prepare a comprehensive harbor management plan in conjunction with its proposed LGWRP. Such a plan may address competing needs in a harbor area, and provide for a comprehensive plan to reconcile those needs and interests (Exec. Law § 922, 6 NYCRR Part 603).

The LGWRP must be approved by the Secretary. Following approval of the proposed LGWRP by the Secretary, state agency actions must be consistent to the maximum extent practicable with the LGWRP (Exec. Law § 915[8]). Regulations governing the approval are set forth at 19 NYCRR Part 601. The Secretary is required to “periodically” review the administration and implementation of every LGWRP, and shall revoke approval if it is found that the policies and goals of the LGWRP are not being carried out in accordance with its terms (19 NYCRR § 601.7).

The number of municipalities in Suffolk County which actually have an approved LGWRP is fairly small: it includes the Villages of Greenport, Head of the Harbor, Lloyd Harbor, Huntington Bay, and Sag Harbor, the hamlet of Huntington Harbor (as part of the Town of Huntington), and the Town of Smithtown (New York State CMP Status Sheet, December 1, 2004).

The practical effect of an approved LGWRP on an application for a State or Federal permit for an action within the jurisdiction of that LGWRP will generally be that a consistency review of those permits may be required. The federal permits (e.g., the special use permit requested by FINS), (see Section 5.2 below), as well as state permits, for activities within the state Coastal Area will require consistency review.

## **5. Other Involved Federal Agencies**

### **5.1 United States Environmental Protection Agency (USEPA)**

In addition to its jurisdiction over the regulation, review and approval of pesticides and pesticide labeling under FIFRA and its authority to enforce the CWA (see Sections 1.1 and 1.2 above), USEPA provides general information regarding the transmission and spread of WNV through various publications available on its website ([www.epa.gov](http://www.epa.gov)).

### **5.2 Department of Agriculture**

Pursuant to FIFRA, USEPA must consult with the Department of Agriculture before issuing proposals to cancel the registration or change the classification of a pesticide. The Secretary of Agriculture must respond to said notification, and the Secretary's comments, along with the response of USEPA, must be published in the Federal Register (FIFRA Section 6[b] general statute: 7 U.S.C. §136d[b]).

Another function served by the Department of Agriculture with relation to vector control is protection and monitoring. The Animal and Plant Health Inspection Service (APHIS) is an integral part of the Department of Agriculture's efforts to protect and monitor the safety of animal and plant resources from agricultural pests and diseases, such as WNV, among others (<http://www.aphis.usda.gov/lpa/about/welcome.html>). The agency provides general information regarding the transmission and spread of WNV and the pesticides employed to combat its vectors (<http://www.aphis.usda.gov/lpa/issues/wnv/wnv.html>).

### **5.3 National Park Service, Department of the Interior**

The NPS provides general information regarding the transmission and spread of WNV (<http://www.nps.gov/publichealth/inter/info/factsheets/fswnvgen.htm>). In addition, the NPS monitors and manages mosquito populations, by, for example, implementing a Mosquito Action Plan (MAP) that is tailored to suit the particular region which is being monitored. The NPS has implemented a MAP with respect to the Fire Island region of Long Island (<http://www.nps.gov/fiis/ /MAPfy02.htm>).

FINS, a national park, is administered by the NPS. FINS was originally established by Federal Act of September 11, 1964 (Pub. L. 88-587, 78 Stat. 928, U.S.C. 459e). The park includes a 26-mile long stretch of Fire Island, as well as the William Floyd Estate, a 615 acre park located on the mainland of Long Island. The park boundaries on Fire Island encompass 17 communities, with approximately 4,100 homes. There are two incorporated villages within the park, each with their own governing bodies. (See FINS 2004 MAP, July 28, 2004).

