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US WATER SERVICES PRIVATIZATION

KEY ISSUES & EXPERIENCES

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INTRODUCTION & BACKGROUND

A surging interest in public-private partnerships in the urban water utility sector prompted the National Research Council Water Science and Technology Board to appoint an expert committee in the late 1990s to review issues and experiences with water services privatization in the United States. That committee's report, *Privatization of Water Services in the United States: An Assessment of Issues and Experience*, was released in 2002 (NRC, 2002). This paper summarizes that report and its primary findings.

There is a long history of private delivery of water services in the United States (US). Most of the nation's large urban water systems were initially private ventures. As the nation's cities expanded, the resources required to adequately maintain and extend the water infrastructure often grew beyond the means of the private sector. Today, investor-owned water utilities account for about 14 percent of total US water revenues, a market share that has held remarkably steady since World War II (EPA, 1997). There are currently about 54,000 US community water systems, the vast majority of which serve fewer than 10,000 people.

The term *privatization* covers a broad spectrum of water utility management, operations, and ownership arrangements, ranging from private provision of services and supplies (e.g., laboratory analysis) to contracting with a private firm for operation and maintenance, or contracting for plant design, construction and operation. In the US, the outright sale of water utility assets to a private firm seldom occurs except in cases of consolidation of small systems. No major US city has sold its water system assets in recent decades. The most common form of water services privatization in the US has been the outsourcing of operations and maintenance from a public utility to a private firm.

Several factors are driving US municipal officials to consider some degree of privatization of their drinking water and wastewater treatment systems. A key factor is a large backlog of deferred maintenance of water storage, treatment, and distribution systems. Some estimates place the figure for needed investments for US water utility infrastructure replacement at $250 billion, or greater, over the next thirty years. Utilities are also challenged to comply with increasingly stringent water quality standards. The Clean Water Act and the Safe Drinking Water Act continue to play important roles in initiating changes in utility management and operations.

Several large water service delivery firms, based in both the US and abroad, possess ample resources, competent business and technical staff, and state-of-the-art laboratory and other facilities and are seeking to increase their share in the US water utility sector. The larger global firms include: Suez (based in France) and its water division; ONDEO; the German-based multi-utility firm RWE; and the French firm, Vivendi Environment. US companies include: the American Water Works Company, Inc. (which merged with RWE in 2002); the Philadelphia Suburban Corporation; and the San Jose Water Company.

Water Services Contract Terms

Public Control

Competition?

Transparency

Workforce

Municipal Bonds

Benchmarking

CONCERNS REGARDING WATER SERVICES PRIVATIZATION

The complexities of water services privatization require that contracts between the city government or public utility and the private contractor be carefully negotiated and structured, lest problems arise later in the process. For Example, the City of Indianapolis recently repossessed its water utility from a private contractor, while the city of Atlanta cancelled its contract with a private water services operator.

Community leaders and citizens are frequently concerned about channels of communication, protection of watersheds and public participation in policy decisions.

Community leaders are also concerned about loss of control over a vital public service because a public official can never fully transfer accountability for water utility management to the private sector. If a water service privatization arrangement fails to meet the public's expectations, the public is more likely to lodge protests with the public official than with a private contractor. Community leaders must also ensure that some recourse is available in the event that a privatization arrangement does not develop as intended.

There is a tendency in the public's mind to equate privatization with competition, as some may assume that a privately held firm's operations will be more "efficient" because of its greater exposure to forces of the market. In practice, however, competition is limited to the period when competitive bids are being accepted or in serving growth areas. Once a contract is signed, only monitoring and enforcement of the contract terms — not market forces — can guarantee expected levels of performance.

Another concern relates to openness and transparency of utility policies and practices. Deliberations of public bodies are subject to numerous "sunshine" provisions which require open meetings and records. However, when a private firm assumes operations or ownership, business practices may not be readily shared with the public. A related issue is how privatization affects the welfare of the utility workforce. There are often concerns that workers may be exploited or that jobs will be lost. The largest source of cost reductions historically has been more efficient labor use, often through cross-training. However, most contracts preclude workforce reduction except through natural attrition.

A key concern of private contractors is the high cost of preparing a detailed technical and financial proposal for buying or managing a major utility system. Contractors must consider the likelihood that a contract will actually be signed. In some cases, requests for contract proposals have been issued with the primary intent of spurring better performance by the public utility.

Shortly after World War I, Congress granted an interest-rate subsidy to municipal government bonds. By exempting investors from having to pay income tax on municipal bond interest, the federal government granted municipal borrowers a 2.5 to 3 percent borrowing cost advantage over private investors, which private firms often feel constitutes an "uneven playing field."

OPTIONS FOR IMPROVING DELIVERY OF WATER SERVICES

Public officials have several choices when considering options for improving water utility performance: 1) improve existing public operations; 2) contract minor or major services to the private sector; or 3) transfer ownership of the utility's assets to the private sector.

Improving Operations

A major tool for improving public utility performance has been "benchmarking"— i.e. the process of comparing a utility's overall performance or select processes to the performance of similar utilities. It is accomplished through approaches that range from informal comparisons of data to sophisticated statistical analyses. The *Water Utility Benchmarking Association* conducts benchmarking studies to identify practices that improve the overall operation of its members (see website: www.waterbenchmarking.com). The International Organization for Standardization (ISO) has also developed a set of international standards for utility performance. Based in Switzerland, the ISO uses a standardized system for assessing company performance. Both public and private companies engage in these self-improvement practices.

In one example of an effort to improve existing water utility operations, the Phoenix Water Services Department (PWSD) began an internal review in 1995 to see how it compared with other well-run public utilities. Its program focused on ensuring that no employee involuntarily lost a job, maintaining or improving customer service levels, and emphasizing on-the-job training and cross-training — i.e.

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Water Services

encouraging staff to develop multiple skills. Phoenix has been pleased with these efforts, which have produced substantial cost savings and reduced the need to hire additional staff. In addition to tangible, direct improvements in select performance indicators, such programs can initiate positive changes in "institutional culture." Although private water firms have not greatly increased their share in the US water market during the 1990s and early 2000s, the specter of privatization has often motivated improved performance of US public water utility systems through the implementation of benchmarking, "re-engineering" and similar initiatives.

Contracting Operations to the Private Sector

Outsourcing

Contractual arrangements for services are often referred to "outsourcing." They cover ancillary services such as meter reading, laboratory services, vehicle maintenance or major operating responsibilities. These arrangements are intended to allow businesses to focus on their core functions and competencies by hiring specialists to perform ancillary duties. Towns usually outsource only a limited portion of water utility operations.

Management Role

With privatization of operations, local government's role shifts from traditional utility management to an emphasis on contract management and oversight. The talents and skills needed for contract management (e.g., legal, fiscal, & performance evaluation) differ from the skills needed for traditional operations (e.g., engineering, public service). Public organizations having internal management problems are not likely to effectively manage outside contractors (Scalar, 2000). Successful contract operations depend on good contractor-public agency relations, which are rooted in a contract that clearly states contractor and public agency responsibilities, consumer preferences, and clear, measurable performance indicators.

Regionalization

Contract operations are common in smaller, rural communities in the US. Drinking water and wastewater treatment systems in these areas generally serve less than 3,300 households and businesses. In the US, these systems comprise 78 percent of all drinking water systems, with most of them serving fewer than 500 people. For smaller, remote communities, *regionalization* — i.e. consolidating utility management and operations across several communities in the same area — has helped achieve economies of scale and performance improvements. The regionalization option can be carried out by either public or private operators. The City of Cincinnati's Department of Water Works, for example, has been active in assisting and consolidating smaller suburban utilities. The US Environmental Protection Agency (EPA) has long advocated "public-private partnerships" in the water utility sector (EPA, 1990).

D-B-O Option

One form of these partnerships that has been used frequently is the Design-Build-Operate (DBO) option. In the DBO process, a private firm designs a water or wastewater facility, then builds and operates the plant under a contract, which typically runs for 15-to-25 years. The designer is motivated to anticipate operations problems and to design a plant that will perform efficiently over the contract period. The contractor is obligated to deliver a constructed facility by a certain date and at a guaranteed cost, and the facility must pass an independent evaluation of its performance. At the end of the contract performance period, the community owns the facility.

Sale of Utility Assets to a Private Company

Assets Sale

Turning over ownership of a water utility's assets to an investor-owned utility is the most extreme form of privatization, and is not an option that any major US city has recently exercised. There are, however, situations in which this represents a reasonable choice (Beecher, 2000). Potential advantages of moving to investor-ownership include local government's release from direct management and planning operations, the generation of "up front" funds for other municipal purposes, the transfer of monitoring responsibilities to the State Public Utility Commission and the distancing of operations from local political influences. There are, however, disadvantages of this option. Correctly estimating the value of water utility assets can be a challenging exercise, and in the event it is decided to re-acquire utility assets, the ensuing process may require a city to exercise powers of eminent domain and can be costly and controversial. A major issue is the perceived loss of control of the assets, perhaps more a psychological effect than a real operational impact.

Drawbacks

PRICING AND REGULATORY ISSUES

Replacement Costs

Large financial resources are required to maintain and repair aging water infrastructures and to extend infrastructure to new areas that are experiencing population growth. Even when stated in comparable dollars, replacement costs far exceed original installation costs. Estimates of the price tag for the needs of the US water and wastewater treatment and distribution infrastructure range from $250 billion in the next 30 years (AWWA, 2001) to roughly $1 trillion in the next 20 years (WIN, 2000). Many analysts agree that water and wastewater services historically have been underpriced. Given the needs of the US water infrastructure, it is becoming increasingly difficult to avoid or postpone the

Water Services

Cost-Based Rates

Regulation

Unique Circumstances

Size Considerations

necessary (often long-neglected) maintenance costs. These costs must be supported by rate increases. Many studies indicate that there is a strong public willingness-to-pay for reliable, high-quality water services (AWWARF, 1998; Howe and Smith, 1993, 1994). Nonetheless, water managers and city councils often lack the political will to increase prices or to practice cost-based rate-setting. There are legitimate equity concerns regarding the impact of raised prices on the poorer segments of the population. That concern, however, can be addressed through block rate structures that provide basic water needs at a nominal price. All community water systems in the US are subject to regulation by state water agencies pursuant to the federal Clean Water Act and Safe Drinking Water Act. Systems must meet federal standards, but states can impose additional standards. US states have primacy with respect to water quality regulation, including regulation of withdrawals and diversions. State level economic regulation controls the prices and profits of investor-owned utilities as a substitute for market competition.

SUMMARY AND CONCLUSIONS

The backlog of maintenance and expansion needs of the US' water treatment and distribution systems are tremendous. The resources necessary to maintain, repair, and upgrade drinking water and wastewater treatment facilities are not always readily available from the public purse, and public officials are often reluctant to accept the political consequences of raising taxes or fees to help cover these costs. Some form of privatization of water services represents a viable alternative in many instances. Privatization takes many forms, ranging from the contracting of minor services such as meter reading and laboratory analysis to the transfer of assets to the private sector. No one form of privatization best fits all situations, and privatization agreements and contracts should be tailored to a water utility's and community's unique circumstances. However, privatization should not be equated with competition, as competition exists primarily during the contract bidding, and largely ceases to be a factor after reward of a contract.

The option of privatizing some portion of water utility operations and services does not represent a panacea for addressing all water utility problems. Not all water privatization efforts in the US have been successful, and privatization has, in some instances, led to repossession of assets and cancellation of contracts. Well-run and poorly-run utilities can be found in both the public and private water sectors.

Small to medium-sized water utilities frequently lack financial resources and therefore are prime candidates for some degree of water utility privatization. Consolidation of multiple smaller water utilities often represents an attractive option, and can be initiated by either larger public or private utilities.

An important effect of the possibility of privatization in the US has been to motivate public water utilities to improve their performance. With large multinational firms looking for opportunities to increase their share in the US water market, many public utilities have responded by instituting practices such as "benchmarking" and "re-engineering" to help raise performance levels.

Despite the presence of sophisticated and experienced multinational and US firms in the water utility sector, continued public ownership and operation is the most likely future for the majority of water utilities. The 14 percent market share of private firms in the US water business has remained steady over the past fifty years and is likely to so remain.

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National Research Council website: www.nationalacademies.org/nrc/

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ESA Update

ENDANGERED SPECIES ACT UPDATE

SUMMARY OF THE 12TH ANNUAL ESA CONFERENCE

by Greg D. Corbin, Stoel Rives LLP (Portland, OR)

Conservation Value

The extraordinary scope of activity in federal Endangered Species Act (ESA) litigation, regulation, and policy in 2004 was the topic of the 12th Annual Endangered Species Act conference put on by The Seminar Group in Seattle, Washington. The conference, co-chaired by Melanie J. Rowland (NOAA, Office of General Counsel, Seattle) and James M. Lynch (Stoel Rives LLP, Seattle), featured a stellar array of ESA experts from academia, government, private legal practice, and environmental advocacy groups. Keynote speaker William D. Ruckelshaus, whose resume is too long to list but includes being a former two-time administrator of the federal Environmental Protection Agency (EPA), introduced an enduring theme of the conference — the need for locally derived and supported conservation efforts– through his discussion of the "Shared Strategy," a watershed-based salmon recovery plan for part of the Puget Sound in Washington. Other speakers, such as Larry Phillips, Chair of the Metropolitan King County Council, echoed this theme, but it was Professor Emeritus of Zoology at the University of Washington, Gordon H. Orians, who admonished the audience to pull back from the details and squabbles of the ESA (the trees) to see and embrace the moral value of conservation and stewardship that underpins the act (the forest). Recognizing and acting on this moral ground will grow individual and collective efforts to bring species back from the brink of extinction. This author, for one, was encouraged and inspired by these forest-scale discussions of species protection. Equally interesting, however, was the remainder of the conference, which was often deep in the trees, perhaps even the underbrush, of the ESA. What follows is a summary of many, but not all, of the topics discussed.

ESA Update

Listing

Species Designation

The ESA accomplishes nothing for species protection until the US Fish & Wildlife Service (FWS) or National Oceanic and Atmospheric Administration (NOAA) Fisheries (collectively, the "Services") decides that a species qualifies for protection under the ESA. The decision is driven by the listing process and criteria in ESA Section 4. The ESA commands that the decision be based on the best available science. Even the casual observer recognizes that the decision to list a species and afford it the significant protections of the ESA is a pressure point for controversy. What the same observer may find surprising is that a persistent component of the listing debate is "What is a species?" That topic was addressed by Patti Goldman (Earthjustice, Seattle) and William W. Stelle (Preston Gates & Ellis LLP, Seattle).

"DPS"

The ESA defines "species" to include "any subspecies" and "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). Although honest scientific debate continues over how exactly to define and delineate species and subspecies, as a practical matter those terms are well understood within the scientific community. The same cannot be said for the term "**d**istinct **p**opulation **s**egment" (DPS), which, unlike the terms "species" and "subspecies," had no currency in the scientific community prior to its use in the ESA. Not surprisingly, the term and its use by the listing agencies have generated significant controversy.

Controversy

Examples of controversy over listing a DPS abound. Goldman's presentation covered the most contemporary examples – listing wild vs hatchery salmon, southern resident orca whales in Puget Sound, Arizona pygmy owls, steelhead trout, and the recent status review of marbled murrelets. These controversies stem in part from very different views of the listing decision process. Under the Services' listing policies, determining whether a population is eligible for listing turns on: (1) its *discreteness* from the remainder of its species; and (2) its *significance* to the remainder of its species. According to Stelle, a former NOAA Fisheries Regional Administrator, the listing decision is and properly should be a matter of objective science. He saw his role as Regional Administrator as minimal in listing decisions, relying heavily on briefings from his scientific staff. In contrast, Goldman's view is that too much subjectivity has crept into the listing process, and that the examples she presented illustrate how listing decisions, especially with respect to whether a population is discrete, are driven by subjective concerns of the administration, not objective science.

