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IDAHO CONJUNCTIVE USE

IDAHO SUPREME COURT UPHOLDS CONJUNCTIVE WATER RIGHTS ADMINISTRATION RULES

by Jeff Fereday, Givens Pursley LLP (Boise, ID)

INTRODUCTION

In *American Falls Reservoir District No. 2 v. Idaho Department of Water Resources*, 143 Idaho 862, 154 P.3d 433 (*American Falls)*, the Idaho Supreme Court upheld the facial validity of Idaho's Conjunctive Management Rules (Rules), IDAPA 37.03.11, *et seq.* The Rules, adopted by the Idaho Department of Water Resources (Department) in 1994, set forth the process by which ground and surface water rights in Idaho are to be administered together.

In addition to validating the Rules, the decision confirmed, in the context of water rights administration, several foundational principles of Idaho's Prior Appropriation Doctrine — each of which is referenced in the Rules — such as: the continuing requirements of beneficial use and reasonable means of diversion; the State policy of full economic development of water resources; the prohibition of waste; and others. The court held that the Rules are consistent with State constitutional principles in allowing the Department to consider the amount of storage water available to a senior surface water right holder before ordering the curtailment of a junior water right. The decision underscores the importance of administrative fact-finding before the State will shut off diversions under junior water rights alleged to be causing material injury to seniors. The procedure or body of law by which the State uses its power to shut off a junior water right so that a more senior right might obtain its water supply is commonly referred to as water right administration. The senior's request is referred to as a "delivery call."

The Plaintiffs who challenged the Rules are: five canal companies and irrigation districts (Canal Companies) with Snake River diversions above Twin Falls; Idaho Power Company, which maintains hydroelectric facilities on the river; and holders of water rights in springs flowing from canyon walls in the river reach below Twin Falls (Spring Users). Each of these Plaintiffs asserts its water rights are dependent, at least in part, on Idaho's vast Eastern Snake Plain Aquifer (ESPA or the Aquifer). The Aquifer is understood to be connected to the Snake River in various places and to varying degrees across southern Idaho. The ESPA's western edge is truncated by the deep Snake River canyon along an approximately 40-mile long section downstream from Twin Falls. The Aquifer's water, flowing westward, encounters the canyon and literally spills out of the basalt canyon walls through innumerable fissures and springs in the Buhl/Hagerman area. The Aquifer discharges in this reach collectively are several thousand cubic feet per second. Large amounts of this cold, clean water are collected to serve, primarily, the water rights of fish farms and irrigated tracts on benchlands situated between the cliffs and the river below (the Spring Users). By the time the Spring Users had joined with the Canal Companies in filing the Rules litigation, they too had filed their own delivery calls against ESPA ground water pumpers. These delivery calls also are still pending.

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The Plaintiffs in *American Falls* had criticized the Rules in various ways since their adoption. This litigation finally brought their theories to court. Plaintiffs' central premise over the years had been that when a senior water right holder alleges a water shortage and demands curtailment of junior-priority water rights, the Department's job is immediate and ministerial — watermasters should be directed to shut off ground water pumps without the Director first considering any facts other than the quantity of the senior's water right and the existence of shortage. Plaintiffs' position became even more emphatic once the bulk of ground water rights on the ESPA had been decreed in the ongoing Snake River Basin Adjudication and brought into water districts for which watermasters were appointed.

The Rules do not describe a summary curtailment model for conjunctive administration, and instead require fact-finding on various issues. Because of this, Plaintiffs claimed that the Rules violate a number of water law principles, including: the "first in time" admonition of Idaho's Constitution; Idaho's water delivery statutes; Idaho Code § 42-601 *et seq* (setting forth, among other things, watermaster duties in water districts); and the common law. Plaintiffs further asserted that it was illegal for the Rules to allow the Director, when responding to a delivery call, to consider such issues as: the seniors' actual beneficial use (such as the number of acres actually being irrigated); whether their means of diversion are reasonable; and how the Department's action would serve the concept of "full economic development of underground water resources." I.C. § 42-226. Plaintiffs took the position that any such matters had been resolved in the process wherein their water rights were licensed or decreed and could not be revisited in a delivery call. The Plaintiffs maintained that engaging in these inquiries under the Rules would cause a "readjudication" of their water rights that was not allowed. In *American Falls*, the Idaho Supreme Court rejected all of these theories.

BACKGROUND

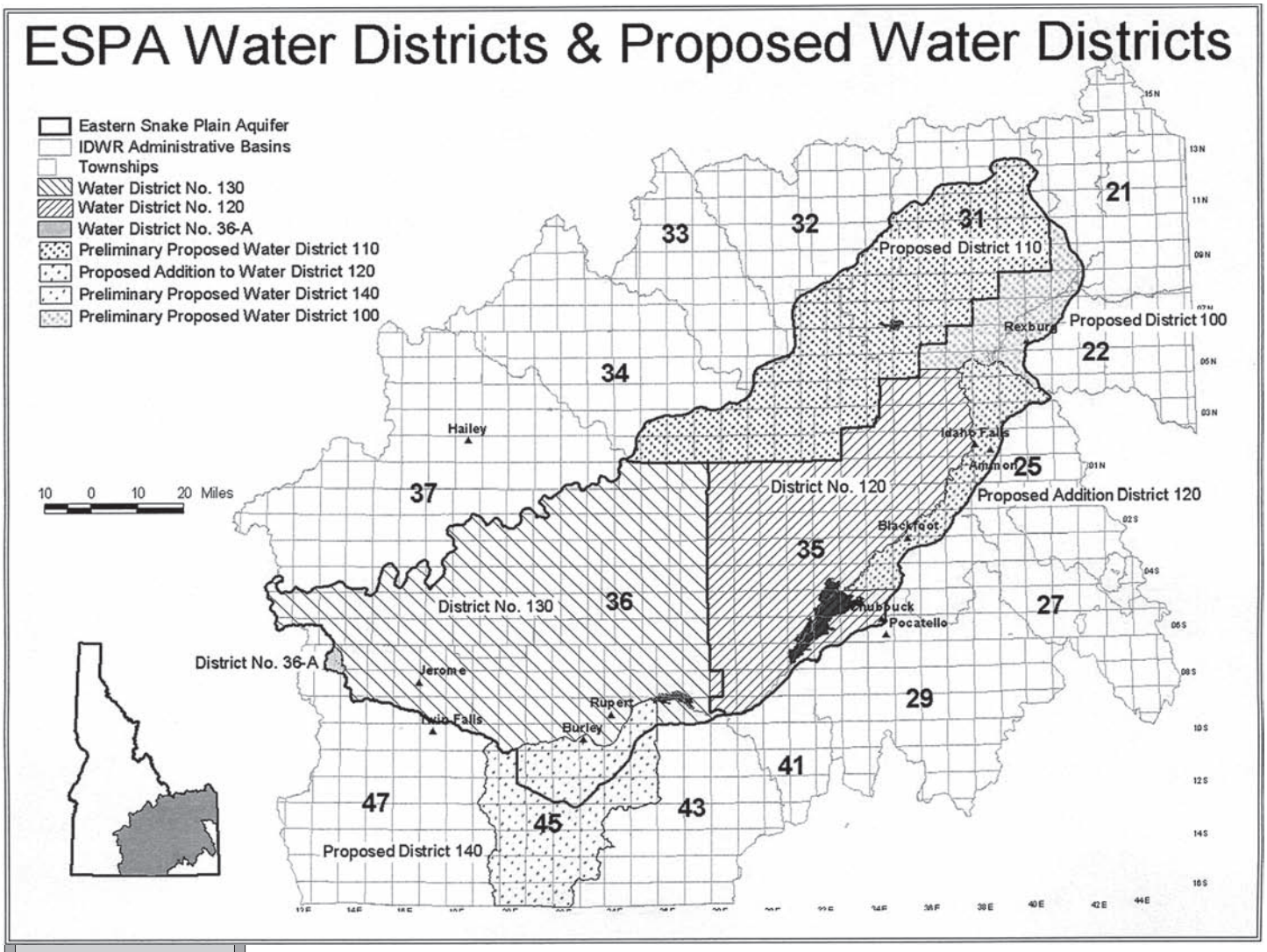
The dispute giving rise to *American Falls* began in early 2005 when the Canal Companies, acting under Rules' delivery call procedures, formally asked the Department to curtail diversions of thousands of unspecified ESPA ground water rights. The Canal Companies believe ESPA ground water pumping is reducing spring inflows to the river upstream from their headgates and injuring their surface water rights.

The Department responded immediately. Applying various provisions of the Rules, the Director issued emergency orders in February through May 2005 that, on a preliminarily basis, determined it reasonably likely that pumping would cause material injury to the water rights of two of the seven Canal Companies in the upcoming irrigation season. The five Canal Companies who were plaintiffs in the *American Falls* case were joined by two others in these initial delivery calls, North Side Canal Company and Milner Irrigation District. These two declined to become parties to the *American Falls* challenge to the Rules. In this section of this article, the term "Canal Companies" refers to all seven, not just the five who filed the separate suit challenging the Rules. The emergency orders sought additional information from the Canal Companies, but in the meantime required ground water users to provide the Canal Companies with certain amounts of replacement water.

Both sides filed objections to the preliminary orders. The Department established a discovery schedule and scheduled a hearing. Meanwhile, the ground water users provided mitigation water as required by the orders, primarily by renting storage water from upper Snake River reservoirs to provide to the Canal Companies and by fashioning means to idle ground water wells. A final determination in the matter, including any mitigation requirement, would come after the facts could be sorted out at the hearing — where both sides could present evidence on various factors enunciated in the Rules. As of this writing, the hearing still has not been held, although the Department has resumed its analysis of the delivery calls and is expected to issue new preliminary orders or other communications informing certain ground water right holders that they will be subject to curtailment unless they provide replacement water for 2007. Absent a settlement, these issues almost certainly will go to hearing.

The Canal Companies took the position that there should be no further fact-finding, that their water right decrees were proof enough of their entitlements, and that their delivery call sufficiently explained to the Director that they were not receiving water to which they are entitled. They maintained that, under the Idaho Constitution's "first in time" mandate, the Department was obligated to shut off ground water pumps in the ESPA, and to do so immediately. The Canal Companies also contended that the various Rule provisions on which the Director relied, and under which he intended to receive evidence at hearing, were unconstitutional or otherwise in violation of Idaho water law.

However, rather than wait to raise these claims in the administrative hearing on the delivery call, in August 2005 five of the seven Canal Companies, joining with Idaho Power Company and a group of aquaculture interests in the Thousand Springs area (collectively Plaintiffs), filed a separate action in Judge Wood's district court asking for a declaration that the Rules violate the Prior Appropriation Doctrine as established by the Idaho Constitution.



Conjunctive Use

Plaintiffs' Position

PLAINTIFFS' ARGUMENTS WERE AS FOLLOWS:

- The Rules allow inquiry into several principles other than "first in time" that Plaintiffs believed should not come into play in water right administration, including such concepts as: "reasonable means of diversion;" whether a senior right can be satisfied using alternate points and/or means of diversion; whether the senior actually is suffering "material injury;" and whether the administration is consistent with "full economic development" of the ground water resource.
- The Rules allow the Department to evaluate a senior's storage water account, including projected "carryover storage," in determining whether senior rights are suffering material injury.
- The Rules invite factual inquiry that impermissibly "looks behind," "readjudicates," or otherwise gives insufficient legal effect to the senior's water right decrees.
- The Rules impermissibly shift the burden to the senior user to prove injury in a delivery call.
- The Rules are illegal in allowing junior right holders to provide mitigation in lieu of curtailment.

Declaratory Judgment

The Plaintiffs' complaint asked Judge Barry Wood of Idaho's Fifth Judicial District Court in Gooding County for a declaratory judgment that the Rules are unconstitutional both on their face and as the Director sought to apply them in the delivery calls. Normally, a district court would dismiss such an action for failure to exhaust administrative remedies as: the parties had not yet produced evidence in the administrative case; the Department had not yet applied law to facts; and there was no final Department action or factual record for court review. However, Plaintiffs convinced Judge Wood that their action should be heard because Idaho's declaratory judgment statute, I.C. § 67-5278, refers to the statute's applicability where rules are "threatened" to be applied. Plaintiffs argued, in essence, that the Director's current process under the Rules was the "best evidence" of how the Department aimed to apply the Rules. The Department and the ground water users argued against this interpretation, but Judge Wood sided with Plaintiffs and heard their challenge.

Conjunctive Use

District Court Actions

Rules Found Unconstitutional

Narrow Grounds

Director's Authority

Injury Claims

Limits on Senior Rights

Spring Discharges

"Futile Call"

Editor's Note: A "futile call" exists when it is determined that a senior water user would not receive the water they are entitled to due to physical factors influencing the water flow -- even if the junior water right is regulated off. When such a "futile" situation is found to exist, the junior water user is not shut off and can continue using their water rights.

THE DISTRICT COURT'S DECISION

After motion practice over many months, lengthy briefing, and oral argument, the District Court issued a 127-page opinion granting Plaintiffs' summary judgment motions, relying on "the underlying facts in this case" — that is, the actions that had occurred under the delivery calls at the Department (Order at 25; *Order on Plaintiffs' Motion for Summary Judgment* in *American Falls Res. Dist #2 v. Idaho Department of Water Resources*, Case No. CV-2005-600, Idaho District Court for the Fifth Judicial Dist., County of Gooding (June 2, 2006)). The judge construed the declaratory judgment statute as vesting the court with jurisdiction over the action based on the "threatened application" of the Rules that Plaintiffs alleged in their briefing. The District Court thus adopted a hybrid approach that considered the Rules constitutionality, both facially and as the Department intended to apply them (Order at 25).