FINS was represented at the Scoping session for the Generic Environmental Impact Statement (GEIS) for this project, and presented comments at the scoping hearing. In those comments, inter alia, the FINS representative advised that in keeping with NPS policy, FINS would require a NPS special use permit for any future actions related to the use of pesticides within the park boundaries (it appears that FINS has not previously sought such a permit for either public or private vector control efforts within the park). In addition, the representative advised that compliance with the environmental review procedures of the NEPA would be required prior to the issuance of any such permit. (See transcript of Public Scoping Session September 10, 2002, comments of Marie Sullivan, NPS, pgs. 000054-000058).

The 1916 National Park Service Act and a 1978 amendment to the National Park Service General Authorities Act require, inter alia, that the NPS promote and regulate the use of the parks within its jurisdiction with conservation as a fundamental purpose, and that the authorization of activities shall be construed in light of the high public value and integrity of the National Park System, not to be exercised in derogation of the values and purposes for which said parks were established (16 USC § 1, 16 USC § 1a-1). The Director of the NPS has promulgated Director's Order # 53, which guides the supervisors of the various parks in the issuance of special use permits. (See also 2001 National Park Service Management Policies, Chapter 8 [Use of the Parks], Chapter 4 [Natural Resource Management], § 4.4.5 thereof [Pest Management], and Director's Order # 77-7 [Integrated Pest Management Manual]).

The NEPA is discussed at Section 1.4 above. Forms for an application for a special use permit for FINS (NPS Form 10-930) are available from the website for the NPS.

#### **5.4 United States Fish and Wildlife Service (USFWS), Department of the Interior**

“To prevent and minimize the impacts of pesticides on fish, wildlife, and plants, the [Fish and Wildlife] Service provides the technical assistance and consults with USEPA during the registration and reregistration of pesticides” (<http://www.contaminants.fws.gov/Issues/Pesticides.cfm>). In addition, under the Endangered Species Protection Program, the Service cooperates with “USEPA Regions, States and pesticide users” in providing information on “pesticide use limitations intended to minimize impacts to threatened and endangered species.” (See Id).

Significantly, the Service’s National Wetlands Inventory “produces information on the characteristics, extent and status of the Nation’s wetlands and deepwater habitats,” which is “used by Federal, State and local agencies, academic institutions, U.S. Congress, and the private sector” (<http://www.wetlands.fws.gov/aboutus.htm>). “Congressional mandates in the Emergency Wetlands Resources Act require the Service to map wetlands, and to digitize, archive and distribute the maps.” (See Id).

#### **5.5 Department of Transportation : United States Coast Guard (USCG)**

The United States Coast Guard (USCG) is responsible for enforcing federal pollution and fish and wildlife acts and regulations in United States waters. USCG may respond to spraying activities in aquatic regions that it patrols to enforce federal law, and provides general information regarding WNV and vector control. (See e.g., <http://www.cgaux.net/WNV.html> [Coast Guard Auxiliary online pamphlet regarding WNV]). In addition, the Coast Guard undertakes certain activities geared toward controlling the mosquito population, and often employs new technologies – such as “mosquito magnets,” devices designed to attract and eliminate mosquitoes – in furtherance of this goal (<http://www.techtv.com/news/culture/story/0.24195.3335798.00.html>).

#### **5.6 United States Army Corps of Engineers (USACOE)**

The USACOE studies the effect of shoreline mosquito propagation, and implements actions to stave off the propagation of virus-carrying mosquitoes in shoreline regions, such as, for example, by granting permits to state and local municipal entities to dredge navigable and other waters



