The Water Report™
Water Rights, Water Quality & Water Solutions in the West

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MUNICIPAL WATER LAW:

WASHINGTON'S LANDMARK LAW FACES CHALLANGES

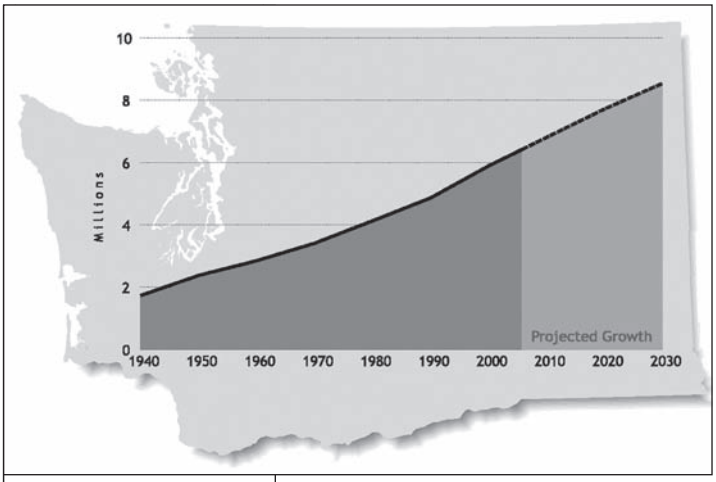
by Jeff B. Kray, Marten Law Group PLLC (Seattle, Washington)

INTRODUCTION

Water for future municipal growth is an increasingly contentious and challenging issue throughout the American West. The United States population is projected to increase to 392 million by 2050 — more than a 50 percent increase from the 1990 population size. US Census Bureau, Population Projections (June 2007). Much of this growth is occurring in municipalities in the arid American West (Tarlock, TWR #43). Absent rapid progress toward water conservation, population increases will accelerate demand for additional municipal water supplies and put pressure on established agricultural, industrial, and environmental water uses at the same time Westerners are increasingly realizing the environmental, economic, and social value of leaving water in streams for fish, recreation, and aesthetics. Meanwhile, global climate change is expected to sharply reduce natural water storage from snowpack in the mountainous West, shift the annual hydrological cycle in ways that will reduce water availability in the summer, and place a further premium on water storage and efficiency (Moon, TWR #18; Udall TWR #28).

State laws in the West establish water use as a property right. The Prior Appropriation system that dominates Western water law favors, and in fact almost universally requires, putting water to beneficial use. Under that system, water that is claimed but not actually put to beneficial use for a specified time period (commonly five years) is forfeited. Municipal water rights are a notable exception to the general principle requiring a party to put water to beneficial use. In Washington and other western states, municipal water users benefit from exceptions to the forfeiture rules allowing them to hold water rights for more water than the amount they presently use. These exceptions embody a "growing communities" doctrine that allows municipalities to maintain water rights to water supplies that they will need for future demand (Tarlock, TWR #43).

States are securing municipal water supplies from forfeiture in different ways. The Washington model is but one approach. In February 2008, the American Bar Association will present its annual water law conference — "21st Century Water Supply, Use, and Distribution: Do the Old Rules Still Apply?" — in San Diego, California. The conference will include a panel titled "How Secure are Municipal Water Supplies in a Prior Appropriation System?" That panel will survey the mechanisms that multiple western states are using to make municipal supplies secure from forfeiture under the beneficial use doctrine. This article explores the mechanisms that Washington is using to ensure that water is available for current and future growth and focuses on a highly contentious piece of legislation, Washington's 2003 Municipal Water Supply – Efficiency Requirements Act (MWL or Act). Chapter 5, Laws of 2003 Second Engrossed Second Substitute House Bill (SESSHB) 1338 (Chapter 5, Laws of 2003).



Washington State Population Projection, Source: "*Managing Our Water Successfully*" WA Dept of Ecology, 2007

MWL was intended to strike a balance between keeping water available for future growth and serving existing water rights during increased water scarcity. With MWL's enactment Washington has moved to the forefront of long-range planning on critical municipal water supply issues. In its first four years, MWL has resulted in two major sets of action: (1) enhanced water system planning and conservation; and (2) litigation over MWL's validity and application. These actions are now redefining Washington water law in ways that will affect Washington, and perhaps other Western states, for decades to come. This article will explain why Washington enacted MWL, summarize the steps that Washington's Ecology Department (WA/Ecology) and Health Department (WA/Health) are taking to implement MWL, and explore the litigation that in one case is challenging MWL's constitutionality on its face and in another case is challenging MWL as applied to particular water rights held by Washington State University.

At stake in this litigation is the amount of water that municipalities will be allowed to use in the future and, consequently, the water supply that will then be available for all other uses.

Water Available

Beneficial Use

Forfeiture Exemption

MUNICIPAL WATER SUPPLY PLANNING ISSUES IN WASHINGTON

Pre-2003 Municipal Water Law

Washington has adopted the Prior Appropriation Doctrine through common law and legislation. RCW 90.03.010. Washington also recognizes certain riparian water rights. *See Department of Ecology v. Abbott,* 103 Wn.2d 686, 694 P.2d 1071 (1985). The Prior Appropriation Doctrine makes putting water to "beneficial use" a critical element in perfecting a water right. The Washington courts have consistently described beneficial use as the basis, measure, and limit of the water right. *Department of Ecology v. Grimes*, 121 Wn.2d 459, 852 P.2d 1044 (1993).

Recognizing municipalities' distinct role in supplying water to the State's citizens, Washington has long provided water rights claimed for "municipal water supply purposes" with an exemption from the "use it or lose it" principle embodied in the State's relinquishment (forfeiture) statute. RCW 90.14.140(2)(d); *R.D. Merrill Co. v. Pollution Control Hearings Bd.*, 137 Wn.2d 118, 969 P.2d 458 (1999). Prior to MWL, WA/Ecology issued water right certificates for municipal uses once the main withdrawal and distribution works had been constructed for using the water, but before all of the water was actually put to use. RCW 90.14.140(2)(d); *R.D. Merrill Co. v. PCHB,* 137 Wn.2d 118 (1999); *See* Final Bill Report, 2E2SHB 1338. Under this "pumps and pipes" philosophy, a municipality could establish unused "inchoate" water rights with priority over subsequent water rights and develop its actual use over time.

Despite the municipal water supply exemption from forfeiture, the law remained unclear on such issues as the appropriate place of use for municipal water rights and the nature and extent of municipal water rights where the certificated volume was not historically put to beneficial use. As further discussed below, the Washington Supreme Court's *Theodoratus* decision brought these issues into sharper focus and increased uncertainty for municipal water suppliers and other users.

Revisiting *Theodoratus*

The Washington Supreme Court's decision in *Theodoratus v. Department of Ecology*, 135 Wn.2d 582, 957 P.2d 1241 (1998), figures prominently in MWL's history and will play a central role in the cases challenging MWL. In *Theodoratus*, the Court held that state statutory and common law does not allow WA/Ecology to determine beneficial use or issue a vested water right based on water system capacity. 135 Wn.2d at 592-597. However, *Theodoratus* did not involve a municipality, and the Court expressly declined to "address issues concerning municipal water suppliers in the context of this case." *Id.* at 594. Indeed, the Court specifically recognized that under Washington's statutes there are significant differences between municipal and other water uses. At the same time, the Court created uncertainty by *implying* that municipal water suppliers could not rely on system capacity to validate inchoate water rights. The Court also suggested that the municipal water supply exemption from statutory relinquishment may not provide a basis for defining beneficial use differently for municipalities. The *Lummi* and *Burlingame* suits discussed below now present the courts with seemingly unavoidable decisions about whether the Washington legislature violated the Washington Constitution in enacting MWL's broad definition of "municipal" purposes and suppliers, validating "inchoate" municipal water rights, or creating a "flexible" place of use.