In its Order, the District Court found that the Rules are unconstitutional for several reasons, including:1) they fail to include express directives as to five "tenets and procedures" that the court believed are constitutionally required; 2) they exempt domestic and stock water rights from conjunctive administration (conjunctive administration refers to regulation of surface water and ground water under an integrated priority system to determine which users are entitled to receive water (senior) and which users must be curtailed (junior); and 3) they allow the Director, in determining material injury, to consider a senior's right to store water in reservoirs for potential future use (so-called "carryover storage").

Press reports of Judge Wood's decision stated simply that he had declared the Rules unconstitutional. However, the District Court's ruling actually *upheld* the bulk of the Rules, finding them unconstitutional only on narrow, mostly procedural, grounds. For example, the District Court rejected Plaintiffs' central premise that the numerous factors the Rules allow the Director to consider "are on their face contrary to the prior appropriation doctrine." (Order at 83) Judge Wood held that a "decree is not conclusive as to any post-adjudication circumstances" (Order at 92), and in a delivery call "the Director has the duty and authority to consider" whether the senior is "irrigating the full number of acres decreed under the right." (Order at 92) The District Court rejected Plaintiffs' argument that junior users cannot use mitigation or replacement water to avoid curtailment (Order at 90 and 102). The court agreed with defendants that the "concept of 'reasonableness of diversion' is also a tenet of the prior appropriation doctrine." (Order at 88) Judge Wood specifically noted that the Prior Appropriation Doctrine allows the State "to compel a senior to modify or change his point of diversion under appropriate circumstances." (Order at 89)

In a portion of the order that could have particular relevance to the injury claims of the Spring Users in the Hagerman Valley area, the District Court stated that, in a delivery call, the Director is entitled to "tak[e] into account whether the senior is protected to historical diversion levels or reasonable aquifer levels." (Order at 102) The judge ruled that "a water user may not command the entirety of a volume of water of a ground or surface source to support his appropriation for a beneficial use involving less than the entire volume," and that "a senior spring user cannot tie up the entire volume of water of an aquifer in order to maintain the natural flow of a spring." (Order at 88-90) The District Court referred to this as the "bath tub" example, wherein "the only time the 'over-flow' produces water is when the bath tub is full." (Order at 90; n. 21.)

The ESPA actually exhibits greater spring discharges in this area today than it did before any significant water development began on the Snake River Plain. This is due to incidental recharge to the Aquifer, and increases in aquifer storage, that resulted from surface water irrigation on the Plain beginning in the early 1900s. Between 1902 and 1953, the spring discharges in this fabled "Thousand Springs" reach increased by approximately 3,700 cubic feet per second, nearly doubling the 1902 discharges. Most of the rights appropriated by the Spring Users were established when the Aquifer was in this enhanced state. Since 1953, spring discharges have gradually decreased (although they still are above 1902 levels), due in part to the use of increasingly efficient surface irrigation practices on the Eastern Snake River Plain that have reduced the historical incidental recharge. Ground water pumping and cyclical droughts also are seen as causes of spring flow declines.

The District Court acknowledged that juniors subject to a delivery call are entitled to a hearing, and may offer evidence to show, among other things, that the senior is "wasting water" or "to establish a futile call." (Order at 101) The lower court agreed that "the policy of the state is to secure the maximum use and benefit and least wasteful use of its resources," and the Rules' "integration of this policy" "is not necessarily inconsistent with Idaho's version of the prior appropriation doctrine." (Order at 86) The District Court ruled that a "senior user cannot call for water if the water is not, or will not, be put to a beneficial use, irrespective of whether the right is decreed," (Order at 86), and acknowledged "that most of the issues pertaining to the principles comprising the prior appropriation doctrine have developed in the context of surface water only. Applying these same principles to the integration of surface and ground water presents an entirely new set of complexities." (Order at 91)

Conjunctive Use

Fundamental Principles

Procedural Components

Rules Failures

Protection of Senior Rights

Taking Found

Carryover Storage

Carryover Rule

Supreme Court Appeal

Injury Claims

Plaintiffs' arguments to the District Court essentially took the position that in water right regulation and administration there is no place for any of the several tenets of Idaho's Prior Appropriation Doctrine except the "first in time" rule. They ended up with a decision from the District Court that disagreed with this theory and with most of their substantive claims. As the Idaho Supreme Court (Supreme Court) was to note in its decision, the "district court rejected [Plaintiffs'] position . . . that water rights in Idaho should be administered strictly on a priority in time basis." *American Falls*, 154 P.3d at 441. The upshot is the unremarkable proposition that all of the doctrine's tenets remain in play throughout all periods when the right is being exercised — not just at the appropriation stage, or at the time a water right is scrutinized in an adjudication. This is especially relevant when a water right owner asks the State to curtail another's water diversion to supply their own. Plaintiffs did not appeal the District Court's rulings on these issues, although they continued to argue about several of these points in their briefs to the Supreme Court.

The District Court rejected Plaintiffs' core contentions about Idaho water law, but did conclude that the Rules are unconstitutional primarily with regard to certain procedural points. As the Supreme Court put it, "[w]hile the district court largely rejected [Plaintiffs'] arguments, it did grant summary judgment based on its finding that the CM [Conjunctive Management] Rules are facially unconstitutional on a different basis: a lack of 'procedural components' of the prior appropriation doctrine that the court viewed as constitutionally mandated." *American Falls*, 154 P.3d at 439. The District Court perceived constitutional infirmities in the Rules' failure: 1) to describe burdens of proof and evidentiary standards applicable in a delivery call; 2) to give proper legal effect to senior water right decrees; 3) to describe objective criteria necessary to evaluate these factors; and 4) to establish a time frame in which the delivery call process must be completed.

The District Court had believed that "[s]uch components are necessary to protect and prevent diminishment to vested senior property rights," and that without these elements in place, "seniors are put in the position of re-defending their adjudicated water right every time a call is made for water." (Order at 90 and 97) Judge Wood had concluded that while "some minimal due process is required" in carrying out a delivery call, "setting up a procedural labyrinth of requiring a senior water right holder to initiate a contested case proceeding . . . which cannot be completed during the irrigation season prevents timely administration to a growing crop and was not what either the framers of the constitution had in mind or what the legislature had in mind in adopting" Idaho's water administration statutes. (Order at 97-98)

As to substantive issues, the District Court concluded that the Rules' exclusion of domestic and stock water rights from administration amounts to a taking of the senior's water right without compensation. It also struck down the Rules' treatment of a senior's carryover (reservoir) storage in a delivery call.

The carryover storage ruling could be seen as the central substantive water law question in the case on appeal. The question was whether it is constitutional for the Director to ascertain whether "the requirements of the holder of a senior-priority water right could be met with the user's existing facilities and water supplies" before curtailing junior well owners, as specified by the Rules. IDAPA 37.03.11.42.01g (the "Carryover Rule").

The Carryover Rule defines reasonable carryover as the water an appropriator would have left in his reservoir account at year's end "under comparable water conditions" without restricting his ability to divert water to storage and fill his reservoirs when water is available: "In determining a reasonable amount of carry-over storage water, the Director shall consider the average annual rate of fill of storage reservoirs and the average annual carry-over for prior comparable water conditions and the projected water supply for the system." IDAPA 37.03.11.42.01.g. Plaintiffs claimed, and the District Court agreed, that it was unconstitutional for the Department ever to require an appropriator to use some of its storage before curtailing junior rights.

The State and the ground water users appealed to the Idaho Supreme Court. The Plaintiffs essentially did not appeal. (One of the plaintiffs, Clear Lakes Trout Co., had raised an equal protection argument below, and did appeal it, halfheartedly, to the Supreme Court. The Supreme Court, however, did not address it.) The Idaho Supreme Court took up the matter on an expedited schedule. As to their delivery calls, Plaintiffs technically could have gone forward with the administrative hearing during the court challenge and appeal. Indeed, the Plaintiffs successfully resisted the State's motion that the Supreme Court stay the Department's administrative action until after it rules. Nonetheless, Plaintiffs did not press for action before the Department, and the calls effectively were placed on hold while the Rules challenge went through the appeal process.

Presumably, now that the Idaho Supreme Court has made its decision, the surface water users' allegations of injury will resume as contested cases before the Department. *American Falls* makes clear that the Rules set forth correct legal standards under which the Department will hear these cases. Plaintiffs have sought rehearing before the Idaho Supreme Court on the carryover storage issue. As of this writing,

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the Court has not acted on the rehearing petition. Plaintiffs also have refilled their delivery calls for 2007, and the Department is expected to take emergency action on them soon.

THE SUPREME COURT'S DECISION

Ruling on Facial vs. "As Applied" Constitutionality

To begin with, the Idaho Supreme Court held that the District Court erred in considering a lawsuit that evaluated aspects of the Rules "as applied." The high court held, as Defendants had argued below, that the reference to a rule's "threatened application" in Idaho's declaratory judgment statute is intended "to permit standing to challenge a rule, but does not eliminate the need for completion of administrative proceedings for an as applied challenge." *American Falls*, 154 P.3d at 442-43. The Supreme Court noted that "a district court cannot properly engage in an 'as applied' constitutional analysis until a complete factual record has been developed." *American Falls*, 154 P.3d at 443. Rather than simply reverse on this single point and dismiss the case as premature, the high court took up, and ultimately reversed, the balance of the District Court's opinion. However, the Supreme Court did affirm the District Court on one ruling not germane to the water law issues — i.e. whether the lower court erred by revoking the City of Pocatello's intervention as a party in the case. The Supreme Court agreed that the District Court had properly exercised its discretion in that regard.

Factual Record Need

Holding on the Rules' Lack of Certain Procedural Components

The Supreme Court analyzed each of the "tenets and procedures" the District Court had concluded the Constitution requires be set out in the Rules. As a starting point, the Court noted that the Rules expressly incorporate all applicable Idaho law, and found that "it is unnecessary to incorporate every extant law unless specifically necessary to a clear understanding of the particular Rule." *American Falls,* 154 P.3d at 444. This is particularly the case, the Supreme Court found, in a constitutional challenge where a court is required to seek an interpretation of a rule that upholds its constitutionality.

Rules Incorporate Law

As to the specific rulings, the Supreme Court first reversed the District Court's conclusion that the Rules must specify burdens of proof and evidentiary standards. These procedures "have been developed over the years and are to be read into the Rules," and the Rules "do not permit or direct the shifting of the burden of proof." *American Falls,* 164 P.3d at 445. The Supreme Court expressed no opinion as to what those burdens are in connection with particular claims, defenses, or factual allegations in a water delivery call.

Burden of Proof & Evidentiary Stds

Second, the Supreme Court rejected the District Court's conclusions about "timely administration" of water rights. "Even if this Court embarked on an analysis of an as applied challenge to the Rules, the facts developed thus far do not support American Falls' contention that it was deprived of timely administration in response to the Delivery Call." *American Falls,* 154 P.3d at 445.

Timely Regulation

> Clearly it was important to the drafters of our Constitution that there be a timely resolution of disputes relating to water. While there must be a timely response to a delivery call, neither the Constitution nor the statutes place any specific timeframes on this process, despite ample opportunity to do so. Given the complexity of the factual determinations that must be made in determining material injury, whether water sources are interconnected and whether curtailment of a junior's water right will indeed provide water to the senior, it is difficult to imagine how such a timeframe might be imposed across the board. It is vastly more important that the Director have the necessary pertinent information and the time to make a reasoned decision based on the available facts.
> *American Falls,* 154 P.3d at 446.

Director's Discretion

Third, the Court took up the question whether the Rules violated a constitutional principle for failing to enunciate "objective standards." The high court noted that the Rules catalogue numerous factors the Director may consider "in determining material injury and whether the holders of water rights are using water efficiently and without waste." The Court held that these "are decisions properly vested in the Director." *American Falls,* 154 P.3d at 446.

"Reasonable" Decisions

> Those factors, of necessity, require some determination of "reasonableness" and it is the lack of an objective standard — something other than "reasonableness"— which caused the district court to conclude the Rules were facially defective. Given the nature of the decisions which must be made in determining how to respond to a delivery call, there must be some exercise of discretion by the Director….[T]he Rules are not facially deficient in not being more specific in defining what is "reasonable" in any given case.
> *American Falls,* 154 P.3d at 446.

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Director's Authority Upheld

Fourth, the Supreme Court addressed the District Court's conclusion that the Rules "allow the Director to, in essence, re-adjudicate water rights by conducting a complete re-evaluation of the scope and efficiencies of a decreed water right in conjunction with a delivery call." *American Falls,* 154 P.3d at 447. The Supreme Court noted, with evident approval, that the District Court had ruled that "even with decreed water rights, the Director does have some authority to make determinations regarding material injury, the reasonableness of a diversion, the reasonableness of use and full economic development." *American Falls,* 154 P.3d at 447. The Court found that the Rules allow the Director to consider factors such as "the system, diversion, and conveyance efficiency, the method of irrigation water application and alternate reasonable means of diversion." *American Falls,* 154 P.3d at 447. Plaintiffs had argued that "the Director is not authorized to consider such factors before administering water rights" and "is 'required to deliver the *full quantity* of decreed senior water rights according to their priority' rather than partake in this re-evaluation." (emphasis in original brief) *American Falls,* 154 P.3d at 447.

Delivery Call Evaluation

Not A Readjudication

> Clearly, even as acknowledged by the district court, the Director may consider factors such as those listed above in water rights administration. Specifically, the Director "has the duty and authority" to consider circumstances when the water user is not irrigating the full number of acres decreed under the water right. If this Court were to rule the Director lacks the power in a delivery call to evaluate whether the senior is putting the water to beneficial use, we would be ignoring the constitutional requirement that priority over water be extended only to those using the water. Additionally, the water rights adjudications neither address, nor answer, the questions presented in delivery calls; thus, responding to delivery calls, as conducted pursuant to the CM Rules, do not constitute a readjudication.
> *American Falls,* 154 P.3d at 447-48.