Discreteness & Significance

Critical Habitat Designation

The Services shall, "to the maximum extent prudent and determinable," designate critical habitat concurrent with listing a species as threatened or endangered. 16 USC § 1533(a)(3)(A). The designation must be based on "the best scientific data available" but, unlike listing decisions, the Services must consider "the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 USC § 1533(b)(2). "Critical habitat" includes specific areas within the species' range at the time it is listed on which are found physical or biological features that are essential to the conservation of the species and which may require special management considerations. 16 USC § 1532(5)(A). Critical habitat also may include areas outside the species' range if the Secretary determines that they are "essential" for the species' conservation. *Id*. § 1532(5)(A)(ii). The designation of critical habitat generally should not include all areas that the species possibly could occupy. *Id*. § 1532(5)(C).

Species' Range

Historically the Services gave critical habitat designations a low priority because agency personnel believed it provided little added protection to listed species. This view of critical habitat resulted in the Services giving little attention to the economic analysis required when designating critical habitat. The Services reasoned that because there was little added benefit to critical habitat not already provided by the co-extensive protections afforded by Sections 7 and 9, there would be little economic impact from designation. That analysis was successfully challenged in a line of cases beginning with *New Mexico Cattle Growers' Association v. U.S. Fish and Wildlife Service*, 248 F3d 1277 (10th Cir 2001). The court held that "Congress intended that the FWS conduct a full analysis of all of the economic impacts of critical habitat designation, regardless of whether those impacts are attributable co-extensively to other causes." The Services have responded to this and subsequent cases by formalizing an extensive economic analysis in each critical habitat designation.

Economics

Donna Darm (NOAA Fisheries, Assistant Regional Administrator) and Mark Plummer (NOAA Fishieries, Economist) presented the results of NOAA Fisheries' 2004 Draft Economic Analysis of Critical Habitat Designation for 13 Pacific Salmon and *O. mykiss* (Steelhead) ESUs. The draft analysis is data rich and very dense. A key feature of the analysis is its different treatment of benefits of designation vs benefits of exclusion. The analysis does not attempt to place a monetary value on the benefits of critical habitat designation. Rather, it expresses these benefits is biological terms. In contrast, the benefits of excluding an area from critical habitat designation are expressed in monetary terms. The

Designation v. Exclusion

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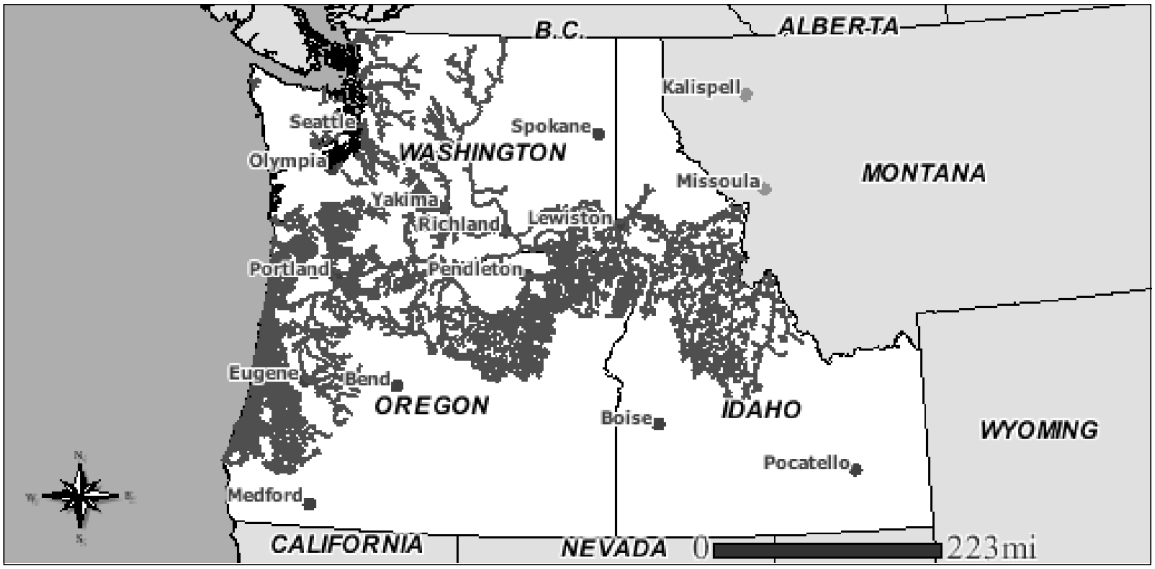
analysis focuses on 5th field watersheds as a unit of study, sets as a baseline condition ESA protections such as those provided by Section 7, attempts to value the "stigma" associated with critical habitat designation on property, and considers whether designation "triggers" other requirements and their associated costs. From this analysis NOAA Fisheries seeks to find a "cost effective" designation. Those interested in the details can view the entire 689-page analysis at http://www.nwr.noaa.gov/1salmon/salmesa/crithab/NWRECONRPT.pdf.



This map depicts the general areas that NOAA Fisheries is proposing to designate (or exclude) as critical habitat under the ESA for 13 Evolutionarily Significant Units (ESUs) of Pacific salmon and steelhead (O. mykiss) in the Northwest.

The Environmental Baseline in Section 7 Consultations

Jeopardy Consultations

Mark Eames, (NOAA, Office of General Council), James Lynch (Stoel Rives LLP, Seattle), and Todd True (Earthjustice) discussed the evolving standards under Section 7(a)(2) of the ESA, which requires each federal agency, "in consultation with [the Services], insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical habitat]." 16 USC § 1536(a)(2). Existing impacts to the species – the "environmental baseline" – are not part of the action under consultation.

"Baseline"

The environmental baseline is important in an ESA Section 7 consultation because it is generally conceded that the future impacts of a proposed action, such as the operation of a dam, is properly considered as part of the proposed action. There is debate, however, over whether ongoing impacts from an existing structure like a dam that blocks upstream habitat should be considered part of the environmental baseline to which the proposed action of operating the facility should be compared, or be considered as part of the proposed action itself. [See Brief, TWR #10]

Existing Facilities

This issue received significant attention recently because of a change in the way NOAA Fisheries has approached the effects of existing Federal Columbia River Power System (FCRPS) dams in its recent **b**iological **o**pinion (BiOp). Specifically, NOAA Fisheries determined that FCRPS dams and their ongoing effects are part of the environmental baseline because the Corps of Engineers and Bureau of Reclamation lack the discretion to do anything but continue to operate the dams. The Services continue to argue, however, whether or not they may properly consider the ongoing effects of existing facilities (including dams) as part of a proposed action's effects.

Ongoing Effects

Distinguishing between the environmental baseline and the proposed action when considering the ongoing effects of an existing facility is critical to: (1) the results of the Services' jeopardy analysis; and (2) what the Services can require in response to any perceived impacts. Including ongoing facility effects as a project impact increases the total perceived impacts of the proposed action, which could make it easier for the Services to conclude that the action is likely to "appreciably reduce" the species' likelihood of survival (a.k.a. jeopardy). In addition, by construing the proposed action to include the ongoing effects of an existing facility, the Services increase the range of measures that they can require a project proponent to take in response to perceived impacts. For example, in a "no jeopardy" biological opinion, the terms and conditions of the applicable Service's incidental take statement could require the project proponent to implement minimization measures designed to address the effects of existing facilities. Even more importantly, in a "jeopardy" biological opinion, the Service could propose a "reasonable and

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BiOp Litigation

prudent alternative" to address the perceived jeopardizing effects of such facilities. Neither of these measures are appropriate if the Services are properly considering existing facilities and their ongoing effects as part of the environmental baseline rather than the proposed action. NOAA Fisheries approach in its 2004 BiOp for the FCRPS will be tested before Judge Marsh in Portland, Oregon in ongoing litigation (*National Wildlife Federation v. Nation Marine Fisheries Service* [For background, see 2004 WL 1698050 (D.OR. July,29, 2004)].

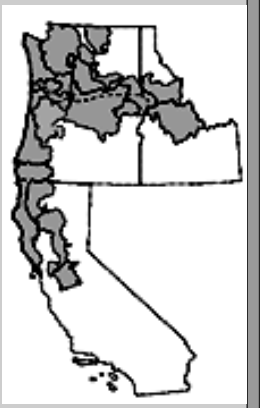
Section 7's Critical Habitat Analysis

Section 7(a)(2) of the ESA requires each federal agency to insure that its actions are not likely to "result in the destruction or adverse modification of [critical habitat]." 16 USC § 1536(a)(2). Stephanie M. Parent (Pacific Environmental Advocacy Center) and Patrick W. Ryan (Perkins Coie LLP) discussed a recent decision by the Ninth Circuit Court of Appeals invalidating the Services' definition of "destruction or adverse modification" for purposes of Section 7 consultations. Adding to decisions in the Fifth and Tenth Circuits, the Ninth Circuit held that the Services' definition violates the ESA by giving insufficient protection to the role critical habitat plays in species recovery. *Gifford Pinchot Task Force v. United States Fish and Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004).

Gifford Pinchot

Habitat Impacts

In 1986, the Services defined "destruction or adverse modification" of critical habit as a "direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 CFR § 402.02 (emphasis added). The court held that the Services' use of the conjunctive "and" in the definition means that so long as an action does not appreciably diminish the value of critical habitat for survival, the standard was not violated by actions that appreciably diminish the value of critical habitat for recovery. According to the court, that definition "reads the [ESA's] 'recovery' goal out of the adverse modification inquiry." FWS could "authorize the complete elimination of critical habitat necessary only for recovery, and so long as the smaller amount of critical habitat necessary for survival is not appreciably diminished, then no 'destruction or adverse modification' as defined by the regulation, has taken place." The regulation as written, "offends the ESA," by drastically narrowing the scope of protection mandated by Congress—protection that includes species recovery as well as survival. *Gifford Pinchot*, 378 F.3d at 1069–70.



Chinook Salmon ESUs

Analysis for Recovery

On the heels of *Gifford Pinchot*, the Services have issued a national interim guidance (Guidance) affecting new and reinitiated Section 7 consultations while awaiting a proposed rulemaking to address the ruling. According to the Services, before the court's decision in *Gifford Pinchot* Section 7 consultations implicitly evaluated the implications of a proposed federal action on critical habitat for recovery. However, the court in *Gifford Pinchot* found that the references to recovery in the BiOps at issue in that case were strictly descriptive and undemonstrative of any analysis of recovery. Consequently, the court deemed the BiOps "irredeemably flawed." The Guidance requires the Services now to give explicit treatment to critical habitat for recovery. It establishes an analytical framework for determining adverse modifications and specifically requires that each BiOp contain a disclaimer that the opinion "does not rely on the regulatory definition of 'destruction or adverse modification' of critical habitat at 50 CFR 402.02. Instead, we have relied upon the statutory provisions of the ESA to complete the following analysis . . ." In addition, the explicit evaluation of adverse modifications to critical habitat for recovery should not mention the word "survival." The Services have indicated that a formal rulemaking in 2005 will address the *Gifford Pinchot* decision.

Rulemaking

The Environmental Protection Agency, the CWA and ESA Section 7

EPA has had a stormy relationship with the ESA. It is fair to say that the EPA has resisted consulting with the Services about the effects on listed species of some programs it administers. Two examples are water quality standards under the Clean Water Act (CWA) and pesticide registrations under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). Only the CWA example is discussed here (see Goldman, this TWR, for discussion of ongoing pesticide issues).

CWA Contexts

The CWA and ESA can meet in a variety contexts. Examples include: consultation over EPA's approval of state water quality standards; EPA issued CWA National Pollution Discharge Elimination System (NPDES) permits; and EPA's approval of delegated state CWA Total Maximum Daily Loads (TMDLs) and non-point source programs. Recent and ongoing examples include consultations over EPA's approval of Oregon's and Washington's water quality standards and EPA Region 10's regional temperature guidance.

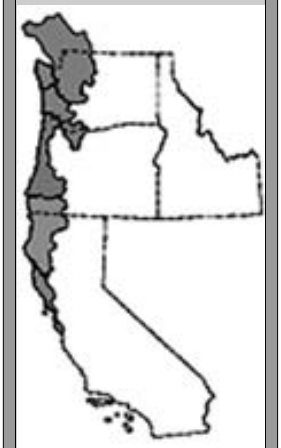
Different Orientations

In terms of their broadest goals, the CWA and ESA are complementary — both seek to protect species. However, the two statutes approach species protection from different orientations and the CWA is generally being less protective of fish than the ESA. Melanie Rowland (NOAA, Office of General Counsel) demonstrated this difference effectively. Under the CWA, a legal level of pollutant in a stream

ESA Update
"Harm"
"Take"

CWA Impacts

"ITPs"



Coho Salmon ESUs

"PPR"

PPR Reissued

may have sub-lethal — yet clearly detrimental — effects on a listed species. For example, concentrations of copper in water that do not kill fish can be lawful under the CWA. However, CWA-allowed copper concentrations have been shown to have clear sub-lethal effects, such as disrupting predator avoidance responses — and thus "harm" the listed fish species. As such, the addition of copper at those concentrations to a stream containing listed species may result in "take" under Section 9 of the ESA.

For the above reason's and others "the ESA tends to disrupt CWA processes" — as John Palmer (EPA Region 10) succinctly pointed out. This is important for CWA permit applicants to understand, as is the fact that the EPA and the Services have not worked out how to resolve these difference in ESA Section 7 consultations. This point was driven home by Beth S. Ginsberg (Stoel Rives LLP, Seattle), who represents a permit applicant in a six-year long Section 7 consultation in which EPA and NOAA Fisheries have been "at war" over water quality standards in the context of EPA issuing a NPDES permit. Until the federal agencies settle their differences, the CWA permit applicant is faced with playing peacemaker between EPA and the Services.

HCPs and No Surprises

In 1982 Congress amended Section 10 of the ESA to authorize the Services to issue permits to nonfederal entities for takings that would otherwise be prohibited under Section 9. If the taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity, the Services may issue an Incidental Take Permit (ITP). The applicant also must prepare a **h**abitat **c**onservation **p**lan (HCP) specifying how it will minimize and mitigate the impact of its activity on listed species. Initially, the Section 10 program had few takers — this has changed.

Responding to concerns that those who obtain ITPs might be subject to changing commitments as new regulations and critical habitat designations develop, the Services jointly promulgated the "No Surprises Rule." This rule provides certainty to ITP applicants that they will not be required to increase their habitat conservation commitments beyond those agreed to when their ITP is approved. The No Surprises Rule tipped the balance in favor of nonfederal entities incurring the expense of producing an HCP and obtaining an ITP. As a result, the Services' HCP program took off. However, as Daniel A. Hall (American Lands) expressed, not everyone believes the increase in HCPs is a positive result for listed species and the ecosystems on which they depend. In Hall's view, most HCPs with No Surprises provide too few protections while "front loading" incidental take and placing mitigation at the "back end."