with a view toward inhibiting the growth of mosquitoes. USACOE protects wetlands under Section 404(a) of the CWA (<http://www.dec.state.ny.us/website/dfwmr/wetdes.htm>). Pursuant to § 404 (33 USC 1344[a]), USACOE regulates the discharge of dredged or fill material into “navigable waters” by means of the issuance of permits. The term “navigable waters” has been defined as waters of the United States, including territorial seas (33 USC § 1362[7]). The USACOE has issued regulations further defining said waters of the United States to include streams, mudflats, sandflats, wetlands, and natural ponds (33 CFR 328.3[a][3]). This includes all waters which are subject to the ebb and flow of the tide. USACOE’s own interpretation of its jurisdiction was narrowed somewhat by the United States Supreme Court in Solid Waste Agency of Northern Cook County v U.S. Army Corps of Engineers, 531 U.S. 159 (2001), in which the Court ruled that USACOE’s regulation extending its jurisdiction to isolated waters that are significant habitat to migratory birds exceeded the CWA’s jurisdiction over “navigable waters” (Weinberg, Environmental Law and Regulation in New York, Ch. 11, § 11.2 [West Publishing 2001]).

Pursuant to Section 401 of the CWA, prior to issuing a CWA permit, USACOE must receive certification from the state that the permit meets state water quality standards. In addition, pursuant to the Fish and Wildlife Coordination Act (16 USC § 661-666), the USACOE is must consult with the United States Fish and Wildlife Service (USFWS) in appropriate instances regarding its issuance of a permit.

USACOE implemented the Aquatic Plant Control Program (APCP), authorized by section 104 of the River and Harbor Act of 1958, as amended, the Removal of Aquatic Growth program, authorized by the River and Harbor Act of 1916, as amended, the Non-indigenous Aquatic Nuisance Species Prevention and Control Act of 1990 (PL 101-646), and the National Invasive Species Act of 1996 (Subtitle C, Sec. 1202 [i][3][A]).

Because non-native aquatic plants are a problem for all of the 48 contiguous states, and mosquito-borne diseases may be fostered by the propagation of mosquitoes in such areas, the USACOE APCP assists – directly and indirectly – in mitigating the mosquito population (<http://www.apms.org/japm/vol36/v36p25.pdf>).

### **5.7 National Wildlife Health Center, US Geological Survey**

The United States Geological Survey (USGS) operates the National Wildlife Health Center, a biological resources center, to assess the impact of infectious diseases on wildlife. The National Wildlife Health Center was established to address the health and disease issues of free-ranging wildlife (<http://www.nwhc.usgs.gov/about/nwhc/index.html>). The Center is “working with the Centers for Disease Control and Prevention (CDC) to learn the current geographic extent of WNV, to understand how it moves between birds, mosquitoes, and humans, and to predict future movements of the virus” ([http://www.nwhc.usgs.gov/research/west\\_nile/west\\_nile.html](http://www.nwhc.usgs.gov/research/west_nile/west_nile.html)).

### **5.8 Division of Vector Borne Diseases, Centers for Disease Control & Prevention (CDC)**

The Division of Vector-Borne Infectious Diseases of the CDC is concerned with vector-borne viral and bacterial diseases. The Division’s mission is to:

1. Develop and maintain effective surveillance for vector-borne viral and bacterial agents and their arthropod vectors;
2. Conduct field and laboratory research and epidemic aid investigations;
3. Define disease etiology, ecology, and pathogenesis in order to develop improved methods and strategies for disease diagnosis, surveillance, prevention and control;
4. Provide diagnostic reference and epidemiologic consultation, on request, to state and local health departments, other components of CDC, other federal agencies, and national and international health organizations; and
5. Provide intramural and extramural technical expertise and assistance in professional training activities.

Emphasis is given to laboratory and epidemiologic research to improve diagnosis, surveillance, prevention, and control of diseases of major public health importance” including such mosquito-borne diseases as WNV, yellow fever, and arboviral encephalitis.

## **5.9 Department of Commerce: National Oceanic & Atmospheric Administration (NOAA)**

The NOAA Office of Global Programs investigates the effects of climatic conditions on WNV-carrying mosquito populations and their habitats. The agency has recognized that

1. Longer summer seasons could expand the transmission season by supporting faster mosquito population growth and virus development and transmission;
2. Warmer winter temperatures could enhance the survival of certain mosquito species;
3. Wetter conditions can expand aquatic breeding habitats;
4. Drier conditions can allow pooling of water, particularly in urban environments, increasing mosquito populations.