Storage Water Use

Ruling on Carryover Storage

Judge Wood had concluded that the Rules are unconstitutional in allowing the Department to consider a senior's carryover storage in determining whether to curtail juniors. The Supreme Court also reversed Judge Wood on this issue.

"Reasonable" Standard

> Concurrent with the right to use water in Idaho "first in time," is the obligation to put that water to beneficial use. To permit excessive carryover of stored water without regard to the need for it would be in itself unconstitutional. The CM Rules are not facially unconstitutional in permitting some discretion in the Director to determine whether the carryover water is reasonably necessary for future needs.
> *American Falls,* 154 P.3d at 451.

The Court further held:

"Hoarding" Disallowed

> Neither the Idaho Constitution, nor statutes, permit irrigation districts and individual water right holders to waste water or unnecessarily hoard it without putting it to some beneficial use. At oral argument, one of the irrigation district attorneys candidly admitted that their position was that they should be permitted to fill their entire storage water right, regardless of whether there was any indication that it was necessary to fulfill current or future needs and even though the irrigation districts routinely sell or lease the water for uses unrelated to the original rights. This is simply not the law in Idaho.
> *American Falls,* 154 P.3d at 451.

Domestic Use Preference

Ruling on Domestic and Stock Water Rights

The District Court had held that the Rules' exemption of domestic and stock water rights from administration in a delivery call amounted to a taking of the seniors' water rights (the Rules provide an exemption from administration for domestic and stock water rights. IDAPA 37.03.11.20.11). Neither side attacked this ruling in its briefs, but the Supreme Court took it up anyway, reversing the District Court. The Supreme Court's position was that the Constitution allows those diverting water for domestic purposes to have "preference" over those using for any other purpose, provided that the domestic right owner provide compensation to the rights taken.

> The right to divert and appropriate the unappropriated waters of any natural stream to beneficial uses, shall never be denied, except that the state may regulate and limit the use thereof for power

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Compensation Required

purposes. Priority of appropriations shall give the better right as between those using the water; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall (subject to such limitations as may be prescribed by law) have preference over those claiming for any other purpose; and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. And in any organized mining district those using the water for mining purposes or milling purposes connected with mining, shall have preference over those using the same for manufacturing or agricultural purposes. But the usage by such subsequent appropriators shall be subject to such provisions of law regulating the taking of private property for public and private use, as referred to in section 14 of article I of this Constitution.
Idaho Const. art. XV, § 3.

Even though the Rule exempting domestic and stock water rights does not reference the "take, but compensate" authority, the Court reasoned that because the Rules incorporate all applicable Idaho law and do not prohibit use of this authority, this provision is constitutional.

Stock Water Rights

The Supreme Court did not explain how a stock water right — presumably an "agricultural" entitlement within the constitutional provision — might be able to have preference over another agricultural water right, such as the irrigation rights the Canal Companies assert in the pending delivery calls. The constitutional provision does not mention stock water rights as such, but expressly provides agricultural rights a preference only over those using water for "manufacturing purposes."

CONCLUSION

Conjunctive Management Upheld

Reasoned Decision

Conjunctive administration of ground and surface water in Idaho is in its early stages, but to those of us who have been involved in a variety of ESPA controversies for many years, it already seems to have a long history. Since 1994, the State's Conjunctive Management Rules have been the subject of speculation, debate, and commentary, but no direct litigation. With *American Falls*, the Idaho Supreme Court finally has spoken, definitively, on the fundamental question of the Rules' constitutionality. In doing so, the Court again validated the bedrock principles of Idaho's Prior Appropriation Doctrine, this time in the still-developing context of administering ground and surface water rights together. The decision does not mean that conjunctive administration will not occur, or that junior water rights shown to cause material injury to seniors will not be subject to curtailment. But it does underscore the principle that before the Director shuts off water diversions, particularly in situations of complicated hydrology and huge economic implications, the Department must "have the necessary pertinent information and the time to make a reasoned decision based on the available facts."

This article appears here pursuant to the author's permission. It will be excerpted in the *Water Law Handbook: The Acquisition, Use, Transfer, Administration, and Management of Water Rights in Idaho* by Jeffrey C. Fereday, Christopher H. Meyer, and Michael C. Creamer, copies of which are available from Givens Pursley LLP.

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Mr. Fereday and his partner, Mike Creamer, represented private ground water interests who defended the Rules in the *American Falls* litigation. Mr. Creamer argued the case before the Idaho Supreme Court.

Columbia BiOp

BiOp Held Invalid

ESA §7 Consultation

Opinion Highlights

Renewed Consultation

Appeal?

FCRPS

Pre-Listing Construction

Consultation Requirements

Jeopardy Defined

COLUMBIA RIVER HYDROSYSTEM BIOP

9TH CIRCUIT UPHOLDS REJECTION OF 2004 BIOP

by Mark L. Stermitz, Christensen, Glaser, Fink, Jacobs, Weil & Shapiro, LLP

On April 9, 2007, the Ninth Circuit Court of Appeals upheld Oregon Federal District Court Judge James Redden's invalidation of the 2004 Biological Opinion (BiOp) covering the Federal Columbia River Hydropower System. *National Wildlife Federation, et al. v. National Marine Fisheries Service, et al.,* 481 F.3d 1224 (9th Cir. 2007). The opinion represents the latest chapter in the saga of federal Endangered Species Act (ESA) coverage for the hydropower system. Litigation has attended these hydropower operations since area salmon were listed under the ESA about ten years ago. Some aspects of the opinion may be instructive only for the particular situation involving the federal hydropower system and the many listed fish that encounter it in migration or otherwise in their life cycles. Nevertheless, the Ninth Circuit addressed important themes on the nuts and bolts of a section 7(a)(2) ESA consultation, especially for any action that presents a close question as to whether it will jeopardize a listed species.

AMONG OTHER THINGS, THE RECENT *NATIONAL WILDLIFE FEDERATION* OPINION:

- Clarified the extent to which the recovery of a listed species must be considered or evaluated in connection with a jeopardy analysis in a §7 ESA consultation
- Summarily disposed of the government's effort to segregate discretionary from non-discretionary actions that would be subject to the consultation
- Emphasized that determining whether an action will jeopardize a listed species is done by aggregating the environmental baseline, cumulative effects and the effects of the action
- Upheld a sweeping remand order that includes an unprecedented level of collaboration among the federal agencies and tribal and state sovereigns in the re-consultation for a new BiOp

The federal agencies and state and tribal sovereign entities that have been engaged in consultation on the massive Federal Columbia River Hydropower System since Judge Redden issued his remand order in October, 2005, appear to be taking the Ninth Circuit opinion in stride, as the remand proceeds apace. However, as of the date of this article it is not known whether the United States will appeal the Ninth Circuit opinion. The current deadline for filing a petition for rehearing or a rehearing en banc is June 25, 2007.

BACKGROUND

The system of 14 dams and reservoirs on the Columbia River system is collectively known as the Federal Columbia River Hydropower System (FCRPS). Since the first listings of salmon under the ESA in 1991, the agencies charged with responsibility for operating and maintaining those projects have been consulting with the National Marine Fisheries Service (NMFS) pursuant to §7(a)(2) of the ESA, 16 U.S.C. §1536(a)(2). FCRPS facilities were all constructed before the salmon were listed under the ESA, a circumstance that ultimately led to one of the main aspects of the recent Ninth Circuit opinion.
ESA SECTION 7(A)(2) STATES:

> Each Federal agency shall, in consultation with and with the assistance of [the consulting agency], insure that any action authorized, funded, or carried out by such agency [... an "agency action"] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary…to be critical… In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.
> 16 U.S.C. §1536(a)(2).

"[L]IKELY TO JEOPARDIZE THE CONTINUED EXISTENCE OF" IS DEFINED IN FEDERAL REGULATION AS:

> Jeopardize the continued existence of means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.
> 50 C.F.R. §402.02.

Columbia BiOp

Facility Directives

NW Power Act

Listed Fish

High Fish Mortality

Previous BiOps

Previous Jeopardy Finding

Rejected Alternative

2004 "No Jeopardy"

Discretion Question

Dist. Court's Frustration

Circuit Court Agrees

FCRPS facilities are operated by either the US Army Corps of Engineers or the US Bureau of Reclamation. For both agencies, the projects were constructed pursuant to Congressional mandates from the 1940's. The Congressional directives typically specified that the facilities were to be constructed and operated for multiple uses including irrigation, navigation, flood control and generation of electrical power. However, in addition to the purposes for which the facilities were constructed, the federal agencies are also charged with implementing and carrying out programs to protect, mitigate and enhance the biological status of fish and wildlife impacted by the construction of the dams, in large part through the Pacific Northwest Electric Power Planning and Conservation Act (known in shorthand as the "Northwest Power Act"), 16 U.S.C. §§ 839-839h, December 5, 1980). These mitigation and conservation programs, insofar as they are funded and carried out by the agencies charged with operating FCRPS, also form part of the action upon which the federal agencies have consulted over the years.

There are 12 listed species (and one proposed for listing) effected by FCRPS and for which consultation must be completed, including: the Upper Columbia River Spring Chinook Salmon; Upper Columbia River Steelhead; Mid-Columbia River Steelhead; Snake River Spring/Summer Chinook Salmon; Snake River Fall Chinook Salmon; Snake River Sockeye Salmon; Snake River Steelhead; Lower Columbia River Chinook Salmon; Lower Columbia River Steelhead; Columbia River Chum Salmon; Upper Willamette River Chinook Salmon; and Upper Willamette River Steelhead. There is currently also a proposed listing for Lower Columbia River Coho Salmon.

The Ninth Circuit succinctly described what migrating fish encounter at the dams on the Columbia River system:

> These fish must pass a number of dams on their journey to the sea and suffer a very high mortality rate in doing so. Each dam in the migration corridor of the mainstream Snake and Columbia rivers has a bypass system. At some dams, the bypass consists of screens in front of the turbine intakes that divert the salmon and steelhead into a passageway through the dam and downstream. At others, the bypass system diverts the fish into barges for transportation around the dam.
> 481 F.3d 1224 at 1228.

Before the 2004 BiOp that was the subject of this appeal, its predecessor from 2000 was also litigated and struck down. In fact, all of the FCRPS BiOps issued since 1995 have been thoroughly litigated. Rulings varied, but most were critical of initial BiOp versions. The rejected 2000 BiOp figures prominently in Judge Redden's summary judgment opinion and therefore also in the Ninth Circuit opinion, mainly by way of comparison. The 2000 BiOp found that eight listed species would be jeopardized by the proposed operation of FCRPS. The ESA requires that if NMFS concludes that an agency's action may jeopardize the survival of species protected by the ESA, or adversely modify a species' critical habitat, the action must be modified to avoid jeopardy. In such a case, NMFS may recommend a "reasonable and prudent alternative" to the agency's proposed action. 16 U.S.C. §1536(b)(3)(A). The 2000 BiOp was rejected by Judge Redden based on his opinion that the federal mitigation actions to avoid jeopardy were not reasonably certain to occur. *See National Wildlife Federation v. National Marine Fisheries Service*, 254 F.Supp.2d 1196, 1213 (D. Ore. 2003).

In the consultation that followed Judge Redden's remand order on the 2000 BiOp, the federal agencies wrote the 2004 BiOP. This 2004 BiOp is the subject of this Ninth Circuit opinion. In contrast to its 2000 predecessor, the 2004 BiOp found that the federal action of operating the dams would *not* jeopardize the continued existence of any listed species, nor would it destroy or adversely modify their critical habitat. In reaching that conclusion, the federal government attempted to remove the nondiscretionary aspects of FCRPS from the consultation. Most importantly, in the government's view the dam's existence should have been beyond the scope of the consultation because it has no authority to remove the Congressionally–mandated dams.

Judge Redden's May, 2005 summary judgment opinion is unequivocal in expressing the Court's frustration with the approach taken by the federal government in the 2004 BiOp. Given that his rejection of the 2000 BiOp was based on the concern that mitigation measures were not reasonably certain to occur, the District Court clearly expected that shoring up those measures should have been the focus of the remand, but: "Rather than implementing its promises on remand, NOAA had abandoned the approach of the 2000 BiOp and instead the 2004 BiOp relied on an analytical framework NOAA had not used before." His invalidation of the 2004 BiOp, and the tightly-controlled remand process that followed it (see below), were approved across the board by the Ninth Circuit.

Columbia BiOp

Dams as Baseline

"Reference Operation"

DISCRETIONARY VS. NON-DISCRETIONARY ACTIONS

A big part of the dispute on the 2004 BiOp in both the District Court and Ninth Circuit centered on the effort by the federal agencies to ferret out the impact of FCRPS on salmon and steelhead caused exclusively by the presence or mere existence of the dams. The government categorized the dams' existence as part of the environmental baseline — essentially the environmental backdrop against which the proposed action itself would be evaluated. As one might imagine however, it is not easy to draw neat biological or technical lines between complex array of threats faced by Columbia River system salmon — distinguishing between mortality caused by dam operation as opposed to habitat degradation or hatchery management for example.

To deal with the complexity of isolating the mortality effects attributable to the presence of the dams, the government decided to first identify an assumed action — a model of sorts — that would include various aspects of a typical dam operation. This model included not just turning the valves and pushing the buttons that control the power generation facilities, but also the related fish and wildlife mitigation programs. This assumed action was called the "Reference Operation." Finally, to actually conduct the required ESA jeopardy analysis, the proposed actions of actual dam operation, together with the related mitigation and operational measures, were compared to the Reference Operation.