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Municipal Water

MWL Purposes

2003 Municipal Water Law

MWL was enacted in part as a response to *Theodoratus* and in part to address related issues that many municipal water suppliers believed would benefit from additional clarification.

THE LEGISLATURE PASSED MWL IN ORDER TO:

- Clarify where municipal water utilities can use existing water rights
- Define which systems and suppliers are municipal utilities exempt from Washington's relinquishment statute
- Establish new water conservation standards for municipal utilities and those who use their water, and impose a fee to fund conservation activities
- Require consistency with land use plans and set forth a duty to provide retail water service
- Establish criteria for changing or transferring municipal water rights
- Allow use of water for environmental goals and pilot watershed agreements

"Municipal Water Supplier" Defined

MWL defines "municipal water rights" by defining a "municipal water supplier" as "an entity that supplies water for municipal water supply purposes." Chapter 5, Laws of 2003, Sec. 1(4); RCW 90.03.015(3). MWL then defines "municipal water supply purposes" to include traditional residential, commercial, industrial, landscape irrigation, and fire flow uses, but also broadly includes the use of water "for any other beneficial use generally associated with the use of water within a municipality." Chapter 5, Laws of 2003, Sec. 1(3); RCW 90.03.015(4). This definition is not limited to uses by cities, towns, or other public utilities, but includes any beneficial use of water to serve 15 or more residential connections.

Ownership Issue

Most controversially, the definition of municipal water supplier does not require the "entity" to own the water right that authorizes the water use. Contract water operators, therefore, could be vested with MWL's benefits and might be entitled to protection from statutory relinquishment. Before we examine litigation over these issues in detail, let's explore MWL's other key element — increased water system planning and conservation.

WA/ECOLOGY & WA/HEALTH ACTIONS TO IMPLEMENT MWL

Supply Planning

MWL has indisputedly increased water supply planning in Washington and has put Washington in company with California, Texas, and Florida in the top tier of states taking aggressive steps toward water conservation and efficiency. Soon after MWL was enacted WA/Ecology and WA/Health began to implement the Act. WA/Ecology regulates Washington water rights. WA/Health regulates water supply systems to protect drinking water quality and ensure conservation. In MWL context the two agencies have slightly overlapping, complementary roles.

As of September 2005, more than 17,000 drinking water systems in Washington provided water to more than five million residents, most of whom received their household water from water systems regulated under the Safe Drinking Water Act (SDWA).

Drinking Water Regulations

As the table below illustrates, most Washington residents receive water from fewer than 200 large Group A community systems, all of which serve more than 1,000 homes. Group A community water systems meet the federal definition of a water system (i.e. serve fifteen or more connections for at least one hundred and eighty days or serves at least twenty-five people year round) and are thereby subject to the federal drinking water regulations. Many of the rest are served by a large number of smaller systems — especially the nearly 13,000 Group B systems that serve an average of eight people per system. Group B water systems are public water systems (i.e. serve two or more connections) that do not meet the definition of a Group A system and are therefore not subject to the federal drinking water regulations but are subject to state regulations under Chapter 246-291 WAC.

	Number of Systems	Residential Population Served
Group A Community Systems	2,277	5,272,582
Serving 1,000 or more homes	197	4,695,590
Serving 100 to 999 homes	525	432,560
Serving 15 to 99 homes	1,555	144,432
Group A Non-Community Systems Serving businesses, schools, motels, and other settings in which people are away from home.	1,852	
Group B Systems: 2 to 15 homes	12,943	109,131
Private Wells: 1 per home		600,000 (approx.)

Washington State Department of Health's Report to the Governor, Water System Capacity, Sept. 2005.

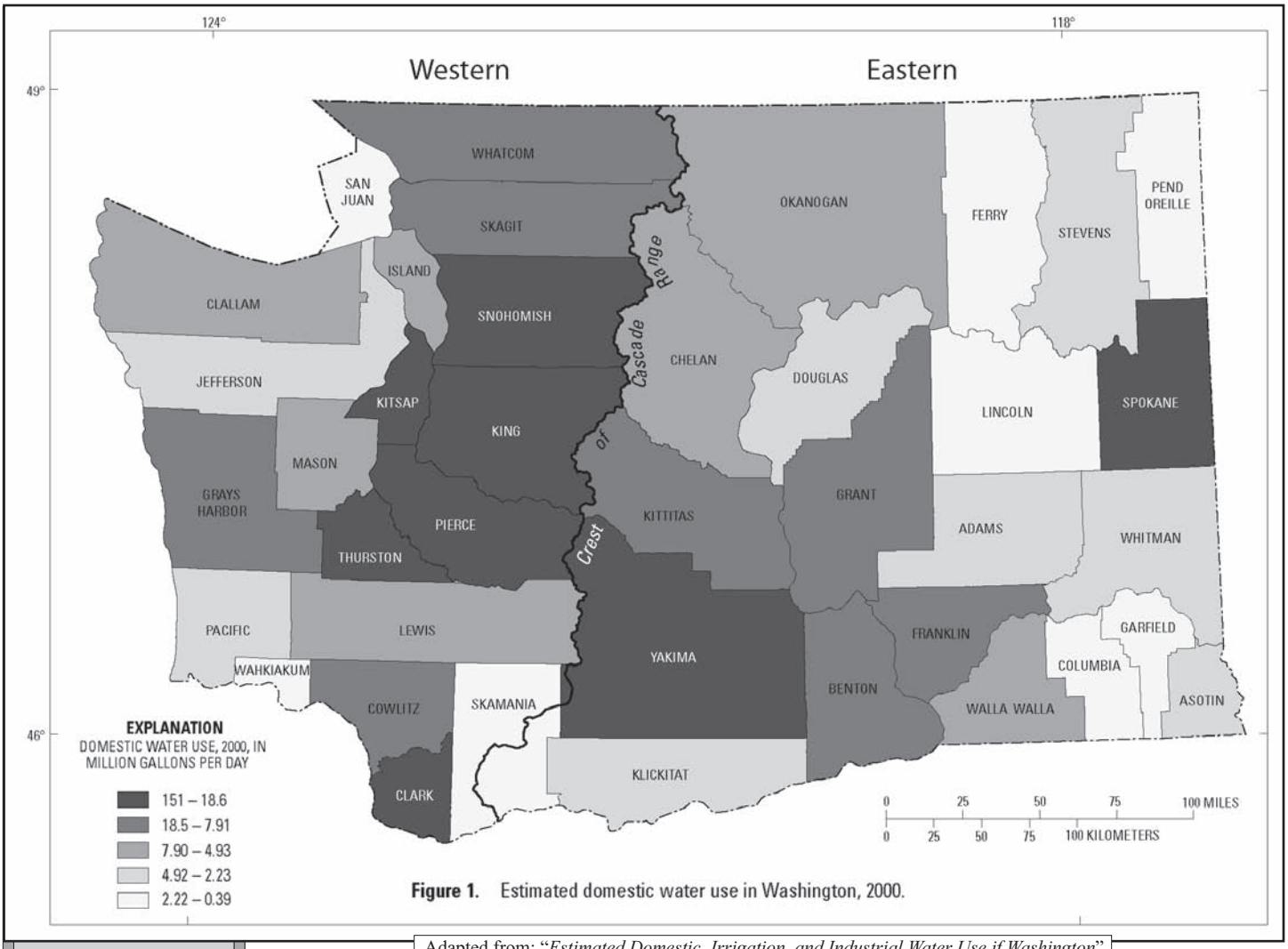

Figure 1. Estimated domestic water use in Washington, 2000.