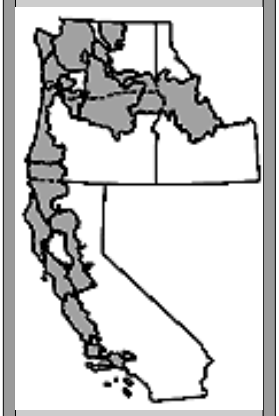
In 1998, a number of environmental organizations challenged the No Surprises Rule on the grounds that the rule resulted in a substantial and unprecedented increase in the number of ITPs that in turn would result in additional otherwise unlawful takings of listed species. *Spirit of the Sage Council v Norton*, 294 F.Supp.2d 67 (D.D.C. 2003). Eric Nagle, (U.S. Department of Interior, Office of the Solicitor) provided a clear, succinct history and summary of the case.

With the case pending, FWS adopted the Permit Revocation Rule (PRR), allowing FWS to revoke an ITP if continuing the permitted activity would be inconsistent with ESA's Section 10 requirement that incidental take "will not appreciably reduce the likelihood of survival and recovery of the species in the wild" and if FWS has not reconciled the inconsistency in a timely fashion. NOAA Fisheries did not adopt the PRR, relying solely on its general permit revocation rule to revoke ITPs. *Spirit of the Sage Council* plaintiffs soon amended their complaint to challenge the PRR on the grounds that FWS failed to follow proper notice and comment procedures under the Administrative Procedure Act (APA).

The court agreed that FWS had failed to comply with the APA and, without addressing the substantive validity of the PRR or the No Surprises Rule, the court vacated and remanded the PRR for reconsideration by FWS. It also remanded "all administrative regulations challenged in this action . . . for global consideration by the Services," including the Services' No Surprises Rule. However, the court never reached the merits of the plaintiffs' claims regarding the No Surprises Rule, so the Services' specific mandate on remand was unclear with respect to that rule. The court ordered FWS not to approve any new ITPs or related documents containing "No Surprises" assurances "pending completion of the proceedings on remand."

FWS recently reissued the PRR after apparently following the proper APA notice and comment procedures. 69 Fed Reg 71,723 (Dec. 10, 2004). The newly issued PRR is essentially identical to the original rule except that it eliminates the requirement that the Services reconcile inconsistency with Section 10 standards in a "timely fashion." According to FWS, each HCP is unique and must be analyzed on a case specific basis, thereby obviating the "timely fashion" requirement. However, neither FWS nor NOAA Fisheries took any apparent steps to address the court's order to consider "globally" the PRR and No Surprises Rule by the December 10, 2004 deadline, and it is unclear if FWS's new PRR will satisfy the court's broad order to consider both rules.

ESA Update



Steelhead ESUs

Editor's Note: Three small ESU-Area maps were included with this article to provide a sense of the geographic range of impact involved. They were adapted from maps taken from a NOAA Fisheries website: www.nwr.noaa.gov/1salmon/salmesa/mapswitc.htm At this website you may select any individual ESU area and pull up a detailed map depicting all involved water bodies.

Spirit of the Sage Council calls into question the viability of the No Surprises Rule. This uncertainty likely has caused some ITP applicants to pause and evaluate the wisdom of continuing down the HCP path. It also offers an opportunity to evaluate the role of the No Surprises Rule in the HCP program and the value of HCPs generally. James R. Johnston (Perkins Coie LLP) remains convinced that HCPs are good for the species they seek to protect and provide important assurances for ITP applicants.

HCPs fall along a spectrum of size, scope, complexity and duration. The simplest HCPs affect a single species and are for one-time impacts that are well understood, can be mitigated and are not expected to recur. In these cases the HCP is more of a mitigation plan than a long-term management plan, and No Surprises offers little in the way of added assurances to the ITP applicant. No Surprises also may be of limited value for more complicated projects that have well-identified impacts and clear measures to address those impacts. In those circumstances the applicant may choose to include in the HCP measurable biological goals and objectives for the project. Meeting those goals and objectives equates to compliance with the ITP and HCP, and creates for the applicant certainty similar to that provided by No Surprises. The largest and most complex HCPs are programmatic agreements that provide broad coverage from ESA liability over the landscape. These HCPs promise to permit whole categories of existing and future conduct. They also promise to provide benefits to all species on an ecosystem scale, something impossible to accomplish on private lands through any other ESA mechanism. The scale and complexity of programmatic HCPs guarantees significant uncertainty and risk, and, consequently, they are the most dependent on No Surprises for their success. Without No Surprises, attempts by states to obtain broad ESA coverage for regulatory programs (e.g. Fish & Forests in Washington) may fail. As Johnston suggested, however, the promise of the HCP program is its ability to accommodate creativity. An HCP is a negotiated contract, and the ultimate success of the HCP program lies is in the hands of those who make the agreements.

Getting to Recovery, Salmon

The final two panels of the conference focused on efforts to recover salmon in the Pacific Northwest. Robert Lohn (NOAA Fisheries, Northwest Regional Administrator) and Michelle McClure, PhD (Northwest Fisheries Science Center, Seattle) set the stage by providing a "snapshot" of NOAA Fisheries' current thinking about salmon recovery plans, and the work of technical recovery teams conducting assessments that support the recovery planning process. According to Lohn, recovery plans required by Section 4(f) of the ESA, must contain objective, measurable criteria for determining when the species should be removed from the list of ESA-protected species. In this sense they are road maps that can set the context for Section 7 consultations, Section 4(d) rulemakings, and HCP approvals. They also set priorities for funding and permitting. For example, Lohn indicated that NOAA Fisheries will give priority to permitting projects that are consistent with and implement recovery plans. This focus on priority will also foster accountability and certainty by making clear what is expected and giving agencies recovery goals against which to measure their actions.

The conference's capstone discussion brought together earlier speakers and Eric Redman (Heller Ehrman White & McAuliffe LLP, Seattle), for an moderated discussion of lessons learned in salmon recovery. The discussion was wide-ranging and, as one would expect, raised more issues than it resolved. One theme that emerged is a need to take a broader view of recovery than the current approach. Redman, for example, noted that salmon harvest is not fully accounted for and is a major impediment to recovery. Goldman expressed her view that the recent focus on status reviews and listings prompted by the *Alsea Valley* case has been a waste of time and resources because NOAA Fisheries has ended up in essentially the same place on listings as it did before that case. Even more broadly, Ruckelshaus and Professor Orians, echoing their own presentations, encouraged us to look beyond the details of the ESA to building healthy ecosystems and strong democratic processes in support of species recovery.

For Additional Information:
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Greg Corbin focuses his practice on fish and wildlife, water, and forest products matters. He represents both public and private interests on regulatory strategies, project permitting, and natural resource-related transactions. He represents clients in matters involving state and federal wildlife laws, including Section 7 consultation, incidental take permitting, and critical habitat designations under the ESA. His practice encompasses a variety of water rights matters, including establishing rights in the adjudication of Oregon's Klamath River Basin. His forest products practice includes work arising under the ESA, CWA, and state water law, and various contract and real property transactions. He holds a master of forest science degree, is an active professional member of the Society of American Foresters, and an active member of many forest-related trade organizations. Mr. Corbin is an Adjunct Professor of Law, Northwestern School of Law of Lewis & Clark College.

EPA, THE ESA, & PESTICIDES

by Patti Goldman, Managing Attorney, Earthjustice Seattle

Regulatory Background

ESA § 7 Consultation

The federal Endangered Species Act's (ESA's) Section 7 (16 U.S.C. § 1536) obligates federal agencies to ensure that their actions are not likely to jeopardize the continued existence of the species listed as endangered or threatened under the ESA or to destroy or adversely modify those species' critical habitat. Section 7 applies only to federal actions, but includes private actions funded or authorized by the agency. Section 7(a)(2) establishes a consultation process to guide federal agencies in discharging their obligation to avoid taking actions that are likely to jeopardize the survival and recovery of listed species. Federal agencies must consult with the National Marine Fisheries Service (NMFS) or the Fish and Wildlife Service (FWS) to ensure that their actions will not jeopardize the survival and recovery of listed species or adversely modify critical habitat designated for such species. 16 U.S.C. § 1536(a)(2). NMFS is the appropriate expert fish and wildlife agency for consultations on actions impacting anadromous fish, such as salmon and steelhead, and other marine species.

The ESA mandates such consultations to ensure that an agency action "is not likely to jeopardize the continued existence of any" listed species. 16 U.S.C. § 1536(a)(2). The joint consultation regulations require such consultations whenever an action "may affect" a listed species. See 50 C.F.R. § 402.14.

EPA FIFRA RESPONSIBILITIES

FIFRA Registrations

The US Environmental Protection Agency (EPA) is the federal agency charged with registering pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y. Under FIFRA, a pesticide may generally not be sold or used in the United States unless it has an EPA registration for specified uses of that particular pesticide. Id. § 136a(a). EPA may register a pesticide if it determines that the labeling submitted by the registrant complies with FIFRA's requirements and that the pesticide will not cause unreasonable adverse effects on health or the environment, including on threatened and endangered species and their habitat. Id. § 136a(c)(5). To make these determinations, EPA requires the registrants to submit data on the pesticide's effects. Id. § 136a(c)(2)(B). As part of a registration, EPA approves a label submitted by the registrant for each pesticide use.

ESA Obligations

After approving a pesticide registration, EPA has an ongoing obligation to review pesticide registrations and to ensure that pesticide use avoids unreasonable adverse effects on health or the environment. EPA has the authority to cancel pesticide registrations whenever "a pesticide or its labeling or other material required to be submitted does not comply with the provisions of [FIFRA] or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment." Id. § 136d(b). EPA may immediately suspend a pesticide registration to prevent an imminent hazard. Id. § 136d(c).

Re-Registration Process

Congress initially added environmental standards to FIFRA in 1972. It has since amended FIFRA to strengthen those standards. To bring existing registrations into compliance with the current FIFRA standards, FIFRA establishes a re-registration process in which EPA requires the registrant to submit additional data. EPA then assesses the new data to determine whether the pesticide uses pass muster under the upgraded standards. Id. § 136a-1. The same standards that apply to new registrations govern registration determinations. Accordingly, as part of a re-registration determination, EPA is required to impose restrictions on uses of the pesticides that cause unreasonable health or environmental effects, including those uses that cause harm to threatened or endangered species. Congress first mandated this process in 1972, but, as of 1986, EPA had re-registered *none* of the tens of thousands of pesticides subject to re-registration, and had completed its reassessment of *none* of the 600 pre-1972 pesticide active ingredients. General Accounting Office, *EPA's Formidable Task to Assess and Regulate Their Risks,* at page 3 (1986). Congress amended FIFRA again in 1988 and 1996 to accelerate this process and establish deadlines for re-registering whole categories of pesticides. See 7 U.S.C. §§ 136a-1 & 136b. EPA is in the midst of the statutory schedule for re-registering pesticides that have been on the market for years, and often decades prior to enactment of the environmental registration requirements currently in place.

Deadlines

Risk Determinations

During the course of its re-registration reviews, EPA conducted ecological risk assessments and made findings that particular pesticide uses may adversely affect various types of species. EPA generated these risk assessments to make the FIFRA-mandated re-registration decisions. It re-registered dozens of pesticides based on these assessments over the last 10 years. EPA completed these re-registrations without undergoing ESA consultation on the pesticides' impacts on ESA-listed species where its risk assessments documented significant risks to those species. EPA postponed compliance with the ESA until it finalized an endangered species protection program proposed in 1989.

EPA - ESA Jeopardy & Mitigation

Past EPA Consultations with the FWS on Pesticides

In the 1980s and early 1990s, EPA conducted several Section 7 consultations on the impacts of dozens of pesticides on various listed species. EPA's authorization of pesticide use through pesticide registrations is a federal action subject to Section 7. These consultations produced several biological opinions that found that many pesticide uses would jeopardize the survival and recovery of listed species. Each time a biological opinion made a jeopardy call, it proposed a **r**easonable and **p**rudent **a**lternative (RPA) to avoid jeopardy. Those RPAs generally prescribed buffers around the species' habitat either as the sole mitigation measure or in combination with other mitigation. Even where the biological opinions found that a pesticide use would not jeopardize the species' survival, the opinion set out mandatory measures to mitigate the take of the listed species as mandatory terms and conditions of the incidental take statement. These mitigation measures likewise generally included buffer zones around listed species' habitat.

Buffers

The buffers embodied in the RPAs and recommended take mitigation measures fell into several ranges. The low end of that range consisted of 20-yard ground application buffers and 100-yard aerial application buffers. The mid-range consisted of 40-yard ground and 200-yard aerial buffers. And the high end extended the ground buffers to 100 yards and the aerial buffers to a quarter-mile, although some buffers were as large as a half-mile or more.

EPA Proposals

EPA has not fully implemented the buffers prescribed in these biological opinions. In 1989, EPA proposed an endangered species protection program, which it re-proposed in 2002. Under this program, EPA would include a statement on the pesticide label instructing users to follow county bulletins. These county bulletins would embody the old biological opinion prescriptions, contain maps that identify endangered species' habitat, and spell out the pertinent buffer and other restrictions that apply. Under the proposed program, the label on the pesticides would make compliance with the county bulletins mandatory. Under FIFRA, pesticide labels convey mandatory constraints on use of the pesticides; violations of the label mandates can give rise to civil and criminal penalties.

County Bulletins

EPA has begun the process of developing county bulletins that prescribe mitigation to protect threatened and endangered species from pesticides in particular counties. At present, however, such bulletins have been developed for only some states and for only a fraction of the species on the ESA list. Moreover, in the absence of binding label instructions, compliance with county bulletins is completely voluntary.

California Bulletins

In conjunction with EPA, California has developed its own county bulletins. California has specified a 40-yard ground and 200-yard aerial buffer subject to site conditions. It has added irrigation controls and a 20-foot vegetated buffer strip along waterbodies to protect aquatic species. Like EPA's county bulletins, compliance with the California bulletins remains voluntary until an EPA endangered species protection program is finalized. However, for restricted use pesticides, California requires a permit and the county agricultural commissioners can require compliance with the bulletins in such permits. No studies have documented the extent to which the buffers have been required in such permits or the extent to which the buffers have been implemented voluntarily.

Litigation on Pesticides' Impacts

Pesticides Cases

In January 2001, the Washington Toxics Coalition, Northwest Coalition for Alternatives to Pesticides, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources filed a lawsuit seeking to compel the EPA to consult on the impacts of pesticides on listed salmon and steelhead. *Washington Toxics Coalition v. EPA*, No. C01-132C (W.D. Wash.).

Other cases have similarly challenged EPA's failure to comply with its ESA Section 7 obligations. See *Californians for Alternatives to Toxics v. EPA*, No. C00-3150 CW (N.D. Cal.) (2002 consent decree establishing schedule for consultations and requiring formal consultations for certain pesticides for their effects on listed forest plants or listed California salmon or steelhead); *Defenders of Wildlife v. Whitman*, 02-CV-2089 ESH (D.D.C. filed 2002) (challenging EPA's failure to bring its registration of fenthion, which has resulted in the deaths of numerous threatened and endangered birds, into compliance with the ESA and other statutes; registrant is voluntarily canceling fenthion registration); *Center for Biological Diversity v. Whitman,* C-02-1580 JSW (N.D. Cal. filed 2002) (challenging EPA's failure to consult on impacts of numerous pesticides on listed California red-legged frog); *NRDC v. EPA*, No. RDB 03 CV 2444 (D. Md. filed Aug. 2003) (seeking to compel EPA to ensure that its registration of the herbicide atrazine will not jeopardize the survival of various threatened and endangered species, including the loggerhead turtle, leatherback turtle, green turtle, Kemp's ridley turtle, shortnose sturgeon, pallid sturgeon, and freshwater mussels); and *Center for Biological Diversity v. Leavitt*, No. 04-CV-126 CKK (D.D.C. filed Jan. 2004) (seeking consultation on pesticides that impact endangered Barton Springs salamander).