<http://www.ogp.noaa.gov/aboutogp/spotlight/health/westnile.htm>

NOAA is also involved in the administration of the CZMA (see section 1.3 above). The National Marine Fisheries Service (NMFS), within NOAA, is consulted by the USACOE for advice regarding dredge/fill permits under the CWA (see section 5.5 above).

## **6. Pending Lawsuits Involving Suffolk County Vector Control**

### **6.1 The Challenge to the 2002 Plan**

#### **In re Peconic Baykeeper et al v Suffolk County et al**

**Index: 02-13925**

This is an Article 78 proceeding and action for declaratory and injunctive relief pursuant to CPLR § 3001. The petitioners sought a judgment annulling a determination of the Suffolk County Legislature to issue a negative declaration for the 2002 plan pursuant to SEQRA; for judgment declaring that a positive declaration should be issued for such plan; and enjoining the County DPW from commencing work under the Plan.

*Legal claim:* The petitioners asserted that the Suffolk County Mosquito Control Plan (MCP) was arbitrary, capricious and in violation of SEQRA and its implementing regulations. The petition alleged that the county legislature attempted to “evade SEQRA purposes and procedural mandates by taking only a cursory glance at the environmental harm that attends the Division of Vector Control’s 2002 Plan of Works.” Petitioners additionally claimed that the county prepared the EAF in such a way as to avoid preparing an EIS for the MCP. Petitioners claim that the County made misrepresentations regarding the existing County mosquito control ditches. The Petition also alleged that the plan would have a large impact on critical environmental areas. It further alleges that the component of SCVC’s plan involving the reopening of the ditches materially conflicts with the CCMP of the PEP.

The Petition included an Affidavit from the Baykeeper with an extensive list of wildlife in the area, and listed the alleged effects the vector control program would have on wildlife. The PEP Pledge was included in the exhibit. This comprehensive document lists and describes the Peconic Estuary area, and prescribes how it should be protected and preserved. The 2002 County EAF is also included as an exhibit.

The petition includes an Affidavit of Fred Chiofolo. Chiofolo is a fisherman who crabs in the area, claims he has seen helicopters spraying over the water in which he crabs, and asserts that this spraying has damaged the crab population.

*Decision:* Hon Paul J. Baisley Jr., of the State Supreme Court dismissed the Article 78 petition, holding that judicial review of the SEQRA process is limited to whether the agency's determination was made in violation of the proper procedures, was affected by an error of law, was arbitrary and capricious, or an abuse of discretion. The court further went on to say that "(a)lthough judicial review in SEQRA matters must be meaningful, it is not the role of the courts to 'weigh the desirability of any action or choose among alternatives, but to assure that the agency itself has satisfied SEQRA, procedurally and substantively'" (Matter of Jackson v State of New York 503 NYS2d 298). The court further went on to say that: (1) the issues in the petition were moot; and (2) even if the court were to adjudicate the claims, the County had performed the review as legally required. The 2002 case was dismissed as moot. Inasmuch, the Court never reached a conclusion as to the merits of the case.

Once it was clear that Suffolk County was extending its 2002 plan into 2003, the Petitioners made a motion for leave to renew. The Supreme Court denied this motion, holding that it would not have changed the outcome of the case. The Petitioner also filed a motion to consolidate the 2002 appeal and 2003 suit; that motion was dismissed as "academic."

After Judgment, Petitioner filed a Notice of Appeal on April 14<sup>th</sup> 2004. This appeal has been dismissed by the appellate division.