Adapted from: "*Estimated Domestic, Irrigation, and Industrial Water Use if Washington*" USGS Scientific Investigations Report, 2004

Policy Statement

WA/Ecology takes a water right-by-water right approach to MWL implementation. This is in contrast to taking a portfolio approach for all the water rights associated with a water system. WA/Ecology coordinates with WA/Health and local water suppliers and has developed an Interpretive & Policy Statement setting forth how it intends to implement MWL. The Policy Statement is available to the public and guides agency staff but it is not a rule enforceable against water users (see www.ecy.wa.gov/programs/wr/rules/images/pdf/pol_2030.pdf).

MOU Guidance

In April 2007, WA/Ecology and WA/Health entered into a Memorandum of Understanding (MOU) that provides general guidance for the agencies' cooperation and sets forth each agency's MWL responsibilities. According to the MOU, WA/Ecology has regulatory authority over water resources management and WA/Health has regulatory authority over ensuring safe and reliable drinking water. WA/Ecology and WA/Health have also developed Joint Review Procedures, which provide detailed direction to agency staff on coordinating water system planning and water rights administration. The MOU and Joint Review Procedures are available on WA/Ecology's Water Resource Program website at www.ecy.wa.gov/programs/wr/rights/muni_wtr.html.

Efficiency Planning

Water Use Efficiency Rules

WA/Health has enacted new Water Use Efficiency Rules that took effect on January 22, 2007. WAC 246-290-800 *et seq.*; www.doh.wa.gov/ehp/dw/municipal_water/water_use_efficiency_rule.htm. The rules affect all "municipal water suppliers" and address key MWL elements as follows:

- WATER USE EFFICIENCY PLANNING REQUIREMENTS: municipal water suppliers are required to collect data, forecast demand, and evaluate leakage and water use efficiency measures (including rate structures that encourage water use efficiency) as part of a water system plan or small water system management program. WAC 246-290-100 and 246-290-105.

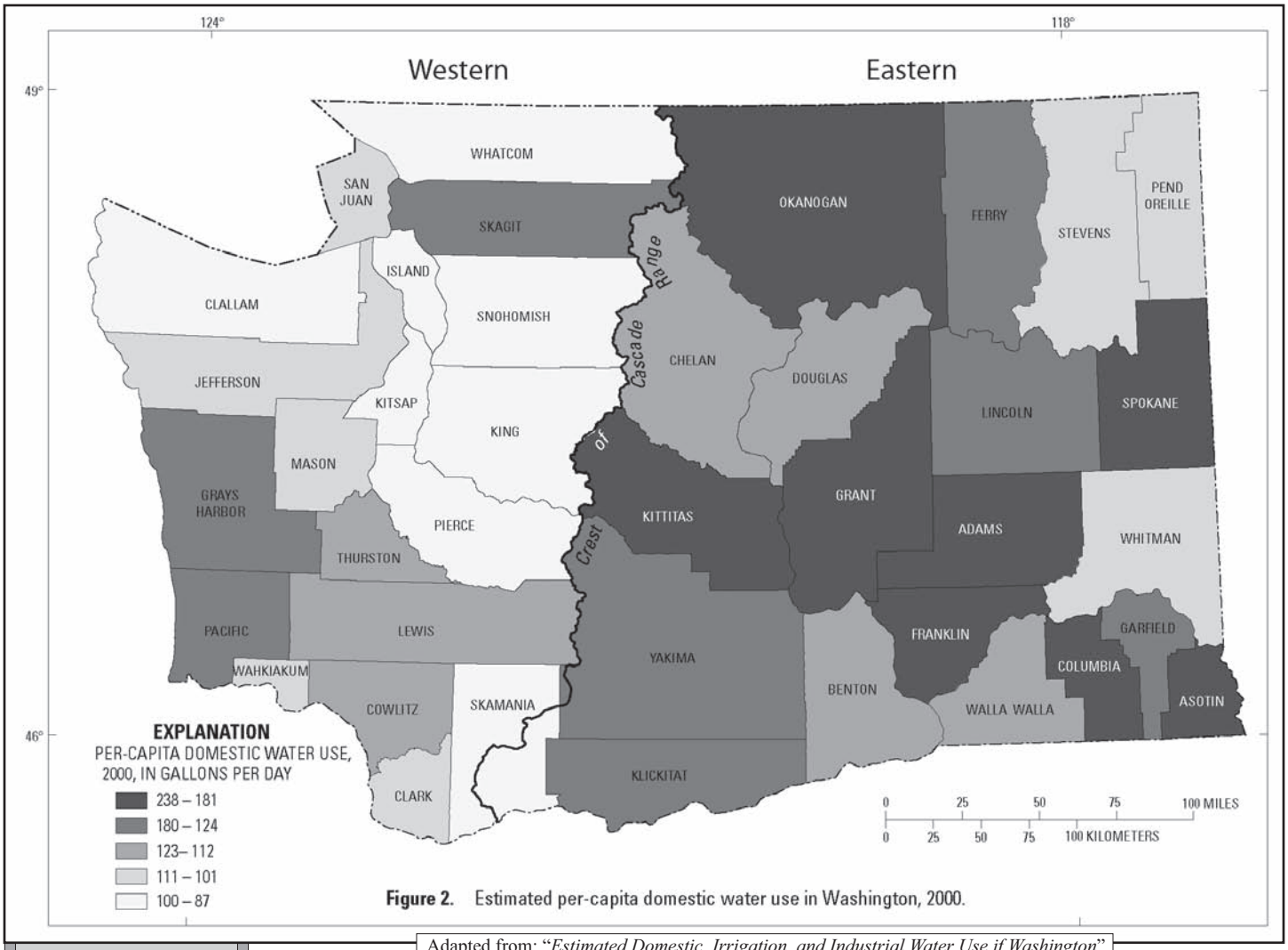

Figure 2. Estimated per-capita domestic water use in Washington, 2000.

Adapted from: "*Estimated Domestic, Irrigation, and Industrial Water Use if Washington*" USGS Scientific Investigations Report, 2004

Leakage Standard

- DISTRIBUTION LEAKAGE STANDARD: municipal water suppliers are required to meet a state leakage standard of 10% or less in order to minimize loss of water from distribution system leakage. Municipal water suppliers must install source meters and service meters on all connections by January 22, 2017. WAC 246-290-820.

Efficiency Goals

- WATER USE EFFICIENCY GOAL SETTING AND PERFORMANCE REPORTING: municipal water suppliers are required to set water use efficiency goals through a public process and report their performance to WA/Health and the public. Although WA/Health will allow municipalities some flexibility in how to achieve their goals, the goals must include measurable performance standards. Large municipal water systems must set these goals by January 22, 2008 and small systems must do so by January 22, 2009. WAC 246-290-830.

Rule Criticism

Critics of the draft rule had argued that it did not go far enough and, in particular, that the leakage standard is overly permissive and metering is not required except at the water source. WA/Health responded by emphasizing that the rule takes important steps toward water efficiency and includes reporting and performance elements that will facilitate later revisions if needed.

Consumption Data

Data gathering and goal setting are the first steps in water use efficiency planning. Large water systems are gathering water consumption and production data now and small systems must do so starting January 1, 2008. These are critical steps in the water use efficiency process because they are components of each water provider's Water System Plan and can impact water rights validation.

Expansion of Place of Use

Under MWL, a municipal water supplier can only expand its water right's place of use if it is complying with the terms in its water system plan, including water conservation requirements. MWL § 5, RCW 90.03.386(2). Therefore, as a practical matter, municipal water right holders must ensure that their water system plans are complete prior to seeking a water right change or risk losing potential water rights.

Municipal Water

New Connections

Duty to Serve

Under MWL (RCW 43.20.260), municipal water suppliers have a duty to provide water service to all new connections within their retail service area if they meet four threshold factors:

- Service is available in a timely and reasonable manner as defined by guidance from WA/Health
- Sufficient water rights to provide service
- Sufficient capacity to serve water in a safe and reliable manner
- Service requested is consistent with local comprehensive growth plans and development regulations per requirements in WAC 246-290-108

Area of Use Allowed

Retail Service Area

In mid-October 2007, WA/Health will issue proposed changes to how it determines "retail service areas" under its Group A Public Water Supply rules (Chapter 246-290 WAC). Retail service areas are to be determined by the municipal water supplier and identified in its water system plans. The retail service area must include all areas where the municipal water supplier currently provides service, and may include areas where new service is proposed. WA/Health proposes that water service may be extended to provide temporary service for a neighboring water system, if there is a written agreement in place.