Columbia BiOp

"Reference Action"

Defenders v. EPA

Agency Reasoning Rejected

Agency Rationale

Separating Impacts

"Effects"

"Baseline"

Consultation Duties

According to the government during district court summary judgment arguments in 2005, the "Reference Action" arising from this process represented "the unavoidable minimum mortality from the hydrosystem's prospective operations, if all the agencies' discretion (and more) were exercised in favor of fish." Depending on which party is asked, that effort was either a legitimate analytical tool to more finely identify the nature of the federal action and therefore the effects it may cause and the measures that could be taken to avoid them, or an artifice to avoid responsibility for the mortality caused by the dams.

This question of consulting on discretionary agency action is especially pertinent in light of the pending US Supreme Court case, *Defenders of Wildlife v. EPA*, 450 F.3d 394 (2006), *reh'g & reh'g en banc denied*, 450 F.3d 394 (2006), *cert. Granted,* 127 S.Ct. 853 (Jan. 5, 2007) (No. 06-549). The *Defenders* case was argued at the US Supreme Court on April 17, 2007. At issue there is the State of Arizona's application to administer the discharge permit program of the federal Clean Water Act. The dispute centers on the contention that EPA violated the ESA's §7 consultation provision, where EPA contends it had no obligation to consult because it had no discretion under the statute but to approve Arizona's application. The statute essentially says that EPA "shall approve" a state's application if it meets the required criteria, which Arizona's did. Thus, the government in that case has presented the issue as one of whether the consultation requirements of ESA Section 7(a)(2) takes priority over an agency's other statutory mandates or limits on an agency's discretion imposed by Congress. [See Light, TWR #25]

Caution should be exercised in drawing too much of a parallel between the discretionary action arguments presented in the Ninth Circuit's FCRSP opinion and the pending *Defenders of Wildlife* case. The massive, biologically complex system of federal dams and reservoirs in the Columbia River Basin seems to have little in common with what in some sense is essentially a paper exercise by EPA in reviewing a state's application for authority to administer the water pollution discharge permit system.

In any case, the Ninth Circuit in its recent opinion was singularly unimpressed with the government's effort to use the Reference Operation as a way to segregate non-discretionary action, using language that will live in ESA infamy:

> At its core, the 2004 BiOp amounted to little more than an analytical slight of hand, manipulating the variables to achieve a "no jeopardy" finding. Statistically speaking, using the 2004 BiOp's analytical framework, the dead fish were really alive.
> 481 F.3d at 1239.

AGGREGATION OF EFFECTS

In the 2004 BiOp and later arguments in support of it, the federal government took the position that to determine whether a federal action causes jeopardy, NMFS is to "consider and evaluate" the environmental baseline, together with any cumulative effects, as a "backdrop" against which a determination is made of how the adverse effects of the action will impact listed species or critical habitat. The government specifically argued that jeopardy must *not* be determined by *aggregating* the baseline, cumulative effects and the effects of the action. That interpretation of the ESA was a crucial component of the overall approach in the 2004 BiOp to separate discretionary from nondiscretionary impacts on salmon from the dams, consistent with the theme that the agencies have no power to remove the dams. While, depending on one's viewpoint, the Reference Operation may have been a novel approach, the government's position on how the baseline, cumulative effects and the effects of the action are to be used in a jeopardy analysis was not completely without support in the ESA and its regulations.

An agency is to consult on the "effects of the action." By definition, that includes "the direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, *that will be added to the environmental baseline*." 50 CFR §402.02 (emphasis supplied). The "environmental baseline" is defined in the regulations as "the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in progress. " *Id.* Stopping there, it would be a simple matter to conclude that the phrase "added to the baseline" means quite literally what it says — calculating the sum of those factors. That essentially is what the Ninth Circuit determined. In fairness however, the federal regulations telling NMFS specifically what its duties are in a formal consultation do not end there and the question is not that simple.

Columbia BiOp

Jeopardy Evaluation

THE REGULATIONS SAY THAT IN ITS JEOPARDY/NO JEOPARDY CALL, THE CONSULTING AGENCY MUST:

- Evaluate the current status of the listed species or critical habitat
- Evaluate the effects of the action and cumulative effects on the listed species or critical habitat
- Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat

50 C.F.R. §402.14(g)(2)-(4).

Note that "baseline" is not mentioned. This is not to say it should be ignored. However, viewed as a whole these regulations do not appear to rigidly tie NMFS' hands by prescribing that its jeopardy determination is essentially a mere cataloguing of the baseline, cumulative effects, and the effects of the action (good and bad), followed by an exercise in sums. In the District Court FCRPS litigation, the government's view that the jeopardy determination was an "evaluation" with the baseline in consideration became known as the "comparative approach." Judge Redden and the Ninth Circuit have soundly rejected that approach. Rather, the rule of this case and therefore for ESA consultations in the Ninth Circuit, is that the consulting agencies are to *aggregate*, or add up, the environmental baseline, the cumulative effects, and the effects of the action and if the result *totals* jeopardy, the action cannot go forward.

"Aggregate" Standard

Dams as Baseline

The thorny problem this poses for FCRPS is that when one considers *only* the presence of the FCRPS dams as part of the baseline — without considering any attendant mitigating actions, funded fish programs, operational measures and the like that would clearly be part of the action itself — the dams pose for the fish, in essence, a "condition of jeopardy." If that is so, then arguably nothing more by way of a federal action could go forward. On the other hand, the federal agencies are not likely to take the presence of the dams out of the environmental baseline, given that it is not within their discretion to remove them. In fact, Congressional action would be necessary to authorize removal of the dams, not just an agency's recommendation. Furthermore, ESA practitioners should agree that — legally-speaking — jeopardy is not an ambient condition but rather the effect of an action. The Ninth Circuit was obviously sensitive to that dilemma, and attempted to clarify the aggregation requirement by holding that there can only be jeopardy if an action "causes some deterioration in the species' pre-action condition." 481 F.3d at 1236. The federal regulations do not speak in terms of "new jeopardy." The Ninth Circuit opinion, however, states that the only jeopardy that can stop a proposed action is "new jeopardy" and that an agency may go forward with any action "that removes a species from jeopardy entirely, or that lessens the degree of jeopardy." *Id.* Adding further gloss to what some would have viewed as a relatively simple regulatory definition of jeopardy, the Court then said:

"New" Jeopardy

> …an agency may not take action that will tip a species from a state of precarious survival into a state of likely extinction. Likewise, even where baseline conditions already jeopardize a species, an agency may not take action that deepens the jeopardy by causing additional harm.
> *Id.*

Finding further need for clarification, the Court also found it necessary to say that even in an aggregation of the baseline and the other effects, NMFS is not required to include the *entire* baseline. This raises the question: "Where does that line get drawn?" The Court said the aggregation must include that portion of the baseline that is "what jeopardy might result from the agency's proposed actions *in the present and future human and natural contexts*." *Id.*, quoting *Pacific Coast Federation of Fishermen's Association v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093 (9th Cir. 2005) (emphasis original). The Court then found that the continued *operation* of the dams is such an "existing human activity," and emphasized that the operation of the dams is within the federal agencies' discretion.

Baseline Included

Operation of Dams

All of this will leave ESA practitioners generally, and FCRPS parties in particular, at somewhat of a loss as to how to account for the *existence* of the dams in a way that will satisfy the Ninth Circuit. There has been no argument that the operation of the dams is within the discretion of the agencies, but the 2004 BiOp's use of the Reference Action confused that issue. Even more unfortunately for NMFS, it alienated both Judge Redden and the Ninth Circuit. Perhaps on remand the government will strive for an approach that clearly takes into account that portion of the baseline that represents the "existing human activities," in the context of "present and future human and natural factors." It appears that may survive challenge, but it would require the federal agencies to swallow hard in seeking a strict interpretation of the ESA and its regulations.

Existence of the Dams

Columbia BiOp

Jeopardy Definitions

Gifford Pinchot

Recovery Required

Short-Term Impacts

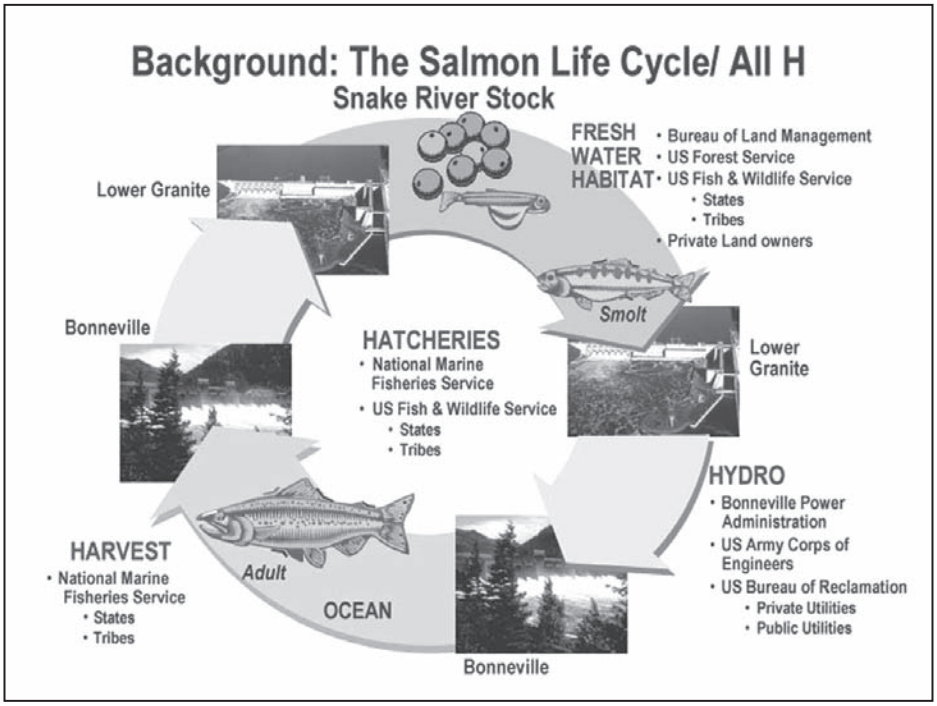
No Recovery Plan

ADVERSE MODIFICATION OF CRITICAL HABITAT

First, recall that in deciding whether an action causes jeopardy, NMFS decides whether "the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species ***or*** result in the destruction or adverse modification of critical habitat." 50 C.F.R §402.14(g)(3); *emphasis added*. The operative phrases in that regulation are also defined. "Jeopardize the continued existence of" means: "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, number, or distribution of that species." 50 C.F.R. §402.02. "Destruction or adverse modification of critical habitat" means: "a direct or indirection alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical." 50 C.F.R. §402.02.

In *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service*, 378 F.3d 1059 (9th Cir. 2004), the Ninth Circuit held that the consulting agencies' definition of "destruction or adverse modification" of critical habitat at 50 C.F.R. §402.02 did not comply with the ESA. The Ninth Circuit found that the definition allowed the consulting agencies to essentially stop their jeopardy inquiry if a "survival" floor was met, which effectively wrote recovery out of the equation. The *Gifford Pinchot* decision was rendered in the context of a question about adverse modification of critical habitat. It did not directly address whether the same reasoning applies to the definition of jeopardy itself. However, since the language is identical, one could surmise that if given the opportunity the Ninth Circuit would have little trouble applying the same rationale to the jeopardy standard. That is exactly what occurred in the recent opinion. The Ninth Circuit upheld Judge Redden's determination that the *Gifford Pinchot* rationale applies equally to jeopardy and to adverse modification of critical habitat.

The impact of that ruling in FCRPS litigation means that the jeopardy analysis has to evaluate the effects of the action on the species' prospects for recovery as well as survival. In addition, the Ninth Circuit upheld Judge Redden's finding that the adverse modification analysis in the 2004 BiOp was deficient, among other reasons, in that it did not adequately consider short-term negative impacts on populations in the context of their overall life cycles: "[I]t is not enough to provide water for [endangered fish] to survive in five years, if in the meantime, the population has been weakened or destroyed by inadequate water flows." 481 F.3d at 1240, quoting *Pac. Coast Fed'n*, 426 F.3d at 1095. As to recovery, the Ninth Circuit agreed with Judge Redden that the BiOp evaluated recovery without adequately supporting that analysis with data on survival. Unfortunately, in this case, recovery analysis is further complicated by the fact that there has been no Recovery Plan adopted for the species at issue in this consultation. Therefore the federal agencies (together with the sovereign parties in the collaborative remand process discussed hereafter) must



Columbia BiOp

Recovery in Jeopardy Analysis

Ninth Circuit Explanation

Separation of Powers

Remand Detailed

New Remand Clear

Collaboration Required

decide how to factor recovery into the jeopardy equation and what resources and information to draw upon to ensure that it meets the ESA's "best available scientific information" standard. In this regard, however, there may be a bit of good news for the government in the Ninth Circuit's opinion. First, the Court clearly stated what NMFS cannot do in factoring recovery into a jeopardy or critical habitat analysis: "Nothing in its prior approach indicates that NMFS may simply avoid any consideration of recovery impacts, as it admits it has done here." 481 F.3d 1224 at 1237.