## **6.2 The Challenge to the 2003 Plan**

### **In re Peconic Baykeeper et al v Suffolk County et al**

Supreme Court Index Number: 03-10744

App Div Number: 2004-050551 & 2004-06439

This is an Article 78 proceeding and action for declaratory and injunctive relief pursuant to CPLR § 3001. The Petition sought a judgment annulling the Suffolk County Legislature's SEQRA Negative Declaration for the extension of the 2002 Vector Control Plan to 2003; and the continuation of the SCVC 2002 Plan of Work extension into 2003. Petitioner further sought judgment enjoining the County DPW from commencing the Vector Control Project.

The County had determined that the continuation of the DPW 2002 program through calendar year 2003 constituted a Type II action for the purposes of SEQRA. Petitioners claim that the County should have filed a 2003 plan, issued a positive declaration, and then completed a SEQRA review. Instead of filing the 2003 plan, the County simply continued the 2002 plan and issued a Negative Declaration. Petitioners allege that the County continued the 2002 plan to circumvent the requirements of SEQRA. The Supreme Court rejected the County's argument that 2003 plan was properly classified as Type II action. The Court found that Suffolk County's decision to issue a Negative Declaration was arbitrary and capricious, and an abuse of discretion.

*Decision:* Justice Baisley held in favor of the Petitioner. The Court held that Suffolk County is required to spray under the WNV Response Plan by immediately initiating the SEQRA process for the 2004 plan. In addition, the Court enjoined the county from commencing work under the 2002 plan in 2003.

A Notice of Appeal was filed by Suffolk County on August 13, 2004. This appeal has been dismissed as moot by the appellate division.

### **6.3 The Challenge to the 2004 Plan**

#### **In re Peconic Baykeeper et al v Suffolk County et al**

Supreme Court Index Number: 04-7322

Justice Paul J. Baisley Jr.

The petition in the 2004 case is a Article 78 proceeding, seeking judgment annulling the Suffolk County Legislature's Type II Determination under SEQRA for continuation of the 2002 Plan and enjoining the DPW from commencing work under 2002 plan.

*Decision:* The court determined the Suffolk County Legislative resolution declaring the 2004 work as Type II, to be arbitrary and capricious, and enjoined the County from doing any spraying until after 2004 SEQRA was complete. A Notice of Appeal was filed by Suffolk County. The appeal is currently pending before the appellate division.

## **6.4 The Challenge to the 2005 Plan**

### **In re Peconic Baykeeper et al v Suffolk County et al**

Supreme Court Index Number: 05-00262

Justice Paul J. Baisley Jr.

The 2005 petition is a Article 78 proceeding claiming that Suffolk County's decision to issue a Negative Declaration for the 2005 plan is in violation of SEQRA, and the 2005 plan poses a significant environmental hazard. The Petition claims the Suffolk County Legislature did not take a "hard look" at the environmental impact as required. The petition also claims that the 2005 work is in direct contradiction to the PEP. The Petition then claims that the long term vector control plan violates SEQRA because a complete EIS has not yet been completed.

Suffolk County's answer responds that all of the County's determinations were lawful and proper in all respects and were not arbitrary nor capricious, and that the Petitioner failed to show direct injury.

The court found that the County Legislature's decision to issue a negative declaration for the 2005 annual plan was arbitrary and capricious. Suffolk County Resolution 1303-04 was annulled and the matter was remitted to the Suffolk County Legislature for further environmental review.

## **6.5 THE CLEAN WATER ACT CASE**

### **Peconic Baykeeper Inc v Suffolk County et al.**

US District Court: Eastern District of New York

Civil Action: CV-04-4828

Filed November 2004

This Federal suit is brought under Section 505(a)(1) of the Federal Water Pollution Control Act. This suit claims that the Peconic Area is a wetlands within the meaning of the CWA and that

operation of the vector control ditch network directly impairs the natural hydrology of tidal wetlands which in turn affect the wildlife. The Complaint also claims that the resmethrin in the pesticide is “highly toxic to fish and marine invertebrates” and has killed fish which injured the plaintiffs. The Complaint requests the following relief: (1) a declaration that the defendants are in violation of the CWA; (2) civil penalties; (3) an award of costs and fees.