Threshold Factors

WA/Health also proposes that a municipal water supplier should consider the four threshold factors and, in its water system plan, describe how it can meet them within the retail service area. A municipal water supplier would be required to provide service for all requests within the retail service area, unless it demonstrated that one or more of the four threshold factors was not met. WA/Health proposes municipal water suppliers address the four threshold factors in their water system plan through the following ways:

Capacity

- Capacity: Municipal water suppliers must include a capacity determination in their water system plan. Capacity determinations incorporate a water system's physical capacity (source and storage) and water right limitations.

Consistency

- Consistency: Consistency applies to adopted comprehensive plans, land use plans, development regulations, and utility service extension ordinances. Consistency determinations must evaluate land use, six-year growth projections, service extension ordinances, provisions of new water service, and other elements as determined by WA/Health related to water supply planning. Municipal water suppliers must ask local governments to determine consistency. If the determination by the local government is not completed, the municipal water supplier must document efforts to be consistent and determine consistency. WA/Health will then make the final consistency determination.

Water Rights

- Water rights: The municipal water supplier must include a water right self-assessment in its water system plan and WA/Health will forward it to WA/Ecology for their review. WA/Health will incorporate water rights into capacity determinations.

Timely and Reasonable

- Timely and reasonable: Municipal water suppliers must include their service policies in the water system plan describing how new service will be provided. WA/Health will provide guidance about what is timely and reasonable.

Rule Development Schedule

As the following table illustrates, WA/Health has proposed an aggressive schedule for developing its rule revisions to determining "retail service areas" under its Group A Public Water Supply rules.

Rule Revisions

Formal comment period	October 17 – November 16, 2007
Public hearings	November 9, 2007, Lacey November 13, 2007, Spokane
Review formal comments and finalize rule	November 19 – December 30, 2007
Adopt rule	December 31, 2007
Effective date	January 31, 2008

Growth Challenges

WA/Health's proposed retail service area changes will have a potentially significant effect on Group A water suppliers. The fourth factor, consistency with growth plans and development regulations, is potentially very contentious. This requirement brings water planning squarely into Washington's growth management planning process and creates opportunities to challenge growth based on water service availability. Local government is charged with determining whether a water service plan is consistent. If local government does not make the determination within 60 days, then WA/Health becomes the decision-maker.

Municipal Water

Water System Plan

Washington's water system plan approval process has become increasingly complex as WA/Health and WA/Ecology implement MWL. There are three key components to obtaining WA/Health's approval for a water system plan:

1) Approvals are required from both WA/Ecology and WA/Health
2) Plans must be consistent with local land use planning
3) The water system's governing body must approve the plan

This process requires water system operators to actively manage their plans. Water system operators should strongly consider obtaining legal assistance to help navigate the process.

LEGAL CHALLENGES TO MWL

Facial Challenges – *Lummi* and *Burlingame* Suits

Plaintiffs

The Plaintiffs in two active lawsuits, *Lummi Indian Nation v. State of Washington,* King County Cause No. 06-2-40103-4 SEA, and *Burlingame v. State of Washington,* King County Cause No. 06-2-28667-7 SEA, allege that MWL is unconstitutional on its face. The Plaintiffs in *Burlingame,* the first of the two lawsuits to be filed, are environmental groups, small-boat fisherman, and individuals. The Plaintiffs in *Lummi* are six Indian Tribes (Lummi Indian Nation, Makah Indian Tribe, Quinault Indian Nation, Squaxin Island Indian Tribe, Suquamish Indian Tribe, and the Tulalip Tribes).

Lawsuits Consolidated

The *Burlingame* suit was filed in King County Superior Court in September 2006, shortly after the Washington Attorney General's Office declined requests from some of the Tribes which are now Plaintiffs in the *Lummi* suit and from the *Burlingame* Plaintiffs for the State to commence litigation challenging MWL's constitutionality. The *Lummi* suit was filed in King County Superior Court in December 2006. The claims in the two lawsuits closely parallel one another and the lawsuits were consolidated on March 20, 2007 into one action under the *Lummi* suit docket number. For convenience, this article will refer to the consolidated action as the *Lummi* suit.

Principal Issues

The principal issues in the consolidated suits are whether MWL deprives junior water right holders of their vested property interests, in violation of both substantive and procedural due process under the Washington and United States Constitutions; and whether MWL retroactively overrules the Washington Supreme Court's decision in *Theodoratus* (discussed above – decision that a private developer's water system capacity is not a basis for defining beneficial use or determining a water right) in violation of the separation of powers doctrine.

MWL Sections At Issue

The *Lummi* and *Burlingame* Plaintiffs each seek declaratory judgments invalidating the following MWL sections:

- Defining "municipal water supplier" and "municipal water supply purposes" to include non-municipal entities and, thereby, entitling developers and private entities to protection from statutory relinquishment (RCW 90.03.015(4))
- Establishing that water rights certificates issued based on construction of works for diverting or withdrawing and distributing water ("pumps and pipes" certificates) rather than on putting the water to actual beneficial use are rights in good standing (RCW 90.03.330(3))
- Permitting municipal water suppliers to define the place of use for their water rights as their WA/Health approved service areas and, thereby, allowing those suppliers to change their place of water use without needing to obtain WA/Ecology's approval (RCW 90.03.386)

The *Lummi* Plaintiffs also seek a declaratory judgment invalidating those MWL sections:

- Authorizing WA/Ecology to amend water right documents to identify municipal water suppliers' water rights as rights for municipal supply purposes (RCW 90.03.560)
- Permitting municipal water suppliers to project the number of service connections or future population sought to be served (RCW 90.03.260(4) and (5))

State's Answers

WA/Ecology and WA/Health have filed Answers substantially denying the *Lummi* and *Burlingame* Plaintiffs' allegations and asking the court to dismiss the suits. The suits raise primarily legal issues and challenge MWL as enacted but do not challenge any specific State actions applying the MLW. Therefore, the cases are likely to be resolved on summary judgment, though standing may also be an issue. The State's Answers also raise issues which are leading to significant discovery targeted at challenging the Plaintiffs' standing and could result in motions to dismiss or for summary judgment, arguing that the plaintiffs do not have sufficient standing to challenge MWL. ["Standing" is a legal doctrine that generally requires each party to a lawsuit to have a sufficient legitimate interest in the outcome that they are entitled to participate as an active party in the litigation.]

Standing Issue

Municipal Water

Utilities Intervene

WSU Defendant

WWUC, CWA, and WSU Interventions in *Burlingame* Suit

In November 2006, the Washington Water Utilities Council (WWUC) and the Cascade Water Alliance (Cascade) both moved to intervene as defendants in the *Burlingame* suit. The WWUC is an association of over 100 Washington water utilities including cities, water districts, public utility districts, mutual and cooperative water utilities, and investor-owned water utilities. WWUC members own and operate water systems that serve approximately eighty percent of Washington's population. The Washington Public Utilities District Association (WPUDA), a WWUC member, is also urging the Washington State Legislature not to amend MWL before the *Burlingame* and *Lummi* suits are concluded. Dean Boyer, *Defending the Municipal Water Law,* 1 WUPDA Connections 8 (January 2007).

Cascade's members are a group of western Washington cities and water districts serving approximately 300,000 water users through a contract with the City of Seattle. Cascade is also currently negotiating with Puget Sound Energy to purchase pending water rights that would allow diversions for municipal water supply. In December 2006, the court granted both the WWUC and Cascade motions to intervene.