EPA - ESA
Washington Toxics

Court Findings

In *Washington Toxics Coalition v. EPA,* the environmental and commercial fishing group plaintiffs targeted 55 pesticides based on evidence that these pesticides are getting into salmon streams at levels that cause harm to salmon or their habitat. The plaintiffs noted that the US Geological Survey had found concentrations of 14 of the pesticides in salmon streams at levels that are associated with negative impacts on fish or other aquatic life. Second, EPA had, in its own re-registration process, estimated that pesticides concentrations in the environment resulting from their authorized uses would exceed agency levels of concern for salmon, salmon food supply, or salmon habitat.

On July 2, 2002, a US District Court in Seattle ordered EPA to begin the process of ensuring that use of 55 pesticides will not harm salmon in the Pacific Northwest. The Court found that "it is undisputed that EPA has not initiated, let alone completed, consultation with respect to the relevant 55 pesticide active ingredients" and that "EPA's own reports document the potentially-significant risks posed by registered pesticides to threatened and endangered salmonids and their habitat."

ACCORDING TO THE COURT:

> "NMFS listed the Sacramento winter run chinook in 1989. During the 1990s, NMFS listed as threatened or endangered approximately 25 additional salmonids. Despite competent scientific evidence addressing the effects of pesticides on salmonids and their habitat, EPA has failed to initiate section 7(a)(2) consultation with respect to its pesticide registrations. . . . Such consultation is mandatory and not subject to unbridled agency discretion. The Court, declares, as a matter of law, that EPA has violated section 7(a)(2) of the ESA with respect to its ongoing approval of 55 pesticide active ingredients and registration of pesticides containing those active ingredients."

Consultation Order

EPA Requirements

The Court ordered EPA to initiate consultations on 55 pesticides according to a schedule that ran through December 1, 2004. However, the initiation of consultation with NMFS merely begins the Section 7 process. NMFS must review the pesticides' impacts and determine whether they will jeopardize salmon survival and recovery, and it must also determine whether mitigation is required to avoid harming salmon or their habitat. Finally, EPA must implement NMFS' recommendations or other measures to prevent jeopardy and avoid take of listed salmon. Even though EPA made its initial effects determinations pursuant to the court order in July 2002, NMFS has yet to complete consultation on any of the 55 pesticides.

NMFS's Draft Nonconcurrence

In April 2004, NMFS circulated a draft nonconcurrence letter, which disagreed with numerous EPA "not likely to adversely affect" determinations. The draft letter states that pesticide use "may have greater than discountable or insignificant effects on listed species" and that the proposed action is "likely to adversely affect" the 26 ESUs [i.e., **e**volutionarily **s**ignificant **u**nits comprising the listed salmon and steelhead] and thus, requires formal consultation. Draft Nonconcurrence Letter at 1. The letter also concludes that EPA's risk assessments do not constitute the best available science because: (1) they are not based on the available peer reviewed scientific literature; (2) they focus on active ingredients to the exclusion of inert ingredients, additives, and the full range of uses of the products; (3) they are devoid of critical information about the locations and needs of the listed salmon species; (4) they lack information about critical exposures, such as those from residential uses and cumulative exposures; and (5) they fail to incorporate evidence of probable sublethal effects. Id. at 2-3. Without this information, the draft states that NMFS cannot evaluate the pesticides' impacts on listed salmon and can have no assurance that the pesticide uses will not cause serious risks and adverse effects. Id. at 3-4.

Interim Buffers

Because the consultation process will take a long time, plaintiffs asked the court to impose interim measures to protect salmon from these pesticides during the consultation process. On January 22, 2004, the district court issued an injunction imposing such buffers. The court had earlier found that pesticide-application buffer zones are "a common, simple, and effective strategy to avoid jeopardy to threatened and endangered salmonids." Order, August 8, 2003, at 16. The court also found that buffer zones will "substantially contribute to the prevention of jeopardy." Id. at 18. The court imposed 20-yard no-use buffers and 100-yard no aerial spray buffers for the pesticides at issue, unless they had received a "no effect" or "not likely to adversely affect" determination. The court exempted certain uses, such as spot treatments and mosquito abatement spraying. These buffers are drawn from the low end of the buffers prescribed in the FWS biological opinions for aquatic species and in the county bulletins EPA has developed in partial implementation of those biological opinions.

Urban Use

The plaintiffs sought additional restrictions on the use of certain pesticides frequently detected in urban salmon streams by the US Geological Survey. The plaintiffs sought these restrictions because impervious surfaces in urban areas limit the breakdown of pesticides that would ordinarily occur in natural landscapes and increase run-off, which is usually channeled directly into streams through storm drains and pipes. At an August 2003 hearing, the court indicated that it would require public notification of hazards associated with urban use of pesticides.

EPA - ESA

The January 22, 2004 injunction required EPA to develop and to notify retailers to post point-of-sale notifications on products containing any of seven pesticides.

The industry intervenors filed five separate motions in the district court and the Ninth Circuit seeking a stay of the injunction. All were denied. [EPA joined the industry intervenors in appealing the injunction, which was argued before the Ninth Circuit in September, 2004.]

Alternative Consultation

Counterpart Regulations Authorizing EPA Self-Consultation for Pesticides

The 1986 joint NMFS-FWS consultation regulations allow alternative consultation procedures to be established by counterpart regulations adopted jointly by the action agency and the two expert agencies. 50 C.F.R. § 402.04. Such counterpart regulations "must retain the overall degree of protection afforded listed species by the Act and these regulations. Changes in the general consultation process must be designed to enhance its efficiency without elimination of ultimate Federal agency responsibility for compliance with section 7." 51 Fed. Reg. 19,926, 19,937 (1986).

Streamlining

The 2004 Pesticide Counterpart Regulations

In August 2004, the Services adopted counterpart regulations that provide optional, alternative approaches to consultation that rely on EPA's risk assessments. 69 Fed. Reg. 47,732 (Aug. 5, 2004). The regulations establish alternative approaches to streamline consultation that could be used at EPA's option. These alternatives address informal consultation, formal consultation, and specific types of FIFRA registrations.

ELIMINATING INFORMAL CONSULTATION

The regulations authorize EPA to make "not likely to adversely affect" determinations without the Services' concurrence, if EPA and the Services have entered into an Alternative Consultation Agreement (ACA) describing:

EPA Authorities

- how the Services have ensured that EPA will make effects determinations consistent with the ESA
- the training required for EPA personnel to make effects determinations
- how new information and scientific advances will be incorporated into EPA's effects determinations
- recordkeeping and oversight measures to evaluate compliance with the ACA and the ESA

The ACA establishes procedures, but no standards for effects determinations and imposes no limits on EPA's discretion in developing and applying scientific methods.

Agencies' Agreement

The agencies have entered into an ACA that allows EPA staff that have completed "appropriate ESA Section 7 training" to make "not likely to adversely affect" determinations on pesticide registrations without any concurrence by the Services. Under the ACA, EPA agrees to review any new information and any changes to its risk assessments recommended by the Services. Id. at 4-5. The Services and EPA would conduct a joint, inter-agency review of a sampling of effects determination to assess how EPA has applied appropriate ESA standards. Id. at 6. The ACA establishes a dispute resolution process in which a panel consisting of personnel from the participating agencies will try to facilitate reaching a consensus on any issues that arise. Id. at 7. The Services and EPA can revise the ACA by mutual agreement without conducting notice and comment rulemaking. Id. The ACA can be terminated by mutual agreement, and a party can, after submitting the matter to dispute resolution, unilaterally terminate the ACA as to that party upon a reasonable belief that it has not or likely will not produce reliable or appropriate effects determinations or satisfy ESA or FIFRA requirements. Id. at 8-9. Termination or suspension of the ACA by any party does not create a need to consult informally or obtain a Service's concurrence in any "not likely to adversely affect" determination made prior to the termination or suspension. Id. at 9.

FORMAL CONSULTATION ALTERNATIVES

EPA Effects Determinations

The regulations allow EPA to pursue alternative formal consultation intended to have EPA's effects determinations become the Services' biological opinions. EPA can: (1) ask the Services to appoint a Service representative to participate in EPA's process of making the effects determination; or (2) submit an effects determination that includes a jeopardy finding and incidental take statement for potential adoption by the Services. 69 Fed. Reg. at 4478-79.

The Services can modify or reject EPA's effects determination only through designated high-level officials in Washington D.C., without any delegation to the regional offices or others who have typically issued biological opinions and concurrences in the past and who would continue to have the authority to adopt EPA's effects determinations without modification. Id.

EXPANDED EMERGENCY CONSULTATION PROCEDURES

Emergency Procedures

The regulations allow EPA to utilize the emergency consultation process set out in the joint consultation regulations for all FIFRA Section 18 exemptions. Id. at 4477 (proposed 50 C.F.R. § 402.42(a)(6)). The joint consultation regulations allow informal consultations "[w]here emergency

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circumstances mandate the need to consult in an expedited manner" for emergency situations "involving acts of God, disasters, casualties, national defense or security emergencies, etc." 50 C.F.R. § 402.05(a). Any required formal consultation must be initiated as soon as practicable after the emergency is brought under control. Id. § 402.05(b).

Emergency Limits

The preamble to the new regulations acknowledges that the Services' 1998 Joint Consultation Handbook states that FIFRA emergency exemptions would not qualify as emergencies "unless there is a significant unexpected human health risk." 69 Fed. Reg. at 4474-75. However, the proposed rule concludes that emergency consultation procedures should not be limited to FIFRA exemptions where an unexpected human health risk is present. Id.

Differing "Emergency Conditions"

The new regulations allow EPA to invoke this authority for exemptions from the FIFRA registration requirements granted under 7 U.S.C. § 136p for particular pesticide uses. While such exemptions may be granted when emergency conditions exist, Id., the FIFRA implementing regulations define "emergency conditions" far more broadly than the ESA consultation regulations. While some categories for such FIFRA exemptions involve public health emergencies, some are based solely on economics. 40 C.F.R. § 166.2 (identifying four exemption categories, one of which can be based on significant economic loss without any adverse health impact); id. 166.3(d). Such emergency exemptions can be granted for three successive years or more while registration of the pesticide is being pursued. Id. § 166.25(b)(2).

Litigation

LAWSUIT CHALLENGING THE PESTICIDE COUNTERPART REGULATIONS

On September 23, 2004, Washington Toxics Coalition; Northwest Coalition for Alternatives to Pesticides; Defenders of Wildlife; Natural Resources Defense Council; Center for Biological Diversity; Pacific Coast Federation of Fishermen's Associations; Institute for Fisheries Resources; and Helping Our Peninsula's Environment, filed a lawsuit challenging the pesticide counterpart regulations. The administrative record will be filed in late February with discovery and summary judgment briefing to follow. *Washington Toxics Coalition v. U.S. Dept. of Interior, et al* (CO4-1998)

THE CHALLENGE IS BASED ON THE FOLLOWING GROUNDS:

Consultation Lack

First, the lawsuit contends that the counterpart regulations illegally delegate the Services' statutory consultation role to EPA and eliminate the checks and balances written into Section 7 of the ESA. Pursuant to this delegation, EPA will no longer consult with the Services or the NMFS and the Fish and Wildlife Service on whole categories of pesticide registrations that may adversely affect listed species or their critical habitat. Instead, EPA will unilaterally determine whether pesticide registrations are likely to jeopardize listed species' survival and/or whether and the extent to which to mitigate harm to individual members of listed species.

Expertise Lack

Second, the lawsuit contends that the Services have violated their obligation to ensure the consultations will use the best available scientific information. EPA lacks the institutional expertise in endangered species that the Services uniquely possess. The expert wildlife agencies are generally the repositories of the best scientific evidence given their role in listing threatened and endangered species, designating critical habitat, conducting Section 7(a)(2) consultations, issuing incidental take permits and statements with necessary mitigation measures, and developing recovery plans.

The lawsuit also challenges: the environmental assessment prepared on the regulations for failing to consider alternative ways to "streamline" ESA consultations on pesticides; the optional formal consultation procedure because it is predicated on the erroneous conclusion that EPA's risk assessments can lawfully and scientifically be substituted for an ESA consultation by the Services; and the application of the emergency consultation procedures to all Section 18 exemptions.

Differing Action Standards

The counterpart regulations and ACA allow EPA to make effects determinations based on the risk assessments generated to make FIFRA decisions. However, FIFRA registration and re-registration determinations are made under an unreasonable adverse effects standard that allows EPA to balance the risks to health and the environment, including endangered species, against the economic benefits of the pesticide use. Moreover, EPA generally refrains from taking action to cancel a pesticide registration until it has filled data gaps with industry studies that often take years to complete. In contrast, the ESA makes Section 7(a)(2) consultations subject to the best available science, which requires agencies to act based on the information in hand, rather than wait for the generation of studies conducted to fill data gaps, the development of scientific models to quantify impacts, or peer review of models or studies.

The Services have found EPA's ecological risk assessments inadequate to account for pesticides' species impacts because of significant gaps in data on pesticide effects on species and their habitat and EPA's failure to incorporate peer-reviewed scientific literature and surface water monitoring into its risk assessments. EPA has acknowledged problems with its risk assessment process and EPA has promised to make improvements. However, EPA still lacks adequate information and methods to assess the impacts of urban pesticide use, pesticide effects on amphibians and reptiles, sublethal effects, and cumulative uses

EPA - ESA

Obligation to "Insure"

Retaining Protections

Limited Safeguards

Logging Consultations

Litigation

and exposures to pesticide active ingredients, inert ingredients, and mixtures. EPA has promised to document how it resolves data gaps and uncertainties, as well as how it decides to use such available data on a case-by-case basis. At the same time, the Services have dispensed with case-by-case review of EPA's "not likely to adversely affect" determinations based on their evaluation of EPA's risk assessment process.

Finally, in issuing the counterpart regulations, the Services have abdicated their statutory obligation to "insure" that agency actions are not likely to cause jeopardy to the continued existence of listed species or destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2). By using the word "insure," Congress evinced its intent to require the agencies to take affirmative steps to guard against the prohibited jeopardy to listed species or adverse modification of their critical habitat. In order to "insure" against a likelihood of jeopardy, any risk "must be borne by the project, not by the endangered species." See *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987).

The counterpart regulations and ACA depart from the "insure" mandate in at least three respects. First, the counterpart regulations and ACA lower the threshold for consultations from "may affect" to "likely to adversely affect" the listed species. Second, the joint consultation regulations' authorization for counterpart rules that supersede the established consultation procedures, see 50 C.F.R. § 402.04, is qualified by the requirement that: "Such counterpart regulations must retain the overall degree of protection afforded listed species required by the Act and these regulations." 51 Fed. Reg. at 19,926. The counterpart regulations and ACA substitute one process — i.e. unilateral EPA effects determinations — for another, i.e. informal consultation that requires the Services' concurrence in EPA "not likely to adversely affect" concurrences. Given that the ESA institutionalizes caution through the Section 7(a)(2) consultation process, jettisoning inter-agency consultation for actions that EPA deems "not likely to adversely affect" listed species or their habitat fails to "retain the overall degree of protection afforded listed species" by the ESA and the joint consultation regulations. Third, the delegation of authority to EPA in the counterpart regulations and ACA is far too broad and open-ended to retain the same level of protection afforded by the current informal consultation scheme in which the Services must concur in an action agency's "not likely to adversely affect" determination. Neither the counterpart regulations nor the ACA contains standards that constrain EPA's discretion or otherwise ensure that EPA will make credible and appropriate effects determinations based on the best available science.