The Court explained the degree to which recovery must be factored into a jeopardy analysis:

> It is only logical to require that the agency know roughly at what point survival and recovery will be placed at risk before it may conclude that no harm will result from "significant" impairments to habitat that is already severely degraded. Requiring some attention to recovery issues does not improperly import the ESA's separate recovery planning provisions into the section 7 consultation process. Rather, it simply provides some reasonable assurance that the agency action in question will not appreciably reduce the odds of success for future recovery planning, by tipping a listed species too far into danger.
> 481 F.3d at 1241 (emphasis in original)

In addition, the Ninth Circuit plainly stated that only "in exceptional circumstances" could injury to recovery alone justify a jeopardy determination. Thus, the standard for addressing recovery in the jeopardy analysis, articulated in detail by the Ninth Circuit in this case, appears to be reasonable and clears up some questions remaining after the *Gifford Pinchot* decision. One certainly hopes, despite the significant amount of uncertainty in the data about certain aspects of salmon lifecycles, that there is at least enough information on the overall status of the 13 species covered by the FCRPS BiOp so that a reasonable judgment can be expressed on the existing barriers to recovery, and whether the proposed action will either exacerbate or alleviate them to any degree.

REMAND AND COLLABORATION

When a Court invalidates federal agency action, its remand order must bear in mind the Constitutional doctrine of Separation of Powers — the line the Court must not cross that would interfere with the discretion of the federal agency in carrying out its duties upon remand. When the District Court overturns an agency action and orders a remand to correct the problem, it cannot "dictat[e] to the agency the methods, procedures, and time dimension of the needed inquiry." *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976). Federal Courts variously issue remand orders that range from spelling out literally nothing in terms of the Court's expectations on the course of the remand, to orders containing timelines and various benchmarks. In the FCRPS case, when the 2004 BiOp was invalidated by Judge Redden, the federal government was dealing with a Court that had previously issued a relatively detailed remand order only to have it, in the Court's view, ignored by the federal defendants. In his new remand Order Judge Redden left little to the imagination in terms of his motivation in directing the course of the remand:

> In its proposal as to how the remand should proceed, NOAA states that it would be improper for me to issue an order that specifically identifies steps NOAA and the Action Agencies should take during the remand to produce a valid biological opinion, because to do so would inject the court into the deliberative process of the administrative agencies. I disagree. I recognize NOAA alone is charged with the responsibility of drafting a valid biological opinion. So far, they have not succeeded. Courts do defer to administrative agencies, and they should, and I have. Experience, however, shows that the court should, and sometimes must, be more than a passive participant in the remand process. The many failures in the past have taught us that the preparation or revision of NOAA's biological opinion on remand must not be a secret process with a disastrous surprise ending. The parties must confer and collaborate if we are to reach the goal of a valid biological opinion. The government's inaction appears to some parties to be a strategy intended to avoid making hard choices and offending those who favor the *status* quo. Without real action from the Action Agencies, the result will be the loss of the wild salmon. Based on prior history and the experience of the last remand, it is clear that progress can only be made if the agencies understand exactly what is required of them.
> Oct. 7, 2005 Remand Order p. 8.

Columbia BiOp

Court Directives

Thus, the 2005 Remand Order: contained timelines for reporting progress to the Court; pointedly describes the flaws in the 2004 BiOp the Court wants corrected; and directs NMFS to collaborate in that effort with the state and tribal sovereigns. The Court then backs up these directives with various threats on what may occur if the government does not carry them out:

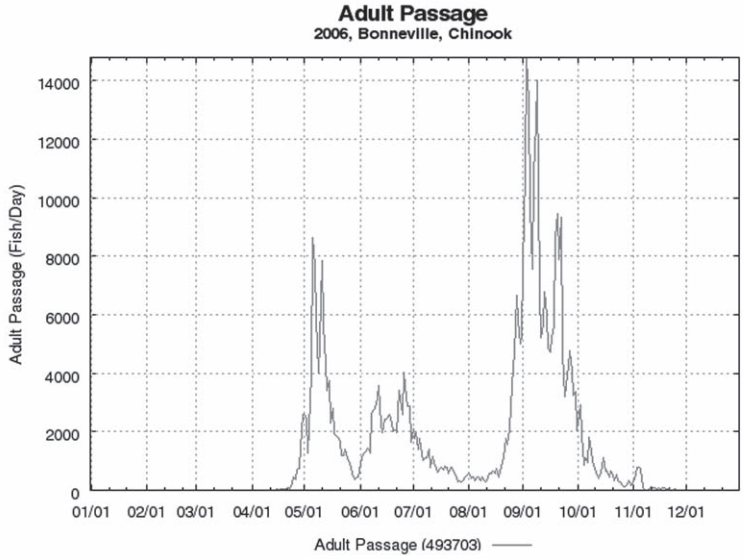
> "A failure now will result in vacating the biological opinion…In such an event, the courts would be required 'run the river'…'Speeching' on the dams will not avoid breaching the dams…I intend to act promptly if adequate progress is not being made during the remand period…"
> *Id*., *passim*.

NMFS' Challenges

On appeal, NMFS did not challenge most of the remand order, but did contest the requirement that it provide a "failure report" if it finds it cannot develop a proposed action that avoids jeopardy within the remand timeframe. Moreover, it challenged being ordered to collaborate with the sovereign entities. The Ninth Circuit merely found the failure report a reasonable form of progress report that has been approved in many other cases. On the more important question of mandating collaboration in the remand, the Ninth Circuit said: "This collaboration requirement is justified both as a reasonable means to ensure that NMFS complies with the ESA's mandate that agencies 'use the best scientific and commercial data available' in their decision-making, 16 U.S.C. §1536(a)(2), and as a reasonable procedural restriction given the history of the litigation." 481 F.3d 1224 at 1242.

Collaboration "Reasonable Restriction"

Clearly this requirement is as much about process as substance, because as the Ninth Circuit also noted, "the requirement does not on its face direct the substance of the agencies' actions on remand, and may not be interpreted to do so." *Id.* As is discussed briefly in the next section, however, while the ultimate discretion in making the jeopardy call and writing the BiOP remains with NMFS, opening the process to the other sovereigns may realize benefits for both the technical integrity of the resulting new BiOp, as well as a boost for the credibility of federal agencies facing a very skeptical federal court system.



WHAT LIES AHEAD

Ninth Circuit Impact on Remand

It is unlikely there will be any immediate impact on the remand process from the Ninth Circuit opinion, given that the remand has been underway since Judge Redden issued his order in the Fall of 2005, and in that roughly one and a half years much work has been done. Status reports and status conferences in the District Court indicate that the federal agencies, and certainly the sovereign collaborative parties, were not being guided by the notion that eventually the Ninth Circuit would overturn Judge Redden's summary judgment opinion or remand order. It may well be that this appellate decision will simply be taken in stride by the federal government but, even if an appeal is pursued in the US Supreme Court, the timing of the remand is such that it will probably be completed before any resolution would come from that appeal. In the nearer term it is conceivable that the Supreme Court will issue an opinion in the *Defenders of Wildlife* case that could address the question of consulting on non-discretionary actions, but the odds of that occurring within a timeframe that would impact the ongoing FCRPS consultation are small.

Columbia BiOp

Status Conferences

Updated Proposed Action

Technical Collaboration

BPA Press Release

Strong Oversight

The federal agencies and sovereigns have been reporting their progress in the remand to Judge Redden, with status conferences that follow each quarterly report. Typically the status conferences have involved more courtroom argument than mere reporting of what has transpired since the previous conference. The non-sovereign plaintiffs and some sovereigns have complained variously, for example, that they have not been given a meaningful opportunity to participate in the remand; that from what they can tell the federal government is not following Judge Redden's admonitions; that certain specific means of calculating or apportioning responsibility for the impacts of the hydro system have been wrongfully rejected by the remand participants; and that the jeopardy standard is hopelessly ill-conceived.

On May 21, 2007, a milestone was reached when the federal government filed in the District Court the draft updated proposed action (consisting of some 600 pages). That document, when finalized, will be the formal document upon which consultation to determine jeopardy will occur. The parties will submit comments and the action agencies will consider them before the action is finalized. In the face of the conflicting reports he has been getting about the process, Judge Redden has to-date resolutely refused to wade into the remand itself, thereby contradicting fears expressed by the federal government in both the District Court and Ninth Circuit that the judicial branch was telling the executive branch how to write the new BiOp. One reason may be the unprecedented amount of technical collaboration that has taken place in the remand process as reported to the Court. Documents filed with the status reports show scores of meetings of technical and policy groups made up of representatives of all sovereigns. These meetings are addressing the most complex aspects of FCRPS operations. Scores of technical products are being created specifically for the new BiOp. [The draft proposed action and other documents are available at http://www.salmonrecovery.gov/]

A press release issued by the Bonneville Power Administration (the US Department of Energy agency that markets and distributes FCRPS-generated power) in response to the Ninth Circuit opinion suggests that the federal agencies are recognizing the value of the collaborative process:

> The federal agencies remain committed to a process begun more than a year ago to produce a comprehensive biological opinion for Federal Columbia River Power System operations that will protect listed salmon.
>
> We look forward to continuing the collaboration process with the states and tribes. We remain hopeful that collaboration will increase the likelihood that the final biological opinion will not only protect salmon but will have broad regional support as well.
>
> Bonneville Power Administration press release, Monday, April 9, 2007

The District Court's skeptical view of the motivations of the federal agencies carried forward into the Ninth Circuit's opinion, but this strong hand of the federal court system in the remand process may make the difference between success and failure in the product that is delivered from the collaborative process.

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Municipal Stormwater

Program Flexibility

Evaluation Difficulties

New Guidance

Info Needs

NRC Assessment

CWA § 402(p)

Phased Approach

"MS4s"

"MEP"

Ambiguity

Phase I & II Compared

MUNICIPAL STORMWATER

AN OVERVIEW OF CURRENT REGULATION & MANAGEMENT

by Misha Vakoc, Regional Stormwater Permit Coordinator, US Environmental Protection Agency, Region 10, Seattle WA

Introduction

The federal requirements for controlling pollutants in municipal stormwater runoff are fundamentally rooted in flexibility — flexibility for the regulatory agency to define requirements through a National Pollutant Discharge Elimination System (NPDES) permit and flexibility for the municipal entity subject to that permit to determine the appropriate practices that control pollutants to the maximum extent practicable. As a result, it is difficult to succinctly summarize how well existing municipal storm water management programs are working to reduce pollutant impacts across the country.

The US Environmental Protection Agency (EPA) offers a framework to evaluate the municipal stormwater management programs through the recently published *Municipal Separate Storm Sewer System (MS4) Program Evaluation Guidance* (January 2007, EPA-833-R-07-003). While this guidance document represents the first time EPA has put forth national recommendations to States regarding the review of MS4 programs, EPA recognizes that significantly more information is needed regarding how best to manage stormwater overall.

To help address some of the lingering questions pertaining to how we can consistently reduce pollution from the urban landscape and subsequently measure that reduction in an objective manner, EPA has asked the National Research Council (NRC) to convene an expert panel. This NRC panel will assess the current state-of-affairs of stormwater management and provide recommendations on overcoming the challenges common to all stormwater management programs.

Background

Although the NPDES program has been the main pillar of the Clean Water Act programs since the early 1970's, the stormwater permitting program is comparatively young. In 1987, Congress included Section 402(p) in the Clean Water Act, 33 U.S.C.§ 1342(p). This section establishes a comprehensive, two-phase approach to municipal stormwater control under the NPDES permit program. Specifically, municipal stormwater permits were divided into two phases. In 1990, EPA issued the Phase I stormwater rule (55 FR 47990; November 16, 1990) that required NPDES permits for operators of **m**unicipal **s**eparate **s**torm **s**ewer **s**ystems (MS4s) serving populations greater than 100,000. In 1999, EPA issued the Phase II stormwater rule (64 FR 68722; December 8, 1999) which expanded the requirements to smaller MS4s in urban areas as defined by the US Census Bureau.

In Section 402(p) of the Clean Water Act, Congress allowed MS4 permits to be issued on a system- or jurisdiction-wide basis. In addition, Congress set forth two specific requirements for MS4 permits. First, the permits must include requirements to effectively prohibit non-stormwater discharges into the storm sewers. Second, the permits must define controls to reduce the discharge of pollutants to the "**m**aximum **e**xtent **p**racticable" (MEP). MEP controls include "management practices, control techniques and system, design and engineering methods, and such other provisions as the EPA Administrator or the State determines appropriate for the control of such pollutants" (this is commonly known as the "MEP standard"). The MEP standard is arguably ambiguous. This standard has led to confusion over what the water quality endpoint requirements are or should be, and has resulted in a multitude of court challenges.

Nationally, EPA estimates that there are more than 6,000 MS4s regulated by the NPDES stormwater regulations. Approximately 1,000 of the Phase I MS4 communities have been permitted through the use of individual NPDES permits. These individual permits are written specifically for a particular municipal area requiring the implementation of a stormwater management program. Many of these Phase I MS4 permits and associated programs have been in place since the mid-1990s. By comparison, most Phase II communities are permitted through the use of state-wide general NPDES permits. These State-wide permits contain general provisions which stipulate the implementation of a stormwater management program. A small percentage of States and EPA Regions have opted to cover Phase II MS4s under individual NPDES permits. The Phase II stormwater program significantly increased the number of NPDES-permitted entities. Generally speaking, there was no commensurate increase in staffing or other resources at the federal or State level.

Municipal Stormwater

"SWMP"

Unlike NPDES industrial wastewater permits — which typically contain specific end-of-pipe effluent limits based on water quality standards or available treatment technology — the central requirement of the MS4 NPDES permits call for the municipal entity to develop a **s**torm**w**ater **m**anagement **p**rogram (SWMP). An SWMP documents the best management practices, operation and maintenance requirements, and other activities to be undertaken by the municipal entity to protect the water quality in nearby receiving water bodies to the MEP.

EPA's regulations for Phase I and Phase II stormwater define the broad framework of the expected stormwater management programs for MS4s, and in general define "minimum measures" or expectations that must be addressed by MS4 operators.