Washington State University (WSU) has also intervened as a defendant in the suits. WSU is interested in MWL litigation at least in part because it is currently defending a specific MWL challenge to its water rights. That challenge is discussed in detail below. WWUC, Cascade, and WSU are now all defendants in the *Lummi* suit.

"As Applied" & "Facial"

An "as applied" challenge refers to a case where the law is applied to the specific facts of the case and the particular water rights at issue. A "facial" challenge, however, describes a case where the legality and constitutionality of the laws are challenged, without a specific factual situation being involved in the case.

Extensive Discovery

Plaintiffs, defendants, and interveners are all participating in discovery in the *Lummi* suit. Although the suit does not rely on specific factual challenges to the law, the discovery to date has been extensive. The parties have issued substantial written interrogatories and requests for document production to each other. The parties have also negotiated to attempt to narrow the scope of discovery to particular issues and partial Water Resource Inventory Areas (WRIAs) that represent unique watersheds. To date, Washington has produced three separate document sets and its discovery responses are almost complete. No depositions have yet been conducted but at least some are expected. [Depositions are sworn testimony of witnesses prior to hearing or trial.]

The discovery appears to have two primary goals. One, for the plaintiffs to determine if there are any facts on which they could make "as applied" challenges to MWL. Two, for the defendants to determine if there are grounds to allege that the plaintiffs lack standing to challenge MWL. As to the first goal, the state and the defendant interveners have issued discovery to the plaintiffs requesting that they supplement their discovery responses based on information they receive from the state. These supplemental discovery requests are intended to test whether the cases will evolve into "as applied" challenges. Those responses are due on November 30, 2007.

Critical Issues

No Beneficial Use

Change in Place

Summary Judgment Issues

The parties to the *Lummi* suit have agreed not to file motions for summary judgment before January 14, 2008, after discovery is complete. The summary judgment target date had been September 14, 2007, but the parties pushed the date back five months based on the volume of discovery. On or after January 14, 2008, the parties are expected to file cross-motions for summary judgment. If issues remain after the court decides those motions, the cases will go to trial in June 2008.

The plaintiffs' motions for summary judgment will likely focus on three issues critical to MWL's validity. First, plaintiffs will argue that MWL violates substantive due process under the Washington and United States Constitutions by: (a) retroactively expanding municipal water suppliers' water rights and, thereby, impairing junior users' vested water rights; (b) retroactively eliminating the beneficial use requirement for perfecting municipal water rights; and (c) expanding the place of use for municipal water rights from the area specified on the water right certificate to the service area described in a water system plan.

Second, plaintiffs will argue that MWL violates procedural due process under the Washington and United States Constitutions by validating municipal water rights that have not been put to beneficial use and allowing such water right holders to change the place of use without providing junior water right holders with notice and an opportunity to be heard. Plaintiffs will assert that these MWL provisions bypass the Washington Water Code's processes for protecting junior water rights and instream flows.

Municipal Water

System Capacity

Finally, plaintiffs will seek to rely on *Theodoratus* to argue that the Washington Supreme Court has already held that state statutory and common law does not allow WA/Ecology to determine beneficial use or issue a vested water right based on water system capacity and, therefore, that MWL improperly reverses that decision, violating the "separation of powers" doctrine. In regard to that argument, it is intriguing to note that under MWL Mr. Theodoratus would apparently now be considered a municipal water supplier (a private water developer serving more than 15 residences), whose water rights would now be determined by system capacity. However, as noted above, *Theodoratus* did not involve a municipality, and the Court expressly declined to "address issues concerning municipal water suppliers in the context of this case." 135 Wn.2d at 594. Therefore, the *Theodoratus* decision may ultimately not control whether MWL is valid and the courts may need to address MWL as a case of first impression.

Impacts of Litigation

If the *Lummi* Plaintiffs are granted the full relief they seek, then:

- "Municipal water suppliers" would be required to put their water to actual beneficial use in order to perfect their water rights
- Non-municipal entities would no longer qualify as "municipal water suppliers" and their water rights would potentially be subject to statutory relinquishment
- "Municipal water suppliers" would find it more difficult to move the place of use of their water rights to accommodate growth.

There will likely be a trial court opinion on these issues by mid-2008.

"As Applied" Challenge – The *Cornelius* Case

Proposed Changes

In another case with implications for MWL, environmentalists have asked the Washington Pollution Control Hearings Board (Hearings Board) to review Washington State University's (WSU) proposed changes to six Eastern Washington water rights. *Cornelius, et al. v. Ecology,* PCHB No. 06-099 (Pending). One of the appellants, Scott Cornelius, is also a plaintiff in *Burlingame v. State of Washington,* described above. The *Cornelius* appeal is the first "as applied" challenge to MWL and, as such, differs from *Burlingame's* facial challenge.

The Facts in *Cornelius*

University Water Rights

WSU operates and manages farms, a veterinary hospital, orchards, athletic fields, a golf course, and greenhouses for educational purposes. To support these facilities, WSU holds water rights for domestic and agricultural purposes. WSU presently withdraws water from seven wells on its Pullman, Washington campus.

WSU has water rights to approximately 5,300 acre-feet (AF) of water per year. It has historically used up to 2,000 AF of water annually but its annual use is currently down to approximately 1,800 AF based on conservation measures even though the student population continues to grow. WA/Ecology approved the entire 5,300 AF of water per year on its determination that WSU's rights are in good standing.

Aquifer Declining

All of the WSU's well withdrawals are from the Grand Ronde aquifer. The aquifer is believed to be declining (groundwater level dropping) and it is a shared resource between the college towns of Pullman, Washington and Moscow, Idaho.

The Issues in *Cornelius*

Point of Withdrawal Change

The *Cornelius* appeal asks the Hearings Board to invalidate WA/Ecology's decisions approving WSU's applications to change the point at which WSU withdraws water from its wells. As approved, the applications allow WSU to withdraw water from any or all of its existing wells without limitation on the location of the withdrawals. WSU applied to consolidate its wells to increase water reliability. This consolidation of the wells also allows WSU to use the water under its six water rights anywhere within a "service area" approved by WA/Health.

Expansion Issue

The *Burlingame* complaint asserts that WSU's proposed water right changes will allow it to pump more groundwater than it could before Washington enacted MWL. Thus, WSU intervened in the *Burlingame* suit as a defendant. WSU asserts that its interests as an educational institution are uniquely different from the State's interests or the Washington Water Utilities Council's interests in the case because WSU is not a utility, city, or town.

Municipal Water

Cross-Motions for Summary Judgment

On August 28, 2007, the parties filed cross-motions for summary judgment. The parties have identified eighteen major legal issues, some with multiple sub-issues. Cornelius has raised constitutional issues regarding whether MWL violates substantive due process, procedural due process, or the separation of powers doctrine that directly parallel the issues raised in the *Lummi* case. However, Cornelius argues that the Hearings Board does not have authority to consider such constitutional issues.

Cornelius Issues

Primary MWL-related issues raised on summary judgment that are unique to the *Cornelius* case are:

- Whether WSU is a "municipal water supplier" under MWL
- Whether WSU's water rights are rights for municipal supply under MWL
- Whether WSU has abandoned or relinquished certain water rights by non-use (if MWL is valid and WSU is a municipal water supplier then these issues are likely moot)
- Whether WA/Ecology properly applied MWL to approve WSU's change of place of use for its water rights
- Whether MWL has enabled WSU to assert rights to more water than it has put to beneficial use thus enlarging WSU's water rights and impairing existing rights

Aquifer Impacts

There are also factual questions about the practical effect the water right changes will have on the aquifer and surrounding water uses. WSU asserts that the changes merely consolidate its water use to emphasize use at two modern wells.