The answer by Suffolk County denies the allegations and further raises the Affirmative Defense that the complaint fails to state a claim upon which relief can be granted.

This case is currently pending and a motion for Summary Judgment is before the Court.

## **6.6 PERMIT CHALLENGE I**

### **Baykeeper v New York State DEC et al.**

Suffolk County Supreme Court

Index 2004-19089.

Petition Filed: August 2004

Case Pending

This is an Article 78 proceeding to declare the permit issued under the Environmental Control Law to the SCDPW for mosquito control in tidal wetlands during 2004, due to NYSDEC’s failure to make a adequate determination under SEQRA prior to issuing the permits. This petition charges with violation of SEQRA by failing to review the permit as required.

In response to the petition, the state filed a motion to dismiss for lack of judiciable controversy, asserting that there is no actual controversy, but an abstract hypothetical issue. This motion was denied.

## **6.7 PERMIT CHALLENGE II**

### **Town of Southampton v New York State DEC et al.**

Suffolk County Supreme Court



Index Number: 2004-19068

This is an Article 78 proceeding and is parallel to Permit Challenge I. The primary difference is that the Petitioner is the Town of Southampton, not the Baykeeper. The elements and theory of the case is almost identical to Permit Challenge I.

The Suffolk County response to this case was to make a motion to dismiss, this motion was similar to Permit Challenge I. This motion was denied in February 2005.

## **7. Regulator Interviews**

As part of the Task 2 effort, interviews were conducted with regulatory agencies responsible for compliance enforcement of regulations pertinent to the operations of the SCVC Program.

### **7.1. United States Environmental Protection Agency (USEPA)**

USEPA is responsible for enforcing the requirements of Federal regulations regarding mosquito control activities, including the FIFRA, the CWA, and the National Pollution Discharge Elimination System (NPDES), as applicable.

In USEPA Region 2, this activity is conducted within the Division of Enforcement and Compliance Assistance (DECA) under the supervision of Director Dore F. Laposta. The Pesticides and Toxic Substances Branch of DECA, under the direction of Kenneth S. Stoller, has direct responsibility.

For the purposes of this report, an interview was conducted with Mr. Stoller, as well as Dr. Adrian J. Enache, Ph. D., M.P.H., who leads the pesticide team for USEPA Region 2 and is also a member of the Technical Advisory Committee for this study. As stated in the interview, which was conducted by telephone, USEPA has delegated all authority regarding the SCVC Program to the NYSDEC.

### **7.2 New York State Department of Environmental Conservation (NYSDEC)**

New York's regulatory framework for pesticides mirrors the Federal regulations, predominantly FIFRA, for pesticide management. New York State has received USEPA approval of its enforcement program pursuant to FIFRA, and thereby exercises primary enforcement responsibility. NYSDEC administers and enforces regulations pertinent to mosquito control in New York pursuant to the authority set forth in the ECL, particularly Articles 15 (water resources), 33 (pesticides) and 71 (enforcement) relating to pesticide use, and Articles 24 (freshwater) and 25 (tidal) relating to wetland permits.

For the SCVC program, this authority is administered by NYSDEC Region 1, under the supervision of Regional Director Peter A. Scully and RPA John W. Pavacic.

For the purposes of this report an interview was conducted, at the NYSDEC Regional Offices in Stony Brook, with Mr. Pavacic as well as Gregory Koslowski, Regional Manager, Bureau of Habitat. The discussions are summarized below.

#### 7.2.1. ECL Article 15 – Aquatic Pesticide Permits (APPs)

APPs are required if any mosquito larvicide or pupicide is to be used in or over any surface waters of the County, with very limited exception. Surface waters are exempt only if they meet all of the following criteria:

1. Lie wholly within the boundaries of lands privately owned or leased by the individual making or authorizing treatment.
2. Measure one acre or less in size.
3. Have no outlet to other waters.
4. Are temporary ponds, or are ponds that do not contain fish.