The only safeguard in this self-consultation process will come in the form of periodic, after-the-fact reviews conducted jointly by EPA and the Services. If the Services find that EPA has failed to produce reliable or appropriate effects determinations or has failed to satisfy ESA or FIFRA requirements, and the matter is not resolved through the ACA's dispute resolution process, the Services may terminate or suspend the ACA. However, "[t]ermination, suspension, or modification of an alternative consultation agreement does not affect the validity of any NLAA determination made previously under the authority of" the counterpart regulations. 50 C.F.R. § 402.45(c). Even blatantly erroneous NLAA determinations would remain effective.

The Logging Self-Consultation Rule & Litigation

On December 5, 2003, various land management agencies (e.g., US Forest Service, Bureau of Land Management), joined by NMFS and FWS, adopted counterpart regulations that would similarly eliminate expert agency oversight and approval of "not likely to adversely affect" determinations for certain logging activities. 68 Fed. Reg. 68,254 (Dec. 8, 2003); 68 Fed. Reg. 33,806 (June 5, 2003) (proposed rule). Under the final rule, no NMFS and FWS review would be required of such determinations if the action agencies have entered into an Alternative Consultation Agreement with the Services. An Alternative Consultation Agreement will list staff positions that will have authority to make such determinations, describe procedures for developing a joint training program, and describe the standards that will apply. NMFS and Fish and Wildlife Service are to monitor such agreements and may terminate them in the event of noncompliance. However, any "not likely to adversely affect" determinations made under an Alternative Conservation Agreement will remain valid and in place even if an agreement has been violated and is subsequently terminated. The logging self-consultation rule is being challenged in *Defenders of Wildlife v. Norton,* No. 1:04-VC-1230 GK (D.D.C. filed July 2004), in conjunction with a challenge to the FWS's failure to list the Canadian lynx as endangered, as opposed to threatened.

The logging self-consultation rule suffers from the legal pitfalls described above. The fox guarding the henhouse problem is particularly striking, as a court of appeals judge recently explained in a concurring opinion in *Earth Island Institute v. U.S. Forest Service,* No. 02-16999, at 17411 (9th Cir. Dec. 11, 2003) (Judge Noonan, concurring):

"If the Forest Service sold no timber, a portion of its operations would be shut down. Forest Service jobs would be lost. Forest Rangers would have to find other work.

EPA - ESA

Bias?

Congress cannot by statute or longstanding custom turn a biased adjudicator into an impartial adjudicator. The requirement of impartiality is imposed by the Constitution . . . A preliminary survey of the public information available on the budget of the Forest Service sales budget suggests that timber sales by the Forest Service generate many millions of dollars and that, to an extent not immediately determinable, the sales create a budget for the Forest Service that, in the conduct of more sales, make it independent of the normal appropriate process. Any governmental agency would put a premium on an operation that gives it a perpetual revolving fund not dependent on Congress."

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FERC

State CWA Authority

Water Quality Standards

HYDROELECTRIC RELICENSING & THE CLEAN WATER ACT

by David C. Moon, Editor

Section 401 certification from a state, required under the federal Clean Water Act (CWA), is often a make or break issue in relicensing proceedings. The holding in the 1994 Supreme Court case, *Jefferson County PUD v. Ecology Dept. of Washington*, 511 U.S. 700 (1994), granted extensive power to state's determinations in their Section 401 certifications.

The expansion of state authority under Section 401 has made hydroelectric relicensing much more complicated. Licensees need to be just as prepared on Section 401 issues as they are on Federal Power Act (FPA; 16 USC 791 et seq.) or federal Endangered Species Act (EPA) issues, since a proactive CWA § 401 approach is critical to success.

Overview of Section 401 - State Certification

The CWA (33 USC § 1251 et seq.), is a comprehensive water quality statute designed to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 USC § 1251(a). The CWA also seeks to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 USC § 1251(a)(2). Section 303 of the CWA requires each state to institute comprehensive standards establishing water quality goals for all intrastate waters, and requires that such standards "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses."

The US Environmental Protection Agency (EPA) reviews and approves each state's water quality standards. See 33 USC § 1313(c)(3); 42 Fed. Reg. 56792 (1977). Following EPA's approval, the state standards become the water quality standards for the applicable waters of that state. 33 USC § 1313(c)(3). Under the CWA, states are responsible for enforcing water quality standards on intrastate waters. 33 USC § 1319(a). [Should EPA disapprove or "fail to approve" a state's proposed water quality standard, the state may resubmit a standard or leave the setting of the standard to EPA. EPA is also responsible for CWA administration in those state's lacking the delegated authority to do so.]

Section 401 certification is required for "any applicant for a Federal license or permit" for "activity…which may result in any discharge into the navigable waters." 33 USC § 1341(a). With the broad definition of "navigable waters," applicants are generally caught up by this section and the state certification is required. A state has one year to issue its certification. Certification by the state is waived if not completed within one year. 33 USC § 1341(a)(1).

Certification must contain conditions assuring compliance with water quality standards and "any other appropriate requirement of State law." 33 USC § 1341(d). This broad language sweeps in other provisions of state law that must also be considered in addition to water quality standards. Certification must also provide "reasonable assurance" that water quality standards will not be violated. 40 CFR § 121.2(a)(3).

FERC Important Ruling

***Jefferson County PUD:* Minimum Streamflow Requirements**

The most important case to read to understand the distinct roles of the federal government and the states in relicensing proceedings is *Jefferson County PUD v. Ecology Dept. of Washington*, 511 U.S. 700 (1994). In that case, a FERC license was sought for the Elkhorn Hydroelectric Project on the Dosewallips River, just outside Olympic National Park on federally owned land. Because a FERC license was required and the project would result in discharges to the Dosewallips River, state certification of the project pursuant to Section 401 of the CWA was required. The project was designed to divert water from a 1.2-mile stretch of the river (bypass reach), run that water through turbines to generate electricity, and then return the water to the River below the bypass reach.

Washington's Department of Ecology (Ecology) completed a study to determine the minimum streamflows necessary to protect salmon and steelhead fisheries in the bypass reach. Ecology issued its 401 water quality certification imposing a variety of conditions on the project, including a minimum streamflow requirement of between 100 and 200 cubic feet per second (cfs) depending on the season.

"Antidegradation"

A critical issue in the case revolved around the "antidegradation" policy, which was added to the CWA in a 1987 amendment. This policy requires that state standards be sufficient to maintain existing, beneficial uses of navigable waters and prevent further degradation. 33 USC §1313(d)(4)(B).

Washington's Supreme Court held that the antidegradation provisions of the state water quality standards require the imposition of minimum stream flows. 121 Wash.2d 179, 186-187, 849 P.2d 646, 650 (1993). In addition, the Washington Supreme Court found that 401(d), which allows states to impose conditions based on "any other appropriate requirement of State law," authorized the minimum stream flow conditions. See 33 USC 1341(d). The US Supreme Court granted certiorari to resolve the conflict among the state supreme courts.

State Authority Expanded

The US Supreme Court framed the issue in the case at the beginning of its opinion: "[W]e must decide whether respondent, the state environmental agency, properly conditioned a permit for the project on the maintenance of specific minimum stream flows to protect salmon and steelhead runs." Id. at 702. The US Supreme Court examined the issue essentially in two parts: (1) the scope of the state's authority under Section 401; and (2) whether the minimum streamflow limitations were within the scope of that authority.

The rationale of the US Supreme Court rested firmly on the language of Section 401(d), which they interpreted as an expansion of the State's authority to impose conditions on the certification of a project. THE COURT STATED:

"any effluent limitations"

> "Section 401(d) provides that state certifications shall set forth 'any effluent limitations and other limitations...necessary to assure that any applicant' will comply with various provisions of the Act and appropriate state law requirements. 33 USC 1341(d) . . . The language of this subsection contradicts petitioners' claim that the State may only impose water quality limitations specifically tied to a 'discharge.' The text refers to the compliance of the applicant, not the discharge. Section 401(d) thus allows the State to impose 'other limitations' on the project in general to assure compliance with various provisions of the Clean Water Act and with 'any other appropriate requirement of State law.'" Id. at 710.

The US Supreme Court also relied on EPA's regulations implementing Section 401: "EPA's conclusion that activities - not merely discharges - must comply with state water quality standards is a reasonable interpretation of 401, and is entitled to deference. See, e.g., *Arkansas v. Oklahoma*, 503 U.S. ___, ___ (1992) (slip op., at 18-19); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)." Id. at 711.

Streamflow Requirements

The US Supreme Court affirmed the Washington Supreme Court's decision and held that the state of Washington could impose minimum streamflow requirements, notwithstanding FERC's comprehensive licensing authority. The court held that "the State's minimum stream flow condition is a proper application of the state and federal antidegradation regulations, as it ensures that an 'existing instream water us[e]' will be 'maintained and protected.' 40 CFR 131.12(a)(1) (1992)." Id. at 718. The Supreme Court also discussed the relationship of water quantity and water quality, finding that "there is recognition in the Clean Water Act itself that reduced stream flow, i.e., diminishment of water quantity, can constitute water pollution." Id. at 719.

Power Shift

This holding represents a dramatic shift in power from FERC to the states. The exact limits and complete ramifications of *Jefferson County* are still being worked out as other issues are brought before the courts. The Supreme Court in *Jefferson County* also left no doubt that Section 401 ramifications are not limited to FERC licenses. "Finally, the requirement for a state certification applies not only to applications for licenses from FERC, but to all federal licenses and permits for activities which may result in a discharge into the Nation's navigable waters." Id. at 722.

FERC

"Additional" Flow

§ 401 Trigger

§ 401 Time Constraints & § 404 Permit

Continued Debate

Recent Developments: *Alabama Rivers Alliance*

A case in the District of Columbia's Circuit court, *Alabama Rivers Alliance v. FERC*, 325 F. 3d 290 (D.C. Cir. 2003), has recently provided additional guidance. FERC issued a license amendment allowing the dam's owner to replace three existing turbines with new, more efficient units. Two environmental groups sued, arguing that the new turbines' ability to allow water to pass through more quickly resulted in a "discharge" that triggered Section 401 certification. FERC rejected the environmental groups' argument on the grounds that the new turbines did not result in a discharge. The turbines merely increased the discharge of water for a period of time, thereby reducing the amount of time that the units would operate each day.

The DC Circuit reversed FERC, on the ground that the additional flow was a discharge that "resulted from" the new turbines. Even if the additional flow was for only a short period of time, the court found that it was a discharge of additional flows. This was critical due to the fact that when an applicant dam owner applies for a license amendment involving an increase in flows, the state water quality agency may assert Section 401 jurisdiction under the CWA. Thus, an applicant in such a situation is faced with all the issues regarding water quality and "any other appropriate requirement of State law." 33 USC § 1341(d).

Recent Developments: *Airport Communities Coalition*

In *Airport Communities Coalition v. Graves*, 280 F. Supp 2d 1207 (2003), the federal district court interpreted the requirement in Section 401 that a state must act on a Section 401 certification within one year. At issue was the construction of a new runway at the Seattle-Tacoma Airport. The proposed project would fill in all or a portion of 50 wetlands. Consequently, the Airport needed a CWA Section 404 dredge and fill permit from the US Corps of Engineers (Corps). This, in turn, triggered the need for Section 401 certification from the state of Washington. The Airport applied for certification in January 2001, and the Washington Department of Ecology (Ecology) issued its certification in September 2001, well within the one-year limitation. Local communities appealed the certification to the Washington Pollution Control Hearings Board (WPCHB). The WPCHB added conditions to the Section 401 certification, but did not render its decision until more than a year after the application was made.

In December 2002, the Corps issued its Section 404 permit. It adopted some, but not all, of the conditions that WPCHB added to the 401 Certification. The Corps treated WPCHB's additional conditions as discretionary because they were added after the one-year period had expired. 33 USC § 1341(a)(1).

The Airport Communities Coalition sued, arguing that the Corps must incorporate into its Section 404 permit all of the conditions added by the WPCHB under its Section 401 Certification. The District Court disagreed: "If the time bar is to mean anything, … it must mean that the issuance of State conditions outside the one-year time period must be treated differently than the issuance of such conditions occurring within that period." *Airport Communities Coalition v. Graves*, 280 F. Supp 2d at 1215.

The decision was appealed to the Ninth Circuit, but the appeal was later withdrawn. The District Court's decision stands for now, but it remains to be seen how the appellate courts will treat the one-year limitation.

FERC Enforcement of the Terms of a License (Including Section 401 Conditions)

Some 401 certifications contain more requirements than entire FERC licenses formerly included. Another question that has come up is who enforces 401 conditions, FERC or the states?

Many states believe they have independent enforcement authority over Section 401 conditions. Such conditions only take effect, however, through inclusion in a FERC license, and FERC has exclusive enforcement authority over the license. Although this issue is yet to be decided, the better argument appears to be FERC's based on the exclusive nature of their enforcement authority. The issue, however, is certainly not free from continuing debate.

FERC's authority stems from the requirement under the Clean Water Act that a certification can only be suspended or revoked by the licensing agency (i.e. FERC for hydroelectric power licenses, not the states). A certification "may be suspended or revoked by the *Federal agency* issuing such license or permit..." 33 USC § 1341(a)(5) (emphasis added). Section 401 "provides the *licensing agency* with authority to enforce the terms of a license—which pursuant to § 401(d) include a state's § 401 certifications—once such a federal license has been issued." *American Rivers v. FERC*, 129 F. 3d 99 at 108 (2nd Cir. 1997) (emphasis added).

FERC

State Authority Limited

Litigation Likely

"Voluntary" Compliance

Restored Flow Amount

Temperature v. Habitat

Biological Focus

Resource Impacts

Liquidated Damages to the State: FERC Enforcement Exclusive

In *Consumers Power Company*, 68 FERC ¶ 61,077 (1994), a relicensing settlement agreement was submitted to the Commission (FERC) that required the licensee to pay liquidated damages to the state for violations of water quality standards. FERC held, "Nothing in the CWA authorizes the State to engraft a State enforcement scheme onto a federal license." Id. at 61,374. FERC concluded that "Congress clearly intended, and so provided, that the Commission and only the Commission, would be able to assess penalties against licensees for non-compliance with license orders and terms." Id.

In 2003, FERC rejected a license condition in a settlement that would have required the licensee to pay liquidated damages to Michigan for violations of water quality standards. In *Charter Township of Ypsilanti*, 105 FERC ¶ 62,019 (Oct. 9, 2003). FERC's statement was that "Such a liquidated damages scheme conflicts with the enforcement and civil penalties provisions of…the FPA… ."

At least in FERC's view, the immense power of the states under their 401 certification authority ends once the FERC license is issued. In *Erie Boulevard Hydropower*, 102 FERC ¶ 61,052 (2003), the Commission explained that once a license that includes a water quality certification is issued, such certification may only be amended by FERC in response to an application by the licensee.

401 Enforcement: A Brewing Conflict

Another conflict is brewing that will likely be litigated. The *American Rivers* court held that FERC must include all 401 conditions in a license without modification. Therefore, FERC is including 401 conditions in licenses that purport to extend enforcement authority to states. FERC should prevail in future litigation on this issue based on the fact that both CWA and FPA law provides that the licensing agency is responsible for license enforcement.