Non-Use Issue

The *Cornelius* appeal also highlights a very interesting relinquishment question: is a de facto changing of a point of withdrawal or diversion — without changing the water quantity withdrawn or diverted — a non-use of water from the permitted point of withdrawal or diversion sufficient to trigger relinquishment? WSU relies on an Oregon Court of Appeals decision, *Russell-Smith v. Water Resources Department*, 152 Or. App. 88, 952 P.2d 104, which essentially held that it would be too draconian to relinquish water rights when the only change is to a different point of withdrawal or diversion, but actual water use (quantity) has not diminished. The *Russell-Smith* decision is consistent with similar decisions from Idaho, Wyoming, and Texas. See *Graham v. Leek,* 65 Idaho 279, 144 P.2d 475, 482 (1943); *Van Tassel Real Estate & Live Stock Co. v. City of Cheyenne*, 49 Wyo. 333, 54 P.2d 906, 910 (1936) (cites omitted); *Ward County Water Improvements Dist. No. 3 v. Ward County Irr. Dist. No. 1,* 237 S.W. 584, 588 (Tex. Civ. App. 1921), *mod.* 117 Tex. 10, 295 S.W. 917 (1927). However, there is contrary law from New Mexico and the issue is one of "first impression" (first case involving this issue) in Washington. See *State v. Fanning,* 68 N.M. 313, 361 P.2d 721, 723 (1961).

Practical Impacts?

The *Cornelius* appeal challenges an application of MWL to allow a particular change of water use under MWL. In contrast, the *Lummi* suit asserts that MWL is unconstitutional on its face, without regard to how it is applied to a specific set of facts. Despite claims in the *Lummi* case that MWL will impair existing water rights, it is curious and somewhat surprising that *Cornelius* is the only case in the four years since MWL was enacted to challenge MWL's application to particular water rights change applications. Interested parties will want to watch how the *Cornelius* appeal proceeds in relationship to the Superior Court suits challenging MWL.

Upcoming Hearing

The parties in *Cornelius* did not move for summary judgment on all the issues that they identified. The Hearings Board will address the remaining issues in a hearing currently scheduled for November 2007.

WATER CONSERVATION OPPORTUNITIES

Seattle Conservation

Another way to accommodate population growth is by water conservation. Seattle's recent history provides a successful example. That city has grown by 300,000 to 400,000 people in the past 25 years but is using the same amount of water as it did 25 years ago. These savings partially result from regulatory changes such as hardwiring conservation into the urban water system by revising the plumbing code to require low-flow toilets and other conservation measures. Paul Constant, *Keeping Our Heads Above Water*, Conscious Choice (June 2007).

Rain-water Harvesting

Washington may be able to do even more with water conservation. For several years the state legislature has debated but not enacted a rain-water harvesting bill. The debate is over the quantities to allow individuals to harvest, before it is viewed as an impact on stream flows and aquifer recharge. Encouraging local water harvesting through rain barrels is one of many options that author Fred Pearce has referred to as "providing local water to meet local needs." Pearce, *When Rivers Run Dry*, p. 308 (2006). Other water conservation options for the urban environment include switching to more water permeable

concrete and pavement to create "porous cities" that facilitate aquifer recharge, and capture and store stormwater for non-potable uses such as toilet flushing and landscape irrigation. Much of the technology for such applications already exists and implementing such practices would have the dual benefit of increasing water supply and reducing flood risk. On the latter point, capturing more stormwater could also have economic benefits by reducing the need for expensive stormwater system enhancements.

CONCLUSION

MWL created the perceived potential for significant new municipal water demand in Washington. However, in MWL's first four years there appear to date to be few examples to support that perception. With the Tribes and environmental groups challenging MWL in the *Lummi* suit and with the WWUC, Cascade, and WSU intervening, most of the major interests have now waded into litigation over MWL's constitutionality. Similarly, the *Cornelius* appeal presents the first chance for the Hearings Board to examine how WA/Ecology is *applying* MWL to particular water rights decisions. The parties to those actions will participate in deciding a significant chapter in Washington's future water allocations. It is equally likely that the trial court and Hearings Board actions are only the first chapter in MWL litigation and that the cases will ultimately be decided by the Washington Supreme Court in late 2008 or early 2009.

By enacting MWL, Washington chose to legislate a compromise between unequivocally embracing the growing communities doctrine and instituting a mandatory process to ensure that future municipal water use is well-planned and efficient. That process is lengthy, time-consuming, and expensive but critical to increasing certainty in Washington's long-term water stability.

The *Lummi* litigation and, to a lesser degree perhaps, the *Cornelius* appeal, have the potential to partially invalidate MWL and turn back the clock on Washington water law. Even if that occurs, it will not eliminate MWL's water use efficiency elements. Furthermore, the policy issue of how to provide municipal water for future growth will remain regardless of the litigations' results. MWL is a solid step toward planning for Washington's water future and a possible model for other states to follow. The issues Washington confronts as it implements MWL are actively defining a roadmap to municipal water law planning. Implementing that roadmap will require creativity and flexibility from water users, state and local governments, water managers, and other interested parties to achieve the balance MWL intended to strike.

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UTAH'S NONPOINT SOURCE GRANT PROGRAM

WHY IS IT NEEDED? - HOW WILL IT WORK?

by Shelly Quick, Utah Division of Water Quality

Nonpoint Sources

Target for Funding

Nonpoint Sources

Proposed Rules

CWA Section 319 Grants

Emphasis on Nonpoint

"Impaired" Waters

Introduction

As is true virtually throughout the West, in the State of Utah the predominant causes of water quality impairment are currently associated with "nonpoint" sources — i.e. diffuse sources, such as rain-induced runoff. Under the federal Clean Water Act (CWA), however, funding for addressing water quality problems has traditionally been more targeted on "point sources" of water pollution (typically "end-of-pipe" outfalls).

Nonpoint sources of pollutants impairing Utah's lakes and streams include: urban runoff; improper animal waste management; irrigation return flows; stream channel alteration; and degradation of aquatic habitat. In recent years Utah has taken a number of steps to direct more funding towards addressing non-point source pollution.

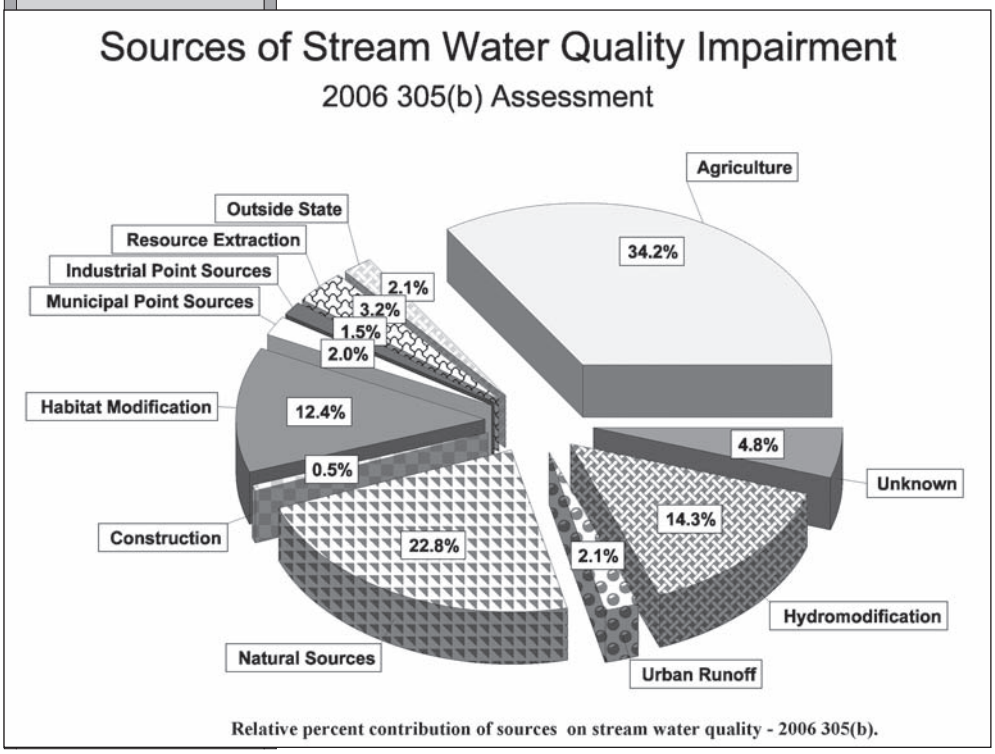
Currently, Utah is proposing new rules concerning how loans negotiated under the CWA State Revolving Fund program (CWSRF) are to be administered. Historically, low interest loans available through CWSRF have been used principally to finance the building or upgrading of wastewater treatment plants, with less than five percent of these monies being used to address nonpoint problems. CWSRF loans are generally administered by state agencies. In Utah, the CWSRF program is administered by the Utah Department of Environmental Quality's Division of Water Quality. An assessment fee on the loans administered under this CWSRF program is used to support a Hardship Grant Program which funds appropriate water quality projects that might otherwise remain unfunded.