MS4 Measures

MS4 MINIMUM MEASURES BROADLY INCLUDE:

- public education; public involvement
- illicit discharge detection and elimination
- construction site runoff control
- post-construction stormwater management
- municipal "good housekeeping"

"BMP" Flexibility

Permittees are allowed flexibility in the types of **b**est **m**anagement **p**ractices (BMPs) and activities that they implement to meet the expectation of reducing pollutants to the MEP. Some States, such as Washington and California, have further defined the minimum expectations for stormwater management programs in detailed guidance manuals.

Source Focus

Stormwater management is based largely on a pollution prevention or source control approach. This is because the specific climate, geology and geography of an area is crucial to determining what types of control options will truly reduce pollutants in stormwater runoff to MEP expectations. BMPs for stormwater can take the form of structural, vegetative, managerial and/or institutional practices. Effective stormwater management requires consideration of runoff along the spatial continuum from site level to watershed level, as well as consideration of natural hydrology. It is important to focus on sources and causes of pollution, rather than simply on treatment technologies.

Evaluation Constraints

Programs' Variability

Program flexibility, as well as the multifaceted nature of the stormwater management requirements, makes it extremely difficult to evaluate the overall effectiveness of MS4 stormwater management programs. To date, there has not been a national assessment of how well stormwater MS4 programs comply with their respective permits or how well these programs protect water quality.

MS4 permits — and the specific requirements contained therein — vary greatly from State-to-State. Some MS4 permits contain broad requirements that outline the basic SWMP components the permittee is required to implement, thus giving the permittee the maximum flexibility to develop a program that meets these broad requirements. Other MS4 permits have been written to be more prescriptive and therefore specify in detail the minimum activities and BMPs for each program element.

Reports' Variability

While each permittee is required to submit an annual report on their program implementation, the format of these reports is not standardized. Consequently, the reports provide a wealth of information for the individual MS4 permittee, but do not always easily lend themselves to a concise summary or comparison with other regulated MS4 areas.

General Findings

WHAT'S WORKING & CURRENT SHORTCOMINGS

Successful Activities

Even given the data constraints, however, there are a few general conclusions that can be drawn from previously conducted MS4 program evaluations and case studies conducted by various States and EPA. These data show that there are some activities and practices that appear to be working well in many MS4 programs. For example, most municipalities seem to have well-established practices for street sweeping, catch basin cleaning, and spill response. A number of MS4 operators have developed creative and lively public educations programs on effective stormwater management practices. Further, staffing resources are effectively utilized when municipalities use inspectors from their pretreatment program to conduct industrial stormwater inspections within their jurisdiction. It is often beneficial when MS4s work with neighboring MS4 jurisdictions through combining resources and expertise.

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Difficulties

LESSONS FROM PRIOR STORMWATER MANAGEMENT EVALUATIONS INCLUDE:

- Because the specific NPDES permit requirements for MS4s vary from State-to-State, it is difficult to make inter-state or inter-regional comparisons of municipal stormwater management programs. While reviewing the annual reports can provide useful information about the local program, the reports alone are not always a good indicator of whether the program is truly effective.
- Trying to draw conclusions about stormwater management program costs and cost-effectiveness is also problematic. Many MS4 permits do not require financial information to be submitted by the permittee as part of the annual report. Moreover, those permits that do ask for such financial information don't have a standardized format for reporting such figures.
- Many stormwater management programs are not designed to address the specific pollutants of concern that are already identified in their watershed through the State agency's impaired waters list. Where pollutants of concern have been identified, stormwater management programs should specifically target a reduction in these pollutants.
- Land use planning and oversight of construction sites are universally challenging for the local MS4 operators.
- Local MS4 operators would benefit from consistent expectations for program content and reporting, and need more feedback from the State and/or EPA NPDES permitting authority.

EPA's MS4 Program Evaluation Guidance

Effectiveness Road Map

To create a central starting point from which EPA and the States can gather information from municipal operators about their stormwater management programs, EPA published the MS4 Program Evaluation Guidance referenced above in January 2007 (Guidance). The Guidance provides a "road map" to objectively gauge the effectiveness of municipal stormwater management programs in a consistent and comprehensive manner. The Guidance contains background information, advice, and a general framework on how to conduct a comprehensive MS4 program evaluation.

Evaluation Procedures

State and federal NPDES permitting staff can use the Guidance to more uniformly gather information through document reviews and in field visits. This information can be used to determine the MS4 permittee's compliance with the NPDES permit. Guidance evaluation procedures can be used by NPDES permit writers to gather information arising from onsite interviews and discussions with municipal staff to inform the permit-issuance or permit-renewal process. The Guidance also contains tools for municipal stormwater managers and can be used to conduct a "self audit" of local management activities using a standard set of questions and checklists.

EPA believes the Guidance will help States and EPA objectively evaluate a permittee's stormwater management activities to determine whether a permittee's stormwater program sufficiently reduces pollutants to the MEP.

Review Types

The Guidance distinguishes between different types of reviews that may be done by the permitting authority. For example, a review in the form of an audit can be used to look at all components of an MS4 program to assess overall implementation and identify problems. The Guidance can also be used to conduct a formal NPDES inspection of the MS4 program, which generally involves a more focused examination of specific MS4 program components to verify compliance with applicable permit requirements.

Any MS4 program evaluation is ultimately based on the requirements set forth in the NPDES permit and activity commitments described within the permittee's stormwater management program. These documents serve as the primary references for an evaluation. EPA recommends that the detailed questions and worksheets outlined in the Guidance be tailored to the needs of the entity conducting the evaluation.

The MS4 Program Evaluation Guidance, as well as an associated web-based training session on the use of the Guidance, is available through EPA's website as listed at the end of this article.

National Research Council Panel

NRC TO EXAMINE REDUCING STORMWATER CONTRIBUTIONS TO WATER POLLUTION

Technical Difficulties

The many technical challenges to addressing the water quality impacts of stormwater runoff are well acknowledged. Stormwater discharges tend to be highly concentrated both in terms of flow rate and quality. This is due to the impervious surfaces associated with urban land use and the variety of contaminants present that can be entrained or dissolved in stormwater. The most prevalent pollutants include sediment, pesticides and fertilizers, and metals from industrial activities. However, specific compounds in the stormwater runoff will vary widely depending on the land use.

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Standards Applicability

In the absence of vegetation or other source control measures to prevent stormwater from coming in contact with pollutants, a wet weather event can lead to water bodies being subjected to a sudden, massive loading of pollutants from nearby land surfaces. State water quality standards were not generally created to address such events and not written in a manner that acknowledges the timing and magnitude of such loadings. Moreover, because many problems found in urban receiving waters are associated with high flows and sediment, it is unclear how appropriate it is to apply traditional State water quality standards to municipal stormwater discharges. [See Singarella, TWR #17]

There are, however, a variety of BMPs designed to prevent or retard stormwater from quickly reaching nearby water bodies and degrading the water quality. These practices include structural methods (e.g. detention ponds) and nonstructural methods (e.g. designing new development to minimize the amount of impervious surface). Limited data currently exists to consistently determine how much pollutant reduction can be assigned to a particular pollution prevention or management practice. [See Strecker, TWR #6]

As a result, EPA has requested input from the NRC to recommend improvements to the national NPDES stormwater program.

NRC Study Goals

Primary goals of the NRC study include:

- increased understanding of the links between stormwater pollutant discharges and ambient water quality
- assessing the state-of-the-science of stormwater management
- recommending associated policy implications to EPA

A fifteen member panel of experts has been asked to address the full scope of the NPDES stormwater program governing industrial, construction and municipal discharges. A final report of their findings will be submitted to EPA in September 2008. The conclusions from this study should be particularly useful for improving municipal stormwater permitting and policy. The study may be able to address the fundamental question of how to determine whether a stormwater management program is achieving the goal of improving water quality.

Discharge Effects

In particular, EPA has asked the NRC panel to clarify the mechanisms by which pollutants in stormwater discharges affect ambient water quality criteria, and to define the elements of a "protocol" to link pollutants in stormwater discharges to ambient water quality criteria. Such an analysis will directly assist the NPDES permitting authorities across the country to develop or refine appropriate MS4 permit conditions intended to reduce the discharge of pollutants to the MEP. Perhaps it will lead to some national consistency of these permit conditions.

Numeric Limits?

NRC has been also asked to comment on a related question regarding whether numeric metrics (in the form of benchmarks or limits) are suitable indicators of a stormwater discharger's reasonable potential to cause or contribute to a violation of water quality standards. This question was previously addressed by an expert panel convened by the California State Water Resources Board in June 2006. This California panel concluded that it currently is "not feasible to set enforceable numeric effluent criteria for municipal BMPs and in particular for urban discharges." The California panel did conclude, however, that it might be technically feasible to include numeric limits in stormwater discharge permits for some industrial and large construction sites. The NRC panel's opinion on this question will add greater national perspective and understanding to this important issue.

Monitoring Issues

EPA has further asked the NRC panel to consider whether monitoring is useful for determining the potential of stormwater discharges to cause or contribute to a violation of water quality standards. A related issue is whether monitoring is useful for determining the adequacy of stormwater pollution prevention plans required for industrial and construction stormwater discharges.

Stormwater discharge monitoring is notoriously problematic due to logistical issues related to local climate and rainfall patterns, as well as practical issues related to equipment and manpower. Monitoring of stormwater outfalls is often not simultaneously coupled with water quality sampling in stream. EPA's monitoring questions to the NRC panel are targeted specifically to the industrial and construction stormwater permits. However, the resulting recommendations on appropriate monitoring will likely be relevant to the municipal stormwater management programs as well. In a municipal stormwater program there are a myriad of questions to consider. For example, where does it make sense to monitor within an urban setting, when there are multiple, if not hundreds, of outfalls geographically distributed across the landscape? What type of monitoring is necessary to obtain useful information? What kind of monitoring is most cost effective? How should the resulting data be interpreted?

Implementation Effects

The NRC panel will also evaluate the relationship between different levels of stormwater management implementation and in-stream water quality. The NRC panel will consider a broad suite of structural and nonstructural BMPs. EPA has asked the NRC panel to make recommendations for how States and EPA

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can best stipulate provisions in stormwater permits to ensure that discharges will not cause or contribute to exceedances of applicable water quality standards. Finally, the NRC panel will assess the design of the current NPDES stormwater permitting program implemented under the Clean Water Act.

Pressing Questions

Estabishing Meaningful Requirements

The issue of establishing meaningful NPDES permit requirements to meet water quality objectives is especially important. However, at present there appear to be more questions than there are ready answers. Notwithstanding the issue of whether numeric pollutant limits are necessary in stormwater permits, should such NPDES permits also try to stipulate requirements for hydrologic changes? For example, should NPDES permits contain specific minimum criteria for pre-development vs. post-development flow volumes? Such requirements for the thousands of municipalities regulated under the NPDES program may indeed prove to be a crucial step in protecting receiving water quality. However, the unique conditions within each watershed must be better understood both by the NPDES permit writers and the municipal permittees if such permit requirements are to be brought forward in a meaningful manner.

TMDL Tie-In

The NPDES permits must also contain requirements that appropriately limit the discharge of pollutants to impaired waters where a **t**otal **m**aximum **d**aily **l**oad (TMDL) analysis has not yet been established to allocate pollutant loads. What types of MS4 permit conditions make sense during the interim time while a TMDL is being completed? Once a TMDL has been approved by EPA, how should specific allocations for municipal stormwater be incorporated into a permit, while still providing flexibility to the discharger?

Conclusion

EPA has created a starting point from which NPDES permitting authorities can begin the difficult process of evaluating the relative success of existing municipal stormwater management programs. However, we need to continue asking — and addressing — the difficult questions. Such analysis is crucial if we are to refine our collective ability to reduce the impacts of municipal stormwater on water quality in a consistent, practical, and reasonable manner.

For Additional Information: Misha Vakoc, US Environmental Protection Agency, 206/ 553-6650 or email: vakoc.misha@epa.gov

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National Research Council website entitled *Reducing Stormwater Discharge Contributions to Water Pollution* is located at: www8.nationalacademies.org/cp/projectview.aspx?key=48711

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WATER BRIEFS

WATER MANAGEMENT RULES NM

COURT UPHOLDS RULES

New Mexico State District Court Judge Matthew Reynolds (Seventh Judicial District) recently issued a ruling that affirms in part the New Mexico State Engineer's Active Water Resource Management (AWRM) Rules and Regulations. The Memorandum Decision, however, also reverses portions of the State Engineer's Order No. 154 that adopted AWRM regulations. The court found that some of the regulations were in violation of the State Engineer's statutory authority and the US and New Mexico Constitutions. *Tri-State Generation, et al. v. John D'Antonio, Jr., New Mexico State Engineer*, Case No. D-0725-CV-05-03 (May 16, 2007).

State Engineer John D'Antonio stated in a press release that "We're reviewing this decision to evaluate the need for an appeal on certain aspects of the judge's ruling that may need some clarification. We appreciate the judge's effort and validation of the Active Water Resource Management initiative and will keep pressing forward."

The case dealt with regulation (administration) of water rights by the State Engineer's Office under AWRM rules, *prior* to the completion of a general adjudication of water rights that would ultimately determine priority dates for all water users. To regulate water rights before an adjudication has been completed, AWRM rules granted authority to the State Engineer to make interim determinations of priority and then regulate rights accordingly (pending final adjudication by a court).

AWRM rules and regulations were challenged by Tri-State Generation and Transmission Association and the New Mexico Mining Association in 2005 (Petitioners), alleging that the rules were unconstitutional on three grounds: separation of powers; due process; and vagueness. A "takings" claim was originally asserted, but not asserted at oral argument, and the court noted that it was not "ripe" for determination (Memorandum Decision at 1).