Why is the issue of which entity has enforcement authority so important? If a licensee concedes that a state has enforcement jurisdiction and the ability to modify a Section 401 certification, it could be difficult to resist unreasonable modifications in the future. The solution for individual licensees—if a state asks for reasonable minor modifications that are within the scope of a license—is to comply but make it abundantly clear they are doing so voluntarily. Don't concede that the state has the authority to modify the 401 certification. This will make easier to decline a future, unreasonable proposal.

The *Lake Chelan* Decision

In 2003, the Chelan Public Utility District entered into a settlement agreement for relicensing of the 48 megawatt (MW) Lake Chelan Project. As part of its relicensing process, the Chelan PUD agreed to restore flows to the bypassed reach of the Chelan River, which had been dry for most of the year for the past 76 years. The four-mile bypass reach extends from the town of Chelan to the Columbia River. There were clear ecological and aesthetic reasons to restore the flow, but the question was how much water should be provided?

Modeling indicated that under the flow regime developed in the Alternative Licensing Process (ALP) fish needs would be met, but the Project would exceed numeric temperature criteria in the bypassed reach required by the state of Washington. It appeared that the numeric criteria could be achieved through high flows (1500 cfs), but those higher flows would have provided less fish habitat than the lower flows developed through the ALP. Also, the cost to the Chelan PUD in foregone power revenue would have been $2.5 million a year due to summertime shutdown of generation.

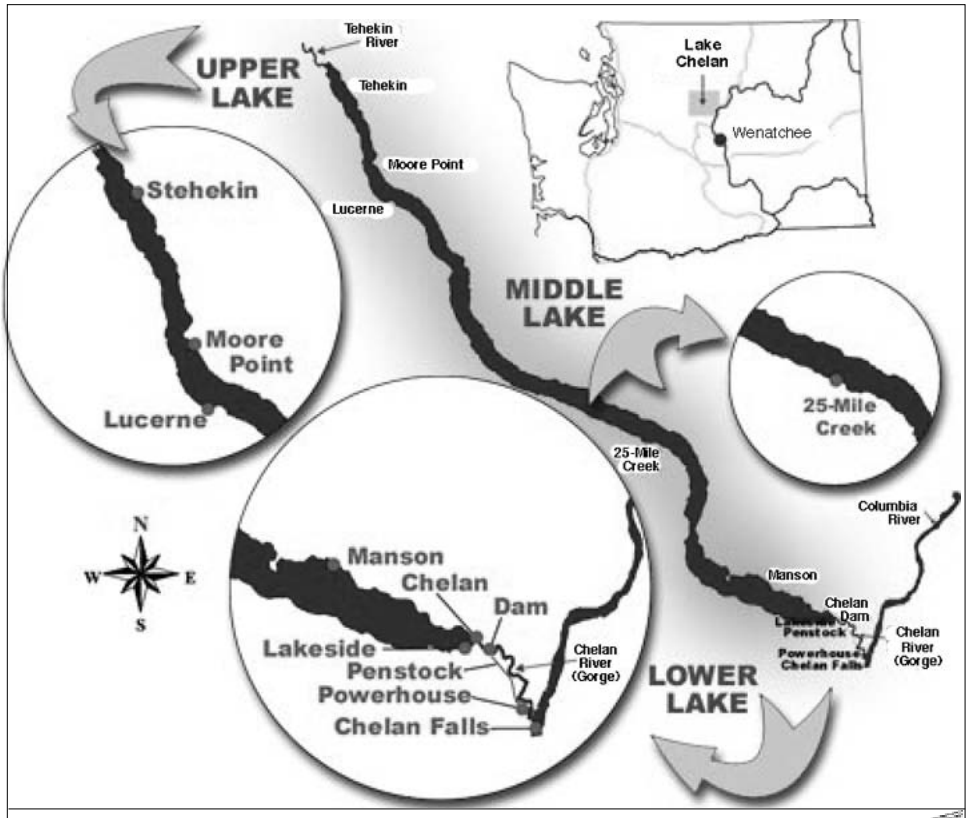
Chelan PUD's response was consistent with its outcome-based approach to relicensing. Chelan encouraged a focus on biological objectives, rather than prescriptive measures. The focus should be on obtaining biological benefits for fish, not on achieving numeric criteria for their own sake. Obviously, a numeric standard is not an end of itself. Thus, one shouldn't be a slave to numeric standards, instead relying on what is best for the resource.

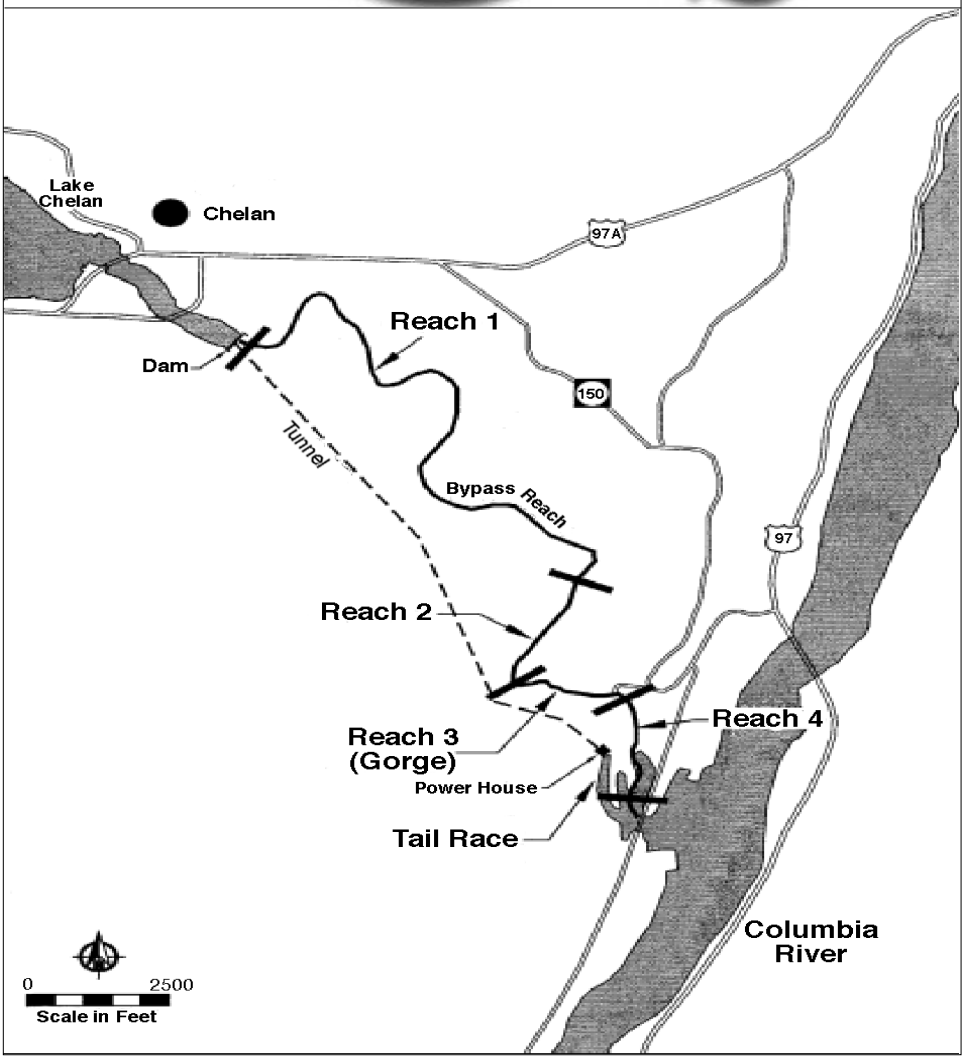
What about a "the law is the law" response from agency lawyers? On behalf of Chelan PUD , Davis Wright Tremaine emphasized that water quality measures must be "reasonable" (citing RCW 90.48) and that authority exists to develop a site-specific standard under EPA's regulations. Numeric criteria are intended to support the designated uses, not the other way around. See 40 CFR § 131.11(a).

Additional support for Chelan PUD's position was asserted. First, the "antidegradation policy" requires that all designated uses, including hydropower, must be "maintained and protected." 40 CFR § 131.12(a)(1). Secondly, under the *Jefferson County* decision, *all* state law related to water quality is relevant, including state law that supports outcome-based 401 certifications. RCW 90.74. Examining the net impact on the resource rather than relying strictly on water quality standards was crucial in this case. It should also be noted that the Chelan PUD did not rely on the FERC/ALP record. Instead, it assembled a separate record for the purpose of the Section 401 certification under the CWA.

FERC

The Lake Chelan Project





FERC

Adaptive Management

Tribes Sue

Strict Adherence Rejected

Chelan PUD 401 — Certification / Settlement

The 401 certification/settlement agreed to by the Chelan PUD and Washington's Department of Ecology contained several important provisions. A rigorous ten-year adaptive management plan that focuses on benefiting fish through the achievement of biological objectives was essential.

THE FIVE-STEP ADAPTIVE MANAGEMENT PLAN REQUIRES PARTICIPANTS TO:

- Establish clear hypothesis
- Implement initial measures
- Monitor effects of initial measures
- Report and review monitoring results in a collaborative process
- Based on a review of the monitoring results, implement additional measures where appropriate.

The parties agreed that all measures must be "reasonable and feasible." At year 10, if the biological objectives have been met, but temperature criteria are not met, or biological objectives are not met and all "reasonable and feasible measures" have been implemented, Ecology agreed to "initiate a process to modify the applicable standards" by undertaking a "use attainability analysis."

Indian Tribes, which largely did not participate in the Alternative Licensing Process sued to overturn the Section 401 certification. After a year of litigation, the Washington Pollution Control Hearings Board (Board)upheld the 401 certification in all respects. "Appellants contention that the Clean Water Act requires strict adherence with numeric water quality criteria is an incorrect reading of the requirements of Section 401 of the Clean Water Act." *Confederated Tribes of the Umatilla Indian Reservation and Columbia River Inter-Tribal Fish Commission v. Ecology and PUD No. 1 of Chelan County*, PCHB No. 03-075 (April 21, 2004). The Board also found that the "primary aim of the section 401 certification is to meet State water quality standards by complying with the intent and substance of the standard rather than its numeric form." Id.

This decision provided a rare courtroom victory for hydroelectric licensees. Chelan PUD is now awaiting a NOAA Fisheries biological opinion before FERC can issue a new license. The settlement and court decision represent a positive Section 401 certification precedent for hydropower in Washington state and elsewhere, but it is clearly not a panacea for all the potential issues involved in hydropower cases. The principles established in the *Lake Chelan* case should apply elsewhere, but different fact patterns could result in different answers.

Editor's Note: This article is based primarily on a presentation by Craig Gannett, Esq. of Davis Wright Tremaine LLP (Seattle) at the Oregon Water Law Conference on November 5, 2004. The Oregon Water Law Conference, sponsored by The Seminar Group, occurs annually and presents two days of excellent coverage on Oregon water law issues.

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WATER BRIEFS

EPA /PESTICIDES/CWA WEST
NEW INTERPRETATION AND RULE

On January 27, EPA announced the issuance of a final interpretive statement and a proposed rule to clarify Clean Water Act (CWA) permitting requirements for the application of pesticides to or over the nation's waters. The statement and proposed rule reflect EPA's belief that CWA permits are not required where application of a particular pesticide to or over water is consistent with requirements under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). EPA's proposal follows a number of lawsuits, particularly one case in Oregon, which called for pesticides to be regulated through Clean Water Act discharge permits (see Goldman, this TWR). The public may provide input on the proposal during a 60-day comment period; comments must be received or postmarked on or before midnight April 4, 2005. The statement and proposed rule can be viewed on EPA's website.
For info: EPA website: www.epa.gov/npdes/agriculture.

EPA SEWAGE "BLENDING" US
PROPOSED RULE CONTROVERSY

A comment period closed on February 9, for EPA's proposed rule on sewage "blending." In the fall of 2003, EPA proposed a "sewage blending" policy that allows sewage treatment plants to bypass the "secondary treatment" phase during heavy rain storms. The rule would allow treatment plants to mix partially treated waste with fully treated waste and discharge the mixture into rivers. Opponents of the rule assert that it will pose a serious threat to human health and the environment, and that it violates the Clean Water Act.

The guidance is entitled: "*National Pollutant Discharge Elimination System (NPDES) Permit Requirements for Municipal Wastewater Treatment Discharges During Wet Weather Conditions*" -see Federal Register on November 7, 2003 (68 FR 63042)(EPA Water Docket, ID # OW-2003-0025).

Critics of the policy also believe the agency's blending guidance will undermine the 1994 EPA Combined Sewer Overflow (CSO) policy which requires, as part of a long-term control plan, the evaluation of alternatives to eliminate CSOs. By expanding the potential use of blending, it is likely that more communities will select blending instead of other alternatives with greater water quality benefits, several Senators asserted in a letter sent to EPA Administrator Michael Leavitt on December 20, 2004. According to EPA's website, approximately 772 cities in the US have combined sewer systems.

EPA maintains that the policy will improve management of sewage treatment facilities. EPA's press release described the policy as focusing on the "practice of blending, which occurs when large volumes of wastewater, caused by heavy rainfall or snowmelt, exceed the capacity of the secondary (biological) treatment units at a sewage treatment facility. During a storm, the incoming wastewater is treated by the primary units and then sent to the secondary treatment units. Amounts in excess of the capacity of the secondary units are diverted around and then later recombined or blended with the wastewater that has been treated by the secondary units. These blended flows are disinfected and discharged." The draft policy is available at EPA's website: www.epa.gov/npdes/blending.
For info: Cathy Milbourn, EPA, 202/564-7824, email: milbourn.cathy@epa.gov; EPA CSO website: http://cfpub.epa.gov/npdes/home.cfm?program_id=5; EPA "Blending" website: http://cfpub.epa.gov/npdes/cso/blending.cfm

COLORADO RIVER 2005 WEST
OPERATING PLAN RELEASED

The Bureau of Reclamation has recently released the 2005 Operating Plan for the Colorado River. A pdf document details projected operations of facilities in both the Upper and Lower Colorado River Basins.
For info: USBR website: www.usbr.gov/lc/riverops.html, click on "2005 Annual Operating Plan"

ESA RECOVERY PLAN WA

NOAA Fisheries is required to develop recovery plans for salmon listed under the Endangered Species Act (ESA). On December 15, 2004, Washington presented NOAA Fisheries with a salmon recovery plan developed by the Lower Columbia Fish Recovery Board. According to the Department of Ecology this is the first recovery plan for listed salmon to be developed under local leadership in a coordinated effort to address several related objectives, including ESA recovery planning. Questions and answers, and the news release from Washington are posted online.
For info: NOAA website: www.nwr.noaa.gov/1srd/Recovery/LCR_Willamette/LCFRB_release/index.html.

COALBED METHANE WY
GENERAL PERMIT ILLEGAL

On January 7, a federal judge held that a Clean Water Act (CWA) permit for coalbed methane (CBM) operations in Wyoming is illegal. The permit had allowed CBM operators to dump millions of gallons of by-product wastewater into the Powder River and its tributaries. Following the ruling, operators cannot build new dams and reservoirs until the US Army Corps of Engineers (Corps) corrects its permits approval process.