Federal funds for nonpoint projects are also available through CWA § 319 Nonpoint Source Management Program grants, though certain aspects of this program have left a number of potential nonpoint project proponents either ineligible or unwilling to participate.

Utah is continuing to refine a process whereby a greater amount of CWSRF funding can be brought to bear on a greater range of nonpoint source activities, sometimes supplementing CWA § 319 grants and sometimes allowing municipalities and other CWSRF loan recipients to free up funding for additional nonpoint source project grants. Impaired water bodies for which Total Maximum Daily Loads (TMDLs) have been set are given priority status.

Utah TMDLs

Under the CWA, surface waters which, due to pollution, are unable to provide for their designated beneficial uses are considered "water quality limited" or "impaired." If impairment persists even when all the point sources operating with National Pollutant Discharge Elimination System (NPDES) permits issued under the CWA are in compliance, a TMDL is established after determining the concerned water body's ability to assimilate discharges while still providing for all its beneficial uses.



Relative percent contribution of sources on stream water quality - 2006 305(b).

In Utah, there have been over 91 TMDLs approved by the US Environmental Protection Agency (EPA). There are currently 108 stream segments that are listed as water quality impaired. As of the 2006 CWA § 305(b) report to Congress, of the streams assessed for at least one beneficial use class, 72 percent were rated as fully supporting at least one assessed beneficial use, 15.3 percent were rated as partially supporting and 12.7 percent were rated as not supporting one or more of their designated beneficial uses. Of the 132 lakes surveyed, 74 (56 percent) were fully supporting, 49 (37 percent) partially supporting, and nine (7 percent) not supporting.

Nonpoint Sources

Zero Percent Loans

Scope Broadened

Focus on NPS

Innovative Funding

Interest Rate Reduction

Legislation / Rulemaking

In 2001, the Utah Division of Water Quality (UDWQ) developed rules that enabled individuals to receive zero percent interest loans for **N**on**p**oint **S**ource (NPS) projects under its CWSRF program. The inclusion of individuals in this loan program set a precedent that proved helpful in bringing about recent legislation which expanded eligibility for NPS project grants distributed under the State's Hardship Grant Program.

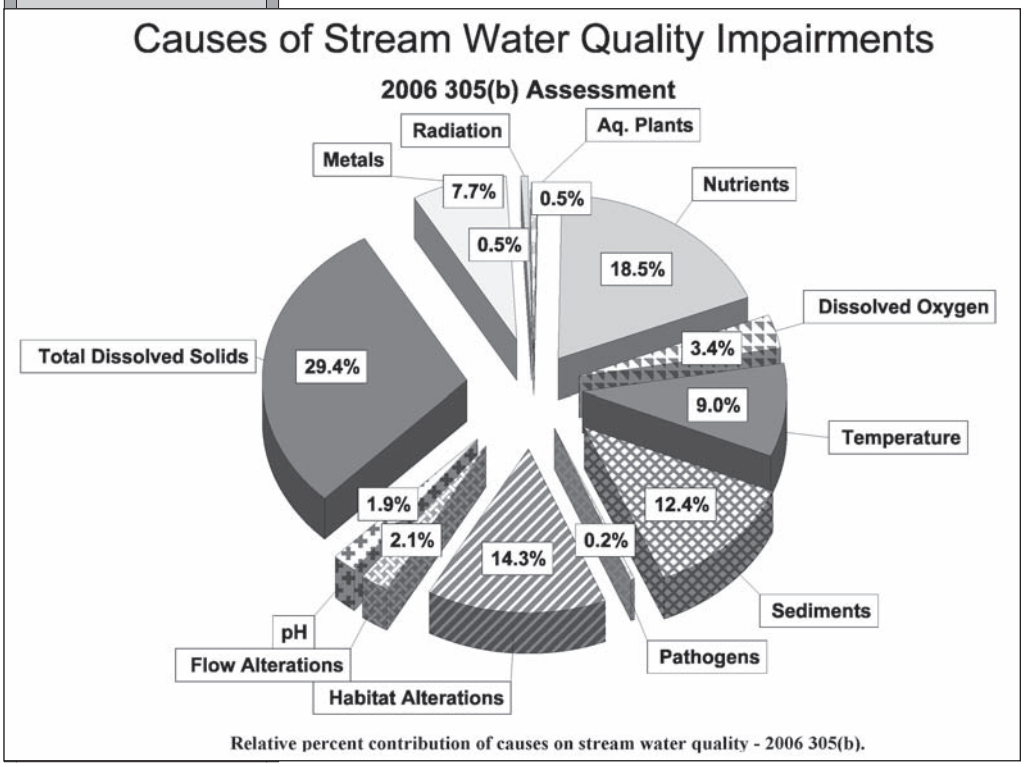
In February 2007, the Utah Legislature revised the Utah Code Annotated and expanded the definition of an NPS project to include "a study, activity or mechanism that abates, prevents or reduces the pollution of waters of the state by a nonpoint source." Utah Code Annotated 73-10c-2 (9). The Legislature also broadened the scope of the hardship grants to include projects of an "individual, corporation, association, state or federal agency or other private entity." Previously, hardship grants applied only to "political subdivisions." These rule changes were made to shift the focus from point source pollution and bring the largest source of funding to bear on the biggest/most difficult pollution problem — NPS. In response to the legislative changes, rules were revised to provide a framework outlining the conditions under which NPS grants would be allocated (Utah Administrative Code R317- 101). The Utah Water Quality Board approved the request to carry out rulemaking on these draft rules, which will receive public comments until mid-October. If the rules are approved as currently drafted, grants could be distributed for a variety of NPS water quality improvement projects in the near future.

Municipal State Revolving Fund Loans

Expanding uses - creating NPS "sponsorship" opportunities

By increasing the principal amount of a municipal wastewater CWSRF loan and lowering the interest rate, the Utah Water Quality Board can essentially provide an incentive for municipalities to "sponsor" (i.e. provide grants to) NPS projects. The recent legislation and proposed rules will increase the applicability of this innovative funding approach.

The Utah Water Quality Board has approved three $22 million wastewater infrastructure projects (another similar project will be presented to the Board in the near future). Each municipality originally would have received $20 million at a 3.4 percent interest rate. By reducing the interest rate by 1.1 percent, the Board is able to loan an additional $2 million to each of these four entities with no increase in the annual loan payments by the sponsoring entity. This additional $2 million is to be used to fund appropriate NPS projects. UDWQ staff, the loan recipient, local watershed organizations, and other governmental agencies will collaborate to identify fundable priority NPS activities within the project sponsors' watershed. However, it is not absolutely necessary for a qualifying NPS project to be located within the sponsoring entity's watershed.



Relative percent contribution of causes on stream water quality - 2006 305(b).