Petitioners were successful in limiting the overall scope of the State Engineer's power regarding priority determinations of unadjudicated water rights. The court stated that the State Engineer's authority for "priority administration" is as set out in NMSA 1978, Section 72-2-9, "namely, that he can administer priorities from court decrees and licenses issued by him, but he cannot determine priorities from other sources. This statutory construction does not provide for comprehensive priority administration that can immediately cover every water user throughout the state, but at least it makes sense of Section 72-2-9.1 without violating the State Constitution." *Id.* at 33. Thus, the court specifically decided that the State Engineer cannot utilize "other forms of evidence…including D. hydrographic surveys, F. permits and G. best available evidence, because no appropriate legislative standards were in place at the time of AWRM's adoption for their implementation." *Id.* at 34.

The court found that certain hearing procedures violated due process requirements of the US Constitution (Amendment V and XIV) and the New Mexico Constitution, art. II, §18. AWRM provisions did not provide for quick hearings on objections to priority determinations, despite the fact that "a primary purpose of AWRM is to quicken the pace for priority administration…" The court ordered that the State Engineer cannot use the hearing procedure that was set forth in the AWRM rules, but instead held that "[F]ormal hearings on objections must be conducted under Section 72-3-3 or some other procedure providing similar guarantees of prompt resolution."
Id. at 40.

Finally, the court restricted the State Engineer's authority when competing priorities between water users are involved: "…the State Engineer's power to determine relative priorities and other elements of water rights in AWRM does not entail the power to weigh evidence between competing rights." The court held that water users "affected by AWRM's administration will have the opportunity to seek a determination of their relative priorities in court, if they object to others having a senior priority date on the administrable water list." *Id.* at 42.
For info: Karin Stangl, State Engineer's Office, 505/ 827-6139; Copies of AWRM rules are available on the State Engineer's website: www.ose.state.nm.us; Copy of the Memorandum Decision is available by contacting The Water Report.

OIL SPILL SETTLEMENT CA

FED & STATE VIOLATIONS

On May 21, EPA announced that Kinder Morgan Energy Partners LP (Kinder Morgan), and SFPP LP, have agreed to pay nearly $5.3 million to resolve liability under the Clean Water Act, Oil Pollution Act, Endangered Species Act, and California's Porter-Cologne Water Quality Control Act and Oil Spill Prevention and Response Act, for three oil spills in 2004 and 2005. The settlement addresses: a 123,774 gallon-spill at the Suisun Marsh in Solano County (April 2004); the 76,902 gallon-spill at Oakland Inner Harbor in Alameda (February 2005); and the 300 gallon-spill into Summit Creek that impacted waters in the pristine Donner Lake watershed in the Sierra Nevada Range in Placer County (April 2005). The spills, on Kinder Morgan's 3,000-mile Pacific Operations Unit pipeline system, discharged a combined 200,976 gallons of diesel fuel, jet fuel and gasoline into waters, sensitive ecosystems, and impacted endangered and other species, habitat and commercial uses.

The 224-acre Suisun Marsh is the largest salt-water wetland in the western US. This sensitive habitat serves as a brooding area for waterfowl and is home to the salt marsh harvest mouse — an endangered species. The discharged diesel fuel spilled into the marsh, caused petroleum tarring along the shorelines, and significantly impacted or killed mammals and birds, including the salt marsh harvest mouse.

The $3.7 million civil penalty includes a $1.5 million payment to the Oil Spill Liability Trust Fund, a combined $1.3 million to the San Francisco Bay and Lahontan Regional Water Quality Control Boards, over $830,000 to the California Department of Fish and Game and nearly $15,000 to the Endangered Species Act Reward Fund. In addition, Kinder Morgan has agreed to fund restoration projects, implement stringent oil spill prevention policies and re-designate pipelines in the eastern Sierras to apply additional precautionary measures that will minimize environmental risks and potential damage if future spills occur. Kinder Morgan has also agreed to hire ten additional "line-riders" who serve as the company's pipeline inspectors.
For info: Mark Merchant, EPA, 415/ 947-4297

WATER BRIEFS

FLOW REDUCTION CA

DROUGHT RESPONSE

Because of unusually low rainfall in the watershed and the request of the Sonoma County Water Agency (SCWA), the California State Water Resources Control Board's Division of Water Rights has approved a request to reduce the flow of water in the Russian River. It also scheduled a June 5 workshop so that residents and interest groups can give Water Board members their feedback on this issue. SCWA made the request to prevent storage levels in Lake Mendocino from dropping to very low levels by the end of summer. SCWA stated that such low levels could: 1) severely impact threatened or endangered Russian River fish species; 2) create serious water supply impacts in Mendocino County and in Sonoma County's Alexander Valley; and 3) harm Lake Mendocino and Russian River recreation.

The order signed May 10 states that, "instream flow requirements for the Upper Russian River (from its confluence with the East Fork of the Russian River to its confluence with Dry Creek) be reduced from 185 cubic feet per second (cfs) to 75 cfs, and the requirements for the lower Russian River (downstream of its confluence with Dry Creek) be reduced from 125 cfs to 85 cfs." Reductions will begin now and the lower flows will be in place by June 1. The Order approves the reduction of instream flow requirements for the Russian River from May 1 through October 28, 2007. The Order, in effect, reduces minimum flows for the Russian River from normal-year criteria to dry-year criteria as defined in State Water Board Decision 1610.

For info: SWRCB website: www.waterrights.ca.gov/notices.>>>click on Transfers and Temporary Urgency Actions Notices>>>Sonoma County Water Agency (Temporary Urgency Change)

HAZWASTE INJECTION KS

DEEP WELL DISPOSAL APPROVED

EPA has approved a petition by Occidental Chemical Corporation (Occidental) to inject liquid hazardous waste from their chemical manufacturing facility near Wichita into a deep underground well. EPA's approval for this additional on-site injection well became effective May 2, 2007. This well is being added to an existing group of five hazardous waste injection wells that EPA approved in 1990.

EPA concurs with Occidental that this method of disposal is protective of human health and the environment and is cost-effective. The method isolates the waste in deep geologic formations with no potential for future contact with underground sources of drinking water or the environment above the surface. Based on a technical review of Occidental's petition, EPA found that the company satisfactorily demonstrated that the hazardous waste will not move out of the injection zone — the base of which is nearly one mile deep — for 10,000 years.

Although EPA has approved this petition, Occidental will also need to obtain a permit from the Kansas Department of Health and Environment to inject hazardous waste into this well. A copy of Occidental's petition application and supporting documentation, along with EPA's Administrative Record, are maintained at the EPA Region 7 office.

For info: Martin Kessler, EPA, 913/ 551-7236 or email: kessler.martin@epa.gov

WATER RESOURCES FUNDS NE

NEBRASKA LEGISLATION

On May 1, Governor Dave Heineman signed LB 701 into law, which provides funding for the state's water-related priorities and includes the creation of a Water Resources Cash Fund (WRCF). The bill addresses both short-term issues in the Republican River Basin and creates a framework for addressing Nebraska's long-term water challenges.

Money dispersed from the fund will be used to help the state continue to comply with interstate compacts and agreements, and reduce consumptive water use in areas declared to be fully or over-appropriated. To address short-term water challenges, the bill provides $3 million for the Department of Natural Resources (DNR) to negotiate a one-year lease of surface water rights in the Bostwick Irrigation District to help the state comply with the Republican River Basin Interstate Compact. The bill also provides $2 million to begin a vegetation removal program in fully and over-appropriated areas of the state, and gives bonding authority to NRD's in fully and over-appropriated regions in order to provide funding needed to meet consumptive use targets through 2012. Bonds would be paid off through fees or taxes levied by local NRD's.

The fund will draw on contributions from several sources, including an annual contribution of $2.7 million in state General Funds from FY 2007-08 through FY 2018-19. An additional $3 million in General Funds will be allocated to DNR for distribution to Natural Resources Districts (NRD's) for regulatory activities in each year of the next biennium. The Governor has also requested an annual contribution from the Nebraska Environment Trust of $300,000. Any federal funds the state receives for water conservation projects will also be directed to the fund. In addition, the fund will receive deposits beginning in FY 2011-12 from revenue generated by a three-fifths per cent check-off on corn and grain sorghum, through FY 2018-19. The WRCF will be administered by DNR, with NRD's contributing a 40 percent match to state funds dispersed through the WRCF.

For info: Jen Rae Hein, Governor's Office, 402/ 471-1967

CAFO COMPLIANCE US

DEADLINES EXTENSION

EPA PROPOSAL

EPA is seeking public comment on the proposed extension of certain compliance deadlines for **c**oncentrated **a**nimal **f**eeding **o**perations (CAFOs). One extension applies to water permit application deadlines for facilities that EPA defined as CAFOs for the first time in 2003. The other extension applies to certain CAFOs that have to develop and implement **n**utrient **m**anagement **p**lans (NMPs). A NMP is a plan that specifies the amount of manure that can be applied to crops so the potential for nutrient runoff to water bodies is minimized. EPA is proposing to extend the dates for newly-defined CAFOs to seek permit coverage and for permitted

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CAFOs to develop and implement NMPs from July 31, 2007 to Feb. 27, 2009.

EPA has been regulating CAFOs for more than 25 years. In 2006, EPA proposed revisions to the CAFO rule which, when finalized, would continue to require the proper management of manure. The 2006 proposal, in response to a 2005 court ruling, would revise the National Pollutant Discharge Elimination System (NPDES) permitting requirements and Effluent Limitations Guidelines and Standards for CAFOs.

The proposed extensions, according to EPA, are necessary to allow the agency to respond adequately to an array of public comments on issues raised in the court decision. The extensions will also provide time for the agricultural community to adjust to the new requirements once they are finalized. EPA is also encouraging states and EPA regional offices to continue to implement their existing regulatory programs in preparation for the final rule. The proposal will be published soon in the Federal Register and will be open for public comment for 30 days.

For info: Dave Ryan, EPA, 202/ 564-4355 or email: ryan.dave@epa.gov; EPA's Animal Feeding Operations website: epa.gov/npdes/caforulechanges

WATER MANAGEMENT OR CONSERVATION AWARDS DESCHUTES RIVER CONSERVANCY

The Deschutes River Conservancy (DRC) was selected to receive the US Department of the Interior's "Cooperative Conservation Award" for its many achievements in finding practical solutions to water management challenges in eastern Oregon. (See Aylward/Newton, TWR #29)

The DRC was nominated by the Bureau of Reclamation for its practical, long-range, incentive-based solutions to the Deschutes Basin's water management challenges and for its ability to produce quantifiable results. A total of 14 nominations were submitted to Interior.

The Secretary of the Interior presented the awards during a Departmental Convocation on May 9 in Washington, DC.

The Cooperative Conservation Award recognizes achievements that involve collaborative activity among a diverse range of entities that may include Federal, State, local and Tribal governments, private for profit and nonprofit institutions, other non-governmental entities, and individuals.

During the 2006 irrigation season, DRC projects increased summer flows in the Middle Deschutes to record levels, achieving the 100 cubic-feet-per-second milestone for the first time since irrigators began diverting water from the river in 1899.

The DRC also implements a water conservation program and a water transfer program that have proven to be a valuable resource for irrigation districts in Central Oregon.

By way of the Central Oregon Water Bank, the DRC is able to facilitate a smooth transfer of water from irrigation districts to meet the needs of many Oregon communities, as well as the environmental needs of the Deschutes River.

Water banks in the Basin help water users meet their water needs at a low cost to people and to the environment. The Groundwater Mitigation Bank restores streamflow and provides mitigation credits to new groundwater users. The Central Oregon Water Bank helps water users transfer existing water rights between different uses.

On May 31, DRC also received the Oregon Water Resources Department's State "Stewardship and Conservation Award." Recognition from the Oregon Water Resources Commission is given on an annual basis to individual citizens, groups, businesses or other partners that embody "serv(ing) the public by practicing and promoting responsible water management" and for conserving and restoring Oregon's water resources. Recipients of the award demonstrate an outstanding commitment to water conservation and implementation of water efficient operations.

The DRC is a non-profit corporation that brings together federal, state, Tribal and local governments with private stakeholders to carry out basin-wide ecosystem restoration projects.

For info: Bea Armstrong, DRC, 541/ 382-4077 x23; DRC website: www.deschutesriver.org

WATER UTILITIES US PERFORMANCE MEASURES EPA SUPPORT

In May, EPA issued a statement of support with six national associations to promote recommended utility performance measures and encourage the use of these tools and 10 management attributes by utilities around the country.

The "10 Attributes of Effectively Managed Water Sector Utilities" utilities seeking to improve performance, include: product quality; customer satisfaction; employee and leadership development; financial viability; infrastructure stability; operational resilience; community sustainability; water resource adequacy; stakeholder understanding and support.

This statement of support represents an important milestone by enabling EPA and its industry partners to develop a list of measures to help utilities manage progress in daily operations, infrastructure and overall performance. Through a common management framework, this approach is intended to enhance the utilities' environmental stewardship efforts. Environmental stewardship encourages water efficiency, energy efficiency, and the use of construction materials and processes that minimize impacts on the environment.

The statement and supporting strategies formalize a comprehensive effort among EPA, the Association of Metropolitan Water Agencies, the American Public Works Association, the American Water Works Association, the National Association of Clean Water Agencies, the National Association of Water Companies and Water Environment Federation to encourage effective utility management. These associations, with about 80,000 members, represent some of the largest utilities in the country.