The Wyoming Outdoor Council, Powder River Basin Resource Council, and Biodiversity Conservation Alliance, represented by Earthjustice, brought the lawsuit. The suit challenged the Corps' general permit that governs construction of dams and reservoirs to dispose of wastewater from coalbed methane wells. See CWA, 33 U.S.C. § 1344(e) regarding Section 404 (authorizes the Corps to regulate discharges of dredged and fill material into navigable waters). These dams and reservoirs are built in channels of seasonal streams. The Wyoming Department of Environmental Quality recently declared CBM wastewater toxic. [See Darin, TWR #3 for a detailed discussion of CBM's impacts on water resources.]

WATER BRIEFS

The court found that the Corps violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, by failing to consider the cumulative impacts of the general permit. The court also found that "the Corps reliance on mitigation measures that were unsupported by any evidence in the record cannot be given any deference under NEPA." The court remanded the case to the Corps for further findings on cumulative impacts, impacts to ranchlands and the efficacy of mitigation measures.

"This Court will not rubberstamp an agency determination that fails to consider cumulative impacts, fails to realistically assess impacts to ranchlands, and relies on unsupported, unmonitored mitigation measures. NEPA and the CWA require more," Judge William Downes' opinion concluded. *Wyoming Outdoor Council, et al v. U.S. Army Corps of Engineers and Petroleum Association of Wyoming*, Case No. 02-CV-155-D (Dist.WY. 2005). A copy of the opinion can be viewed by going to the Earthjustice website and clicking on "Court ruling." The lengthy decision contains detailed discussion regarding relevant law and the failings of the Corps that resulted in findings that the Corps' actions were "arbitrary and capricious."

For info: Jill Morrison, Powder River Basin Resource Council, 307/ 672-5809, Neil Levine, Earthjustice, 303/ 623-9466, website: www.earthjustice.org/news/display.html?ID=945

YAMPA COLLABORATION CO

RESERVOIR EXPANSION

Participants in the Upper Colorado River Endangered Species Program (UCRESP) signed a final agreement in mid-January that allocates additional water for both endangered fish and new growth in Colorado's Yampa River Valley. The project involves the expansion of Elkhead Reservoir near Craig, Colorado in an ongoing effort to nearly double the size of the 13,700 acre-foot reservoir. Water from Elkhead Reservoir is currently used for power generation, recreation and the city of Craig's municipal supply.

Dan Birch, Colorado River Water Conservation District, discussing the project with TWR, emphasized a "unique aspect" of the recovery program. "The Program is taking a collaborative and cooperative approach in lieu of a heavy-handed, regulatory approach. Rather than an agency trying to extract water from existing users, the Program itself is developing water resources necessary for the recovery of endangered species in the Colorado River."

UCRESP operates under the auspices of the ESA, and is an effort whose primary parties are the states of Colorado, Wyoming, Utah, the US Bureau of Reclamation, US Fish & Wildlife Service, and the Western Area Power Administration. Those parties contribute funds for recovery activities and the UCRESP undertakes various actions to help recover the listed species. Mr. Birch told TWR that the Colorado River Water Conservation District is the lead participant on the project to design and construct the reservoir expansion. Approval to enlarge Elkhead Reservoir was obtained from the City of Craig and the Yampa Participants Power Consortium.

The project will result in 7,000 acre-feet per year for instream flow purposes to help the listed species, in addition to 5,000 acre-feet per year being developed for other water uses. The plan also calls for the removal of sport fish that compete with the four endangered fish - the humpback chub, the Colorado pikeminnow, the razorback sucker and the bonytail - that are native to the Colorado River and its main tributaries. Expansion of the reservoir is expected to cost approximately $24 million. UCRESP will contribute $11.5 million over two years for the dam enlargement and an additional $600,000 for removal of the non-native fish.

For info: Dan Birch, UCRESP, 970/ 871-1529, email: dbirch@crwcd.com

HATCHERY-WILD FISH CA/OR

HOGAN REAFFIRMS RULING

Ruling from the bench on January 11, Judge Michael Hogan found that the federal government violated the ESA when it failed to consider hatchery fish in its assessment of coho in the southern Oregon/northern California ESU (SONCC Evolutionarily Significant Unit). Judge Hogan relied on his own opinion in the *Alsea Valley* case, where he found that NMFS had made "improper distinctions...by excluding hatchery coho populations from listing protection even though they are determined to be part of the same DPS [distinct population segment] as natural coho populations." *Alsea Valley Alliance v. Evans*, 161 F.Supp2d 1154, 1162 (Dist.Or. 2001).

Despite his ruling, Judge Hogan did not set aside the ESA listing of coho salmon, but instead left it in place while the National Marine Fisheries Service (NMFS) completes its review of 27 west coast listings. NMFS' action is expected to be complete in June 2005. The written judgment by Judge Hogan, dated January 20, was a single sentence remanding the action to NMFS for further consideration. *California State Grange et al v. National Marine Fisheries Service, et al*, Civ. No. 6-02-6044-HO).

The Pacific Legal Foundation (PLF), which representsed the agricultural community, hailed the decision as a victory in its press release. PLF noted that Judge Hogan also indicated that if a federal agency took a specific enforcement action on behalf of the illegal listing that caused harm, those harmed could go to court and ask to have the federal action stopped. If the federal government tries "to cut off the water again or take some other similar action, we'll be back in court," Russell Brooks of PLF was quoted as saying.

Seeking to uphold protections for the fisheries involved, a number of conservation and commercial fishing organizations intervened in the case. Michael Mayer of Earthjustice, one of their attorneys, told TWR that they are

WATER BRIEFS

pleased that Judge Hogan rejected the plaintiffs' request that the coho be de-listed. Mayer said that Judge Hogan made clear at the hearing that "the potential harm to the coho was apparent" and when balanced against the fact that the "economic harm to the plaintiff was speculative at this point," it did not make sense to de-list the fish prior to NMFS final rules. "Hogan was willing to defer to the agencies determination that the fish still require protection no matter how you count them," Mayer noted.
For info: Michael Mayer, Earthjustice, 206/ 343-7340 x28, website: www.earthjustice.org; Russell Brooks, PLF, 425/ 576-0484, website: www.pacificlegal.org

INSTREAM FLOW WA
TOOLKIT

American Rivers and the Washington Environmental Council have developed a toolkit to assist citizens working to restore and protect stream flows. The new "Instream Flow Toolkit: Advocacy Guide to Healthy Rivers and Stream Flows in Washington" is available in pdf format. To coincide with the state's efforts regarding instream flows, American Rivers and WEC developed the guide with legal, policy, and science "tools" that will be useful to watershed and river advocates whether the protection efforts occur through watershed planning or formal state rulemaking.
For info: Ross Freeman, American Rivers, 206/ 213-0330; Toolkit website: www.amrivers.org/doc_repository/InstreamFlowToolkit.pdf

TOXICITY GUIDANCE US
EPA DRAFT - COMMENT PERIOD

EPA released its draft *National Whole Effluent Toxicity Implementation Guidance* for public review and comment for 60 days. The draft guidance provides recommendations to states and EPA regional offices on implementing **w**hole **e**ffluent **t**oxicity (WET) testing in NPDES permits. The draft WET Guidance is available on EPA's website at www.epa.gov/npdes/permitbasics. Comments may be submitted through Feb. 28, 2005 in a variety of forms (paper, electronic, etc.) to the EPA Docket Center, Docket ID # OW-2004-0037.
For info: EPA website: www.epa.gov/edocket

SURFACE WATER "CALL" ID
GW REGULATION

Senior surface water right owners have issued a "call" to the Idaho Department of Water Resources (IDWR) to regulate junior groundwater right owners in the Eastern Snake River Plain Aquifer (see Rassier, TWR #10). One document filed by the surface water users on January 14, 2005, noted that the Interim Stipulated Agreement, that formerly controlled water diversions, ended two weeks ago and that the administration of groundwater rights is necessary to satisfy the "Surface Water Coalition's" senior water rights. The document went on to say that the Surface Water Coalition remains "committed to 'good faith' negotiations with groundwater users to find a long-term agreement that will restore their water supplies and stabilize the declining spring flows and aquifer levels."
For info: Surface Water Coalition Water Call - Initial Filing, and Secondary Filing on the IDWR website: www.idwr.state.us/

GROWTH AND WATER US
EPA TRAINING MODULE

A new on-line, training module called "Growth and Water Resources" has recently been posted on EPA's Watershed Academy Web website. This training module explains how changes in land use affect water resources, and presents national data on trends in development patterns and activities on land that have become increasingly significant challenges for achieving water quality standards. The module describes a combination of approaches to accommodate future growth in a way that benefits the economy and the environment and will help meet water resource goals. The module also includes a "tools" section with links to on-line resources. EPA's Office of Wetlands, Oceans and Watersheds Smart Growth Team developed this training module.
For info: Jamal Kadri, EPA, email: kadri.jamal@epa.gov. or website: www.epa.gov/watertrain/smartgrowth/

BOR DECISION WA/OR/ID
COLUMBIA RIVER BIOP

On January 12, 2005, J. William McDonald, Regional Director, Bureau of Reclamation (BOR), signed a "*Decision Document Concerning the Final Updated Proposed Action and NOAA Fisheries' November 30, 2004, Biological Opinion Consultation on Remand for Operation of the Federal Columbia River Power System Including 19 Bureau of Reclamation Projects in the Columbia Basin.*" The Decision Document sets forth BOR's decision to implement components of the Federal Agencies' Updated Proposed Action that pertain to BOR, which were analyzed in the NOAA Fisheries 2004 Biological Opinion for operation of the Columbia River Power System. The biological opinion was revised pursuant to court order in *NWF V. NMFS.*
For info: Decision Document at NOAA website: www.salmonrecovery.gov/Implementation/Reclamation_Decision_Document.pdf

EPA WQ PLAN CA
TMDLS - UPPER EEL RIVER

At the end of 2004, the EPA finalized water quality plans for the Upper Eel River and several tributaries in Lake and Mendocino Counties to protect and restore native fish. The TMDLs (total maximum daily loads) include recommendations to reduce sediment and protect trees that provide shade for the streams to protect several species of salmon and steelhead, some of which have been listed as "threatened" under the ESA.

WATER BRIEFS

The EPA evaluated the effects of a local dam, native trees and numerous dirt roads to determine how to restore the river. Timber harvesting, runoff from dirt roads and the removal of native plants have contributed to the excess sediment and increasing stream temperatures, which have led to the decline of the river's native fish population.

The TMDL recommends reducing the amount of human erosion to one part for every four parts nature contributes. The TMDL also requires steps that will increase the amount of shade to the river, such as allowing the natural plants to grow back.

For info: Laura Gentile, EPA, 415/947-4227, email: gentile.laura@epa.gov

STORMWATER PENALTIES ID

IDAHO CONSTRUCTION

EPA reached a settlement with Premier Homes, Inc., and Scott Hedrick Construction, Inc., for failure to control stormwater running from their projects at the Hampton Inn and Comfort Inn sites, respectively, in Meridian. Premier Homes will pay $6,000 and Scott Hedrick Construction will pay $4,000 for violating federal Clean Water Act rules that require construction sites larger than one acre to apply for a NPDES permit and to prevent run-off from polluting local lakes and streams. Uncontrolled and sediment-laden stormwater from the two sites polluted nearby Five Mile Creek

EPA's Waste Water Enforcement Manager in Seattle, Kim Ogle noted the "rules changed last year to require these construction sites to obtain permits and do what is necessary to prevent runoff from their sites from entering nearby streams and creeks."

In a similar settlement, Harrison Heights, LLC and its contractor, Iron Triangle, recently agreed to pay a $27,500 penalty for violating the storm water provisions of the federal Clean Water Act during construction of the Harrison Heights subdivision on the southeast side of Coeur d'Alene Lake. EPA originally charged that the two companies failed to apply for or obtain the general Clean Water Act permit for storm water discharges at construction sites. Specifically, EPA alleged that the companies were building roads and clearing land without an adequate Storm Water Pollution Prevention Plan or sediment and erosion control measures in place at the site. The activities resulted in discharges of soil and sediment from the site into a nearby tributary to Coeur d'Alene Lake.

For info: Mark MacIntyre, EPA, 206/553-7302, email: macintyre.mark@epamail.epa.gov

STORMWATER PERMITS US

OIL & GAS CONSTRUCTION

EPA proposes to extend until June 12, 2006, the regulatory deadline that would require stormwater permit coverage for oil and gas construction activities that disturb between one and five acres of land. EPA said it needs additional time to consider comments raised by stakeholders and to consider the economic, legal and procedural implications related to controlling stormwater discharges from these sites.

The public may provide comments on the proposed extension for 30 days upon publication in the Federal Register (published January 18). A copy of the proposed extension and information about EPA's stormwater program is available at EPA's website (see below).

The proposed extension also outlines EPA's intent to develop and propose a regulation that would address stormwater discharges from these oil and gas construction sites. This proposal, to be made by Sept. 12, 2005, will be made available to the public for review and comment.

During the next 15 months, EPA intends to: complete an economic impact analysis; evaluate several regulatory options for addressing these stormwater discharges; and evaluate practices and methods used to control stormwater discharges from these sites. EPA intends to hold at least one public meeting with stakeholders to exchange information on current industry practices and their effectiveness in protecting water quality.

For info: Cathey Milbourn, EPA, 202/564-7824, email: milbourn.cathy@epa.gov;
EPA STORMWATER WEBSITE: www.epa.gov/npdes/stormwater

CRITICAL HABITAT NW/CA

PUBLIC COMMENT EXTENSION

NOAA Fisheries announced on February 1 that it is extending the deadline for public comments until March 14, 2005 on proposed critical habitat for 20 Evolutionarily Significant Units (ESUs) of salmon and steelhead in the Northwest and California. Comments may be submitted via mail, fax, or email.

For info: NOAA website: www.nwr.noaa.gov/1salmon/salmesa/crithab/CHsite.htm

COLORADO WATER LAW CO

CO SUPREME COURT RULING

Colorado's Supreme Court on January 18 issued a lengthy decision which covers several interesting aspects of water law, including: conjunctive use; water use modeling; augmentation plans; expert witnesses; and attorney fees. The decision also includes a discussion addressing the water court's discretion regarding evidentiary rulings. *In re Application for Water Rights of Park County Sportsmen's Ranch, LLP* (No. 01SA412). The Supreme Court affirmed the water court's decision to dismiss the groundwater application for lack of an adequate augmentation plan. The court also upheld part of the water court's decision to award attorney fees against the applicant and the City of Aurora, based on a finding that the applicant's (Park County Sportsmen's Ranch) claims for precipitation and irrigation run-off were frivolous. Aurora was found to be vicariously liable because the applicant was acting as its agent when it pursued the frivolous claims.

For info: Colorado Supreme Court website: www.courts.state.co.us/supct/supctcaseannctsindex.htm

CALENDAR

February 15-17 DC
ACWA DC Conference, Washington, DC, RE: Annual Conference, Contact with Decision Makers Impacting Federal Water and Environmental Policy. For info: ACWA website: www.acwanet.com

February 16 WA
Natural Resource Damages Litigation Seminar, Seattle, Renaissance Seattle Hotel, 515 Madison Street. RE: Federal, State and Tribal Claims; Natural Resource Damage Assessments; Defenses/Strategies for Minimizing Damage Liabilities; Economic and Technical Modeling, GW Contamination, and Natural Resource Damage Banking for Multi-Party Sites. For info: LSI, 800/ 854-8009, email: registrar@lawseminars.com; or website: www.lawseminars.com/seminars/05NRDWA.php.