Expanded NPS Funding Opportunities

Under the new rules, as NPS grant funding becomes available it will now be possible to greatly expand its usefulness. NPS project funds may augment EPA's 319 Grant program as well as TMDL development and implementation. It could also help fund a Wetland Discovery Laboratory sponsored by Utah State University, stormwater projects, outreach and education, on-site wastewater training, animal waste management, pre- and post-project monitoring (including biological monitoring), stream protection or remediation efforts. Plus, a grant could lead to pollution studies that will determine water quality standards in the Great Salt Lake and provide additional resources for related programs.

Nonpoint Sources

Funding Example

For instance, a study is ongoing to establish water quality standards for selenium, nutrients and mercury in the Great Salt Lake. The study costs will approach $2.6 million and would not have been possible without utilizing CWSRF as a major source of the funding. Concurrently, as part of a natural resource damage claim against Kennecott Utah Copper Corporation (KUCC) based on groundwater pollution caused by historic mining activities, the Jordan Valley Special Service District (JVSSD) is proposing to pump groundwater from several wells located within KUCC's contaminant plume. Among other things, the groundwater contains concentrations of heavy metals and sulfates that can be removed with reverse osmosis technology. JVSSD provides water for an expanding service area and plans to employ the technology to treat the contaminated groundwater plume for use as culinary water (note: the standards for Utah's "culinary water" are comparable to those for "drinking water" in some other states). This action would thus remediate KUCC's plume while contributing much-needed water resources for a growing community.

Wastewater Discharge

The JVSSD treatment system will create a wastewater discharge. One feasible option for disposal of the treatment system's waste brine disposal would be to discharge it to the Great Salt Lake. The study of the Great Salt Lake is expansive and must encompass the ecosystems that rely on the lake environment, which include Brine Shrimp and the vast migratory bird population. An important question is what affect the brine — which contains high concentrations of selenium — has on the waterfowl considering the bio-accumulative effect. Utah's water quality narrative standard requires that these waterfowl be protected. The study was expanded in an attempt to quantify mercury that was discovered in elevated concentrations in the course of the initial study.

Financial Assistance Program: How It Works

Hardship Grants

Under Utah's Hardship Grant Program, a grant may be issued when the Utah Water Quality Board (Board) determines that an appropriate project is not economically feasible unless grant assistance is provided.

Hardship Grant program funding takes following forms:

- Planning Advance for project investigation, which will be required to be repaid at a later date (unless deemed otherwise by the Board), to help meet project costs incident to planning
- Design Advance, usually repaid
- Project Grant, which will not be required to be repaid

The first two grant scenarios are usually implemented for point source municipal infrastructure projects and the later grant scenario would likely be employed for most NPS projects. Until the proposed rules are approved, only loans are available to "individuals" for NPS projects.

Agroci;tire Projects

In order to prepare an effective and appropriate application for financial assistance, the applicant must obtain the necessary financial, legal and engineering counsel. For agriculture related projects, the Utah Association of Conservation Districts (UACD) staff works with the applicant to develop a water quality improvement project that meets the needs of both the applicant and the UDWQ. A Memorandum of Understanding was developed between UACD and UDWQ to "market" CWSRF zero percent interest loans. The UACD helps prepare the application, educates the applicant on the sources of available financial assistance and assists UDWQ staff to provide financial information to process the loan.

Conservation Plans

The Natural Resource Conservation Service (NRCS) has been involved, along with the local Soil Conservation Districts, to prepare Conservation Plans that outline the project specs, the implementation schedule, project costs and the pollutant load reduction to surface or groundwater resources. The borrower submits the application to UDWQ for an eligibility determination.

Eligibility Criteria

The broad scope of eligibility criteria include projects that:

- Abate or reduce raw sewage discharges
- Repair or replace individual on-site wastewater disposal systems
- Reduce untreated or uncontrolled runoff
- Improve critical aquatic resources
- Conserve soil, water or other natural resources
- Protect and improve groundwater quality
- Preserve and protect the beneficial uses of water of the state
- Reduce the number of water bodies not achieving water quality standards
- Improve watershed management
- Prepare and implement TMDL assessments
- Abates, prevents or reduces water pollution (study, activity, or mechanism)
- Supports educational activities that promote water quality improvement

Nonpoint Sources

"Small" Projects Streamlined

In order to accommodate individuals that apply for financial assistance, the Board's Executive Secretary can approve the loan and (when the new rules are authorized) approve grant agreements up to $150,000 per project and up to $1,000,000 per fiscal year. This greatly improves the response time to distribute funds without requiring individuals — who are usually requesting relatively "small" project costs — to present projects directly to the Board. After eligibility is determined, the Executive Secretary submits the application to the Utah Department of Agriculture and Food (UDAF) for processing. During development of the NPS loan program, UDWQ worked closely with the UDAF's Agriculture Resource Development Loans (ARDL) program staff and has patterned the NPS loan program to closely resemble the ARDL program. UDWQ entered into a Memorandum of Agreement with UDAF to obtain the security for NPS loans and make determinations of credit worthiness for each applicant. The UDAF charges a small fee for this service. Because the ARDL program had the resources to process NPS loans, it proved to be an efficient mechanism to distribute loan funding.

Large Projects

Under the proposed rules, applicants requesting loans and/or grants over $150,000 or for eligible funding requests over the $1 million threshold within a fiscal year (July 1 through June 30), will be required to present a feasibility report to the Board for approval.

Projects Prioritized

When an NPS project is determined to be eligible for funding, it is prioritized on the Project Priority List. While a priority system has been in place since the inception of the CWSRF Program in 1988, a new priority system has been developed to categorize NPS projects. The new system first rates a project's ability to protect human health and then its ability to improve water quality. Up to this time, the applications have not been "pooled" following prioritization since funding has been available for all eligible applicants that were ready to proceed. However, as the grant funding becomes available for a wider range projects under the new rules (anticipated by end of 2007), the new priority listing may become increasingly important to determine which NPS projects will receive funding. (the numeric priority and alpha priority systems are found at Utah Administrative Code R317-100-3 and 4 respectively)

Loan Terms

After security for a NPS loan is obtained (usually in the form of water shares or real estate) the funding is provided on a reimbursement basis. The loans themselves have a zero percent interest rate. However, a four percent loan administration fee is paid to the UACD for the administrative and technical assistance to the applicant. The loans terms are no longer than 20 years or the depreciable life of the project, whichever is shorter.

Environmental Review Exemption

The NPS projects are exempt from environmental reviews under the National Environmental Policy Act (NEPA) as long as the projects are identified in Utah's Nonpoint Source Pollution Management Plan. Payments are made to the borrower, contractors or consultants for work relating to the planning, design and construction of the project. Invoices and cancelled checks document that work has been completed along with periodic inspections by water quality staff or a designee. To date, a total of $318,398 NPS loan funds have been distributed to individuals.

Grant Emphasis

Grant applicants to the expanded Hardship Grant Program will follow much of the process outlined for loans (except for securing financing). Grants will be scrutinized to a greater extent with emphasis on projects that address: a critical water quality need; an immediate or potential health hazard; and help implement the provisions of the applicable TMDL.

Financial Assistance for Onsite Wastewater Systems

Individual OWS Projects

Utah Code Annotated 73-10c defines an individual **o**nsite **w**astewater **s**ystem (OWS) as eligible for NPS financial assistance. The local health department official evaluates the need, eligibility and technical feasibility of each project and completes a **c**ertificate **o**f **q**ualification (COQ) that is submitted to UDWQ with the application. Since May 2001, rules have been in place to provide loans for OWS. Out of the seven applications received to date, however, none have been able to provide sufficient collateral or were deemed to have insufficient credit to secure a loan. The proposed rules intend to help remedy this situation.

Funding can be used for replacement or repair of existing OWS if the malfunction is not attributable to inadequate system operation and maintenance. If the draft rules are approved as written, the Water Board's Executive Secretary will be