Examples of waters that are subject to Article 15 requirements include sumps, recharge basins, roadside swales, fresh and tidal wetlands and their adjacent areas, and catch basins and storm drains.

Adulticides are prohibited by label directions from use in or over surface waters, and are therefore not used in areas subject to Article 15. Application of adulticides in non-aquatic sites does not constitute use of pesticide in or over surface waters and, therefore, such pesticide use is not subject to an APP. The Article 15 permits are issued by the NYSDEC Region on an annual basis, and are specific for each chemical used with respect to formulations and approval for particular areas.

APP requirements are not reduced suspended or modified due to an emergency situation.

### 7.2.2. Article 24 – Freshwater Wetland Permits (FWPs)

Pesticide use and habitat modification activities are subject to FWPs. With respect to pesticide use, FWPs are often required independent of whether an Article 15 APP is required. This is common in regulated “adjacent areas” (within 100 feet of a wetland boundary), which do not constitute “waters of the state” and therefore do not require Article 15 permitting.

Habitat modification activities that would require a Freshwater Wetlands Permit could include the draining of a wetland area and water management projects. Article 24 permits can be issued for up to a five-year period.

FWP requirements are subject to change due to an emergency situation.

### 7.2.3. Article 25 – Tidal Wetland Permits (TWPs)

Pesticide use and habitat modification activities are subject to TWPs. Commonly, authorization for pesticide use under Article 25 can be expressed as a component of the Article 15, APP process with reference to the regulated tidal wetlands and their adjacent areas. If an Article 15 permit has been issued, the action is considered to be “otherwise authorized by law” and a separated Article 25 permit is not required.

Habitat modification activities, such as Open Marsh Water Management (OMWM) require Tidal Wetlands Permits, specific for each area being addressed. The construction or modification of mosquito control ditches would require a TWP. Ordinary maintenance and repair of existing mosquito control ditches does not require a permit provided that it does not involve a regulated activity.

Suffolk County was issued a 10-year general permit for mosquito control ditching which expired in 2002. Under this permit, the county was allowed to maintain ditches anywhere in the County, and maintain and replace water control structures. Expansion of the ditch system was also allowable. A new permit, with an expiration date of December, 2004, was issued to the County. Justice Baisley held that this permit may not be expanded into the 2005 year.

Tidal Wetlands Permit requirements are subject to change due to an emergency situation.

#### 7.2.4. Other Potential State Permits

In addition to those permits discussed in the previous sections, which will most routinely apply to the activities of the SCVC Division, the following may also have applicability depending upon the specific action being undertaken. This is not intended to present a complete and comprehensive list of all permits that could be required under any circumstances, but those discussed during the interview that could most likely be utilized.

- Article 15 – Protection of Waters Permit: would apply if excavation or filling activities were taking place in navigable waters of the state.
- Article 15 – Wild, Scenic and Recreational Rivers Permit: would apply if mosquito control activities impacted a state-registered river, including the Nissequogue, Carmans, and Peconic Rivers. There has been no historic activity of this type for mosquito control in the county to date.
- Fish Stocking Permit: would apply for permission to stock a water body with fish that would eat mosquito larvae, most commonly *Gambusia affinis* and *G. holbrooki*.
- Stormwater, Phase II Regulations: - would apply if a mosquito control project disturbed more than one acre of land.

### 7.3 Other Potential Reviewing Agencies

Mosquito control projects may also come under the review of the US Army Corps of Engineers through the Joint Application for Permit as part of the Nationwide Permit Program. These applications will also be reviewed by the New York State Department of State, Division of Coastal Resources for compliance with the New York State Coastal Policies regarding wetlands preservation and flooding and erosion controls.