February 16-17 TN
Source Water Protection: Planning for the Future, Nashville, Metro Water Services, 1700 3rd Avenue North, Sponsored by the American Water Works Association, RE: Source Water Protection Plans (SWPP), Government Roles in SWPPs, Delineation of Source Water Protection Areas, Contamination, Determining Source Water Susceptibility, SWP Area Management,Emergency Plans, Source Water Assessmentm, Funding Options. For info: AWWA Customer Service Group, 800/ 926-7337; website: www.awwa.org

February 16-17 WA
Contaminant Chemistry and Transport in Soil, Surface Water, and Groundwater Workshop, Seattle, Mountaineers Center, 300 Third Avenue West, 8:30am-5pm. For info: Erick McWayne, NW Environmental Training Center, 206/ 762-1976 or email: info@nwetc.org

February 16-18 DC
Environmental Law, Washington, DC, Hyatt Regency Bethesda, RE: Clean Water Act, CERCLA, RCRA, Congressional Developments, Ethical Issues, Wetlands Developments, State and Federal Enforcement, Citizen Suits, Science and Law of Risk Evaluation, Public Lands and ESA, Sponsored by the Environmental Law Institute and The Smithsonian Institution. For info: ALI-ABA, 800/ CLE NEWS, website: www.ali-aba.org

February 16-18 OR
Oregon American Fisheries Society Annual Meeting, Corvallis, Oregon State University. RE: Multidisciplinary and Innovative Approaches to Aquatic Resource Conservation. For Info: website: www.oarfs.org

February 18 CA
Hydro Project Relicensing: Technical and Regulatory Overview, Davis. Presented by U.C. Davis Extension. For info: UCDavis, 800/ 752-0881, website: www.extension.ucdavis.edu

February 19 CA
California EPA – State Water Resources Control Board Meeting, Sacramento, Cal/EPA Building, 1001 I Street, 9am, RE: Water Quality Control Plan for LA Region – Water Quality Objective for Chloride in the Lower Santa Clara River, Water Quality Control Plan for Sacramento and San Joaquin River Basins – Temperature Objectives & More. For info: Debbie Irvin, Clerk to the Board, 916/ 341-5600; email: dirvin@waterboards.ca.gov; website: www.swrcb.ca.gov/wksmtgs/schedule.html

February 22–23 OR
Stormwater Treatment: How it Works, Short Course, Portland. Featuring: Dr. Gary Minton, Author of "Stormwater Treatment: Biological, Chemical, and Engineering Principles" For info: website: stormwaterinc.com

February 23 OR
City of Portland's Class V Underground Injection Control (UIC) Water Pollution Control Permit, Public Hearing, Portland, DEQ NW Region Office, 2020 SW Fourth Ave, 4th Floor,7pm. For Info: Rodney Weick, DEQ/WQ, 503/ 229-5886 or email: weick.rodney.j@deq.state.or.us

February 23 OR
ESA Nuts and Bolts Workshop. Portland, Ecotrust Building, 721 NW Ninth Ave, 8:30am-5pm. For info: Erick McWayne, NW Environmental Training Center, 206/ 762-1976 or email: info@nwetc.org

February 24 OR
NEPA Workshop. Portland, Ecotrust Building, 721 NW Ninth Ave, 8am-4:30pm. "Writing the Perfect EA/FONSI and EIS" For info: Erick McWayne, NW Environmental Training Center, 206/ 762-1976 or email: info@nwetc.org

February 24-25 CA
"Water Supply Challenges in Times of Drought and Growth" 23rd Annual Water Law Conference, San Diego, Westin Horton Plaza Hotel. RE: Creative Settlements & Water Management Concepts, Effective Water Transfers, New Urban Supplies, Critical Habitat and Environmental Baselines for Hydropower, Models in Water Disputes, Shortage Colorado River, Conjunctive Use, Endangered Species Act Compliance, Hot Topics for Water Practitioners. For info: ABA, 312/ 988-5724.

February 24-25 KS
Dam Safety Conference 2005, Topeka, Holiday Inn Holidome, I-70 Exit 357A, RE: Small Dams, Proposed Regulatory Changes, Operating and Maintaining, Liability and Inspection, Sponsored by Kansas Department of Agriculture Dam Safety Program. For info: Beth Cooper, KDA, (785) 296-0573, email: bcooper@kda.state.ks.us

February 24-26 NM
10th Xeriscape Conference, Albuquerque, Albuquerque Convention Center, For info: Xeriscape Council website: www.xeriscapenm.com

February 27-March 3 AZ
31st Waste Management Symposium, Tucson. RE: Global Accomplishments in Environmental and Radioactive Waste Management: Cost Effectiveness, Risk Reduction and Technology Implementation. Organized by WM Symposia, Inc. For info: WM Symposia, 520/ 696-0399, email: mary@wmarizona.org, website: www.wmsym.org/

February 28 CA
NEPA: Definitive and Practical Guide, Los Angeles, Century Plaza Hotel & Spa, 2025 Avenue of the Stars, RE: Cumulative Impacts, Environmental Streamlining, Defining the Scope of NEPA Analysis for Private Activities, Mitigating EAs and FONSIs, Induced Growth, CEQA/NEPA Intersection, How to Win the Lawsuit, Purpose and Need. For info: CLE Int'l, 800 873-7130, website: www.cle.com

February 28-March 2 OR
"Generation for Generations" Northwest Hydroelectric Association Annual Conference, Portland, Lloyd Center Doubletree, RE: Columbia River Bi-Op (Hydropower's Role), Inside the Beltway, Politics of Power, Settlement Process, Regional Water Quality Process, FERC's Role (Tribal Issues, Dam Assessment Process, Defining Boundaries, Integrated Licensing Process, Resolving Conflict in License Development, Future Energy Portfolio, Pre-conference Tour of PGE's Clackamas River Project on 2/28. For info: Jan Lee (NWHA), 503/ 363-0121, website: www.nwhydro.org/downloads/NWHA05%20brochure.pdf

March 1 WY
Wyoming State Water Forum Meeting, Cheyenne, State Engineer's Conference Room, Herschler Building 4E, 10am, Invited Guest: Roundtable – All Water Forum Members, Discussion Item: Water Planning. For info: State Engineer's Office, website: http://seo.state.wy.us/forum.aspx

March 1-4 TX
Texas Water Conservation Association Annual Convention, Austin, Marriott at the Capitol. For info: TWCA, website: www.twca.org

March 2 OR
Forum for Business & Environment "Bio-Energy: A Boost for Oregon's Economy," Salem. Presented by Oregon Environmental Council. For info: Cheryl, 503/ 222-1963, x100 or email: cheryl@orcouncil.org, website: www.orcouncil.org/events.htm

March 3-4 WA
Natural Resource Damage Assessment Workshop, Seattle, Mountaineers Center, 300 Third Avenue West, 8:30am-5pm. Legal and Technical Analysis. For info: Erick McWayne, NW Environmental Training Center, 206/ 762-1976 or email: info@nwetc.org

March 3-6 OR
Public Interest Environmental Law Conference (23rd Annual): "Living As If Nature Mattered," Eugene, William Knight Law Center, University of Oregon. For info: PIELC website: www.pielc.org.

March 4 OR
Drinking Water Conference, Portland, World Trade Center Auditorium. RE: Clean Water Act, Safe Drinking Water Act, Integrating Water Quality & Public Health, Drinking Water Rules, Programs, Funding & Regulatory Requirements, Creative Approaches, Source Water Assessment & Protection, Risk Assessment & Determining Risk of Contamination. For info: Environmental Law Education Center, 503/ 282-5220, website: www.elecenter.com

March 4-5 UT
"Private Property and Nature Conservation: Land Ownership in the 21st Century," Wallace Stegner Center Tenth Annual Symposium, Salt Lake City. RE: Multidisciplinary Approach. For info: Wallace Stegner Center, 801/ 585-3440, website: www.law.utah.edu/stegner

March 6-9 AZ
Membrane Technology Conference & Exposition, Phoenix, RE: Regulatory/Operational Issues, Membrane Cost Modeling, Technology Advances, Sponsored by American Water Works Association, International Water Association and European Desalination Society. For info: AWWA website: www.awwa.org/conferences/membrane/

March 7 UT
Utah Water Quality Board Meeting, St. George, City Council Chambers, 1:30pm. For info: Utah DEQ, 801/ 538-6146, website: www.deq.utah.gov

March 7-8 CO
Colorado Water Law: Long-Term Solutions for Acquiring, Using and Protecting Water, 4th Annual Conference, Denver, Marriott City Center Hotel, RE: Well Augmentation Plans, Computer Water Accounting, Denver Water Board View, Integrating Municipal and Agricultural Water Supplies, Statewide Water Supply Initiative, Drought & Colorado River, Compliance Under ESA Sections 7 & 9, Platte River Recovery Implementation, Bypass Flows, Recreation In-Channel Diversion, Ethics, San Luis Valley, Clean Water Act Issues for Water Management, Legislative & Case Law Update. For info: CLE Int'l, 800/ 873-7130, website: www.cle.com

March 7-11 CA
Pacific Fisheries Management Council, Sacramento. RE: Issues Related to Salmon, Pacific Halibut, Coastal Pelagic Species, Groundfish, Highly Migratory Species, Marine Protected Areas and Essential Fish Habitat. For info: Dr. Donald O. McIsaac, 866/ 806-7204, website: www.pccouncil.org/events/2005/pfmc0305.html

(continued from previous page)

March 8 **OK**

Oklahoma Water Resources Board Meeting, Oklahoma City, 3800 N. Classen Blvd., 9:30 am. For info: OWRB, 405/ 530-8800, website: www.owrb.state.ok.us/news/meetings/board/board-mtgs.php

March 8-9 **UT**

2005 Utah Water Users' Workshop, St. George, The Dixie Center. RE: Efficiency and Enforcement, Forfeiture, Change Applications, Prescriptive Easements, Legislative Task Force Update, Environmental Cleanup and Water Rights, Water Conservation Technology, Water Supply, Water Quality Issues, Ground and Surface Water Protection Program & More. For info: Allison Barnes, 435/ 797-2802

March 9-10 **WA**

Environmental Regulation on Tribal Reservations Workshop, Seattle, Mountaineers Center, 300 Third Avenue West, 8:30am-5pm. For info: Erick McWayne, NW Environmental Training Center, 206/ 762-1976 or email: info@nwetc.org

March 10 **UT**

Utah Board of Water Resources Meeting, St. George, Location TBA. For info: Molly Waters, 801/ 538-7230, email: mollywaters@utah.gov, website: www.water.utah.gov/board/2004SCHED.asp

March 11 **WA**

Residential Redevelopment of Contaminated Property, Seattle, Renaissance Seattle Hotel. For info: LSI, 800/ 854-8009, website: lawseminars.com

March 11 **CA**

NEPA: Definitive and Practical Guide, San Francisco, The Fairmount Atop Nob Hill, RE: Cumulative Impacts, Environmental Streamlining, Defining the Scope of NEPA Analysis for Private Activities, Mitigating EAs and FONSIs, Induced Growth, CEQA/NEPA Intersection, How to Win the Lawsuit, Purpose and Need. For info: CLE Int'l, 800 873-7130, website: www.cle.com

March 11, 18 & April 1 **CO**

Western Water Rights and Water Engineering, Denver, University of Colorado at Denver (Health Sciences Center), 10am–5pm. For info: CU Denver Engineering, 303/ 556-4907, website: www.cudenver.edu/engineer (click on Continuing Education, then Course Information)

March 16-17 **OR**

Oregon Board of Agriculture Meeting, Salem. Location/Agenda TBA. For info: Bruce Pokarney, ODA, 503/ 986-4559

March 17-18 **OR**

Oregon Fish & Wildlife Commission, Coquille, 8 am. For info: Cristy Mosset, ODFW, 503/ 947-6044, www.dfw.state.or.us/Comm/schedule.htm

March 18 **CA**

California EPA – State Water Resources Control Board Meeting, Sacramento, Cal/EPA Building, 1001 I Street, 10am. For info: Debbie Irvin, Clerk to the Board, 916/ 341-5600; email: dirvin@waterboards.ca.gov; website: www.swrcb.ca.gov/wksmtgs/schedule.html

March 21-22 **WA**

Clean Water/Stormwater Conference, Seattle. For info: LSI, 800/ 854-8009, website: www.lawseminars.com

March 23-26 **OR**

Northwest Scientific Association 2005 Annual Meeting, Corvallis, Oregon State University. For info: NWSA website: www.vetmed.wsu.edu/org_NWS/NWSci_Home.htm

March 29-April 2 **NV**

"WQA Aquatech USA 2005," Water Quality Association Exhibition and Convention, Las Vegas, RE: Process Water, Drinking Water, UltraPure and Wastewater Uses, Water Management, Business Operations & Marketing. For info: WQA website: www.wqa.org

March 30-April 1 **CA**

Environmental Industry Summit 2005, San Diego, Coronado Island Marriott Resort. RE: Governor Schwarzenegger's Environmental Policies; Bush Administration Policies; Changes at EPA, DOE, DOD; Remediation, Insurance, Reverse Auctions, Technology Commercialization, and More. For info: Environmental Business International Inc, 619/ 295-7685 x10

March 30 - April 2 **CA**

23rd Annual Salmonid Restoration Conference "Thinking Like a Watershed: From the Headwaters to the Sea," Fortuna. For info: The Salmonid Restoration Federation, 707/ 923-7501, website: www.calsalmon.org

March 30-April 2 **CA**

Third International Conference on Irrigation and Drainage, San Diego, Marriott Mission Valley, 8757 Rio San Diego Drive. RE: Water District Management and Governance, Management of Groundwater Supplies for Agricultural, Industrial and Municipal Users, Information Systems, District Financing, Regional Water Quality Issues, Water Management and Water Rights, Emerging Issues in District Governance, Modernization & More. For info: US Committee on Irrigation and Drainage, 303/ 628-5430, email: stephens@uscid.org, website: www.uscid.org

March 31 **WA**

Permitting Strategies Seminar, Seattle, Washington State Convention & Trade Center, 800 Convention Place, 9am-5pm. For info: The Seminar Group, 206/ 463-4400; website:www.the.seminargroup.net/

March 31-April 1 **TX**

The Changing Face of Water Rights in Texas (6th Annual), Dallas, CityPlace Conference Center, 2711 N. Haskell. For info: Texas Bar, 800/ 204-2222 x1574, website: www.TexasBarCLE.com

April 3-6 **DC**

National Hydropower Association Annual Conference, Washington, DC For info: NCI Publications, 816/ 931-1311, email: nha@hcipub.com

April 4-8 **WA**

Sustainability and Restoration: A Practical Partnership for the 21st Century (2005 Regional Conference), Seattle, Washington State Convention and Trade Center. For info: 866/ 791-1275, email: uw-epp@engr.washington.edu, website: http://www.engr.washington.edu/epp/ser/index.html

April 5 **WY**

Wyoming State Water Forum Meeting, Cheyenne, State Engineer's Conference Room, Herschler Building 4E, 10am, Invited Guest: John Lawson (US Bureau of Reclamation), Discussion Item: Water Forecast. For info: State Engineer's Office, website: http://seo.state.wy.us/forum.aspx

April 5 **OR**

Forum for Business & Environment "New Technology & Market-Based Solutions to Stormwater Pollution," Portland. Presented by Oregon Environmental Council. For info: Cheryl, 503/ 222-1963, x100 or email: cheryl@orcouncil.org, website: www.orcouncil.org/events.htm

The Water Report
Water Rights, Water Quality & Water Solutions in the West
260 N. Polk Street • Eugene, OR 97402