For info: James Horne, EPA, 202/ 564-0571 or email: horne.james@epa.gov EPA WEBSITE: www.epa.gov/waterinfrastructure/bettermanagement.html

WATER BRIEFS

WQ VIOLATION AZ

MINE TAILINGS DISCHARGE

In May, the Arizona Department of Environmental Quality (ADEQ) announced it had issued a Notice of Violation (NOV) to ASARCO Hayden for water quality violations at the company's mine in Pinal County.

In February, a pipeline that pumps mine tailings to one of the on-site tailings ponds at ASARCO's Hayden facility ruptured and discharged over 18,000 pounds of mine tailings into the Gila River flood plain near the facility and into the Gila River itself. Approximately 16,000 pounds of tailings were discharged into the Gila River flood plain and approximately 2,000 pounds of tailings were discharged directly into the Gila River itself.

The discharged mine tailings consist of crushed rock and metals, including lead and arsenic. ASARCO manually removed the tailings that were discharged to the Gila River flood plain, but the tailings discharged into the river were carried downstream and could not be removed.

The NOV requires ASARCO Hayden to take action to avoid another pipeline rupture and to advise ADEQ within 90 days of the action taken.

A Notice of Violation is a compliance tool used by ADEQ to put a party on notice that the agency believes a significant violation of environmental law has occurred.

ADEQ said that ASARCO could also face civil penalties for the violation.

ASARCO recently paid a $77,500 penalty for air quality violations at the Hayden facility due to blowing mine tailings.

For info: ADEQ Office of Communications, 602/ 771-2215 or email : communications@azdeq.gov

US ARMY CORPS DAM SAFETY

CORPS "12 ACTIONS" — 1ST PEER REVIEW RELEASED

The US Army Corps of Engineers (Corps) recently released the *Wolf Creek Dam Consensus Report, Engineering Risk and Reliability Analysis* — an external independent peer review that validates the Corps' high-risk classification of the dam and the interim risk reduction measures currently in effect. This is the first peer review report on a high-risk Corps dam and provides information regarding current Corps efforts to investigate, monitor and modify Wolf Creek Dam in Kentucky. This peer review is a component of both the Corps' Dam Safety Program and the Corps' "12 Actions for Change"— which were released last August. The 12 Actions emphasize: the need to employ dynamic peer review of projects with potential of high consequences; employ risk-based concepts in construction; and effectively communicate risk with the public.

Last January the Corps lowered the Wolf Creek Dam reservoir level to reduce the risk of dam failure during the ongoing, accelerated efforts to fix the project.

In 2005 and 2006 the Corps performed an initial screening of more than130 dam projects, which represent approximately 20 percent of the Corps' 610 dams. The screened dams were believed to be the highest risk among those the Corps owns and operates. The risk-informed screening process considered performance and failure consequences, allowed the Corps to prioritize its dams nationwide, and produced life risk and economic risk information. The Corps' goal is to screen the remainder of its dams by the end of fiscal 2009.

As a result the screening effort, the Corps identified six dam projects that are critically near failure or have extremely high life and/or economic risk, and has made them a national priority for funding, studies, investigations and remedial work. The Corps has implemented interim risk reduction measures, which include: inspections; monitoring; pool restrictions; public awareness; and additional instrumentation at each of the six facilities.

THE CORPS' HIGHEST RISK DAMS ARE:

- Wolf Creek Dam, located in Kentucky
- Center Hill Dam, located in Tennessee
- Martis Creek and Isabella Dams, both located in California
- Clearwater Dam, located in Missouri
- Herbert Hoover Dike, located in Florida

All dams determined to be of highest risk will undergo a dynamic peer review by an independent external panel to ensure the Corps is taking the best approach to reduce risks to the public. The Corps employs independent project reviews to provide additional insight to assist with its dam safety management and programming decisions.

The Corps owns and operates 610 dams that serve a variety of purposes including navigation, flood control, water supply, irrigation, hydropower, recreation, environmental enhancement, and combinations of these purposes. The Corps' primary objective in its Dam Safety Program is to maintain public safety by making sure its dams do not present unacceptable risks to the public.

THE DAM SAFETY PROGRAM:

- prioritizes dam safety studies, investigations and remedial fixes
- prioritizes program funding
- manages and buy down risk with a cost-effective approach
- uses risk management in the routine aspects of the program

The Corps asked an independent external panel of experts to review and assess these six dams and the panel's assessment of the remaining projects is ongoing. The Corps will continue to actively work with state and local emergency managers to ensure emergency notification plans for communities affected are in place.

For info: Keith Ferguson, Corps, 303/ 237-6601

CORPS WEBSITE: The *Wolf Creek Dam Consensus Report, Engineering Risk and Reliability Analysis*, can be found online at: http://www.lrn.usace.army.mil/WolfCreek/.

CALENDAR

June 15 WA

Washington Dredging & Sediment Conference, Seattle. For info: For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, email: hduncan@elecenter.com or website: www.elecenter.com/

June 18-19 ID

IWUA Summer Water Law Seminar & Workshop, Sun Valley. Sponsored by the Idaho Water Users Association. For info: IWUA, 208/ 344-6690 or website: www.iwua.org/

June 19-20 CA

Introduction to the California Environmental Quality Act (CEQA), NW Environmental Training Center Presentation, Oakland, For info: Renata Sobol, NW Environmental Training Center, 206/ 762-1976 or email: rsobol@nwetc.org or website: www.nwetc.org

June 19-20 CA

Analysis and Design of Isotopic and Hydrogeological Characterization of Fractured Rock Settings, Conference, San Francisco. For info: National Ground Water Association, 800/ 551-7379, email: customerservice@ngwa.org, or website: www.ngwa.org

June 21 WA

Mercury: Global Problem - Local Solutions, Conference, Bellevue, RE: Conference Covering All Media (Air, Water, Land), State-of-the-Art Science, New Technologies, and Business Applications. For info: 503/ 227-6361 or email: sue@nebc.org or website: www.nebc.org

June 21-22 OR

Oregon Environmental Quality Commission Meeting, Portland. For info: Helen Lottridge, ODEQ, 503/ 229-6725, or website: www.deq.state.or.us/about/eqc/EQCagendas.htm

June 21-22 CA

Increasing Groundwater Storage to Meet California's Future Demand, Conference, Long Beach, Westin Long Beach. For info: Groundwater Resources Association of California, 916/ 446-3626 or website: www.grac.org/gwstorage.asp

June 22 CA

Los Angeles Area Groundwater Recharge Field Trip, Long Beach, Westin Long Beach. For info: Groundwater Resources Association of California, 916/ 446-3626 or website: www.grac.org/gwstorage.asp

June 24-27 WA

TMDL 2007 Conference, Bellevue, Meydenbauer Convention Center. Sponsored by the Water Environment Federation. For info: WEF, 703/ 684-2400, email: tmdl07@wef.org, or website: www.wef.org/ConferencesTraining/Conferences/SpecialtyConference

June 25-27 ID

The Energy-Water Nexus: Meeting the Energy and Water Needs of the Snake/Columbia River Basin in the 21st Century (Science and Technology Summit), Boise, Red Lion Inn. For info: Gary Johnson, Idaho Water Resources Research Institute, 208/ 282-7985, email: Johnson@if.uidaho.edu, or website: www.iwrri.uidaho.edu/default.aspx?pid=99479

June 25-27 CO

Emerging Contaminants of Concern in the Environment: Issues, Investigations, and Solutions Conference, Vail. Sponsored by the American Water Resources Association. For info: AWRA website: www.awra.org/meetings/Vail2007/index.html

June 26-27 NJ

Environmental Forensics: Methods and Applications Conference, Fair Lawn. For info: National Ground Water Association, 800/ 551-7379, email: customerservice@ngwa.org, or website: www.ngwa.org

June 26-27 WA

Brownfields 2007: Towards Sustainable Redevelopment in the Puget Sound (Conference), Seattle. RE: Redevelopment Trends, Regulatory System, Sustainable Development Practices & More. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

June 27-28 WA

Introduction to Environmental Regulation on Tribal Reservations in Washington NW Environmental Training Center Presentation, Seattle, NWETC Headquarters, 650 South Orcas Street, 8:30am-5pm. For info: Renata Sobol, NW Environmental Training Center, 206/ 762-1976 or email: rsobol@nwetc.org or website: www.nwetc.org

July 11-12 NM

NPDES Overview Course for Permittees, Albuquerque. RE: Basic Requirements & Methods for NPDES Permits, Permit Development & Implementation. For info: Water Environment Federation website: www.wef.org/

July 12 DC

NRC Colloquium on Water Implications of Biofuels, Washington, D.C., The National Academy of Sciences Building. RE: Water Quality, Water Quantity & Related Land Resource Implications of Biofuel Production. For info: Water Science and Technology Board, 202/ 334-3422 or website: http://dels.nas.edu/wstb/biofuels.shtml

July 12-13 WA

3rd Annual Emerging Northwest Tribal Economies Conference, Seattle. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

July 12-13 OR

Department of Fish & Wildlife Commission Meeting, Lincoln City. For info: Director's Office ODFW, 503/ 947-6044, email: odfw.commission@state.or.us, or website: www.dfw.state.or.us/agency/commission/minutes/

July 16-17 NM

Natural Resource Damages Litigation Conference, Santa Fe, El Dorado Hotel. RE: Claim Limits, Injury Assessment Process, Defenses, Injuries Monetized, Strategies & Tactics for Litigation & More. For info: Law Seminars Int'l, 800/ 854-8009 or website: www.lawseminars.com

July 17-20 OH

Summer Conference & 37th Annual Meeting, Cleveland. Renaissance Cleveland. Sponsored by the National Association of Clean Water Agencies. For info: NACWA, 202/ 833.2672, email: info@nacwa.org, or website: www.nacwa.org/meetings/#07winter

July 18 WA

Global Warming Part 3, Conference, Seattle. For info: Holly Duncan, Environmental Law Education Center, 503/ 282-5220, email: hduncan@elecenter.com or website: www.elecenter.com/

July 19 OR

Northwest Water Trading & Marketing Conference, Portland. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

July 19-21 B.C.

Rocky Mountain Mineral Law Institute 53rd Annual Meeting, Vancouver. For info: RMMLF, 303/ 321-8100, email: info@rmmlf.org, or website: www.rmmlf.org

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July 23 HI
SEPA & NEPA Conference, Honolulu. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

July 24-25 OH
2007 NGWA Ground Water and Environmental Law Conference, Dublin. For info: National Ground Water Association, 800/ 551-7379, email: customerservice@ngwa.org, or website: www.ngwa.org

July 24-26 ID
"Hazards in Water Resources," Universities Council on Water Resources (UCOWR) and the National Institutes for Water Resources (NIWR) 2007 Conference, Boise, Grove Hotel. Call for Papers until 12/4/06. For info: Rosie Gard, SIU, 618/ 536-7571, or email: gardr@siu.edu; Idaho Water Resources Research Institute, 208/ 332-4430; or website: www.ucowr.siu.edu/

July 25-27 CA
Western Water Seminar, Monterey. For info: NWRA, 703/ 524-1544, email: nwra@nwra.org, website: www.nwra.org/meetings.cfm

July 26-27 WA
TMDLs in the Pacific Northwest Conference, Seattle. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

July 27 OR
Oregon Coastal Law 2007, Environmental and Natural Resources Section of the Oregon State Bar Presentation, Newport, Hatfield Marine Science Center, 8am-5pm. RE: Law Affecting the Oregon Coast and Near Shore Ocean: Tribal Resources, Marine Protected Areas, Wave Energy, Measure 37 on the Coast, Marine Mixing Zones, More. For info: www.osbenviro.homestead.com/

July 27 OR
Water Marketing Conference, Portland. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net/

July 30-31 WA
Environmental & Natural Resources Litigation Conference, Seattle, Washington State Convention & Trade Center. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

July 30-August 10 MT
Environmental For The Future: Environmental Ethics Institute 2007, Missoula. For info: EEI website: www.umt.edu/ethics

August 3 OR
Department of Fish & Wildlife Commission Meeting, Salem. For info: Director's Office ODFW, 503/ 947-6044, email: odfw.commission@state.or.us, or website: www.dfw.state.or.us/agency/commission/minutes/

August 6-7 NM
New Mexico Water Law Conference: The Year of Water, Albuquerque, Marriott Pyramid North. RE: Policy & Enforcement Priorities, Lower Rio Grande Regulations, Water Courts, *Rapanos* Implementation, Produced Water Regulation, Groundwater Standards, Water Quality Law & More. For info: CLE Int'l, 800/ 873-7130 or website: www.cle.com

August 8-10 MT
154th Council Meeting, Western States Water Council, Bozeman, Hilton Garden Inn, 2023 Commerce Way. For info: Cheryl Redding, WSWC, 801/ 561-5300, email: credding@wswc.state.ut.us or website: www.westgov.org/wswc/meetings.html

August 9-10 AZ
Arizona Water Law SuperConference, Phoenix. For info: CLE Int'l, 800/ 873-7130 or website: www.cle.com

August 12-17 Guatemala
Sixth Inter-American Dialogue on Water Management, Guatemala City. Sponsored by the Government of Guatemala and the Inter-American Water Resources Network. For info: IWRN website: http://d6.iwrn.net/

August 13-17 WY
State Board of Control Quarterly Meeting, Afton (tentatively) For info: Alan Cunningham, Administrator, 307/ 777-6178 or website: http://seo.state.wy.us/news.aspx

August 16-17 OR
Oregon Environmental Quality Commission Meeting, Western Region. For info: Helen Lottridge, ODEQ, 503/ 229-6725, or website: www.deq.state.or.us/about/eqc/EQCagendas.htm

August 20 TX
Conservation Easements Conference, Austin. For info: CLE Int'l, 800/ 873-7130 or website: www.cle.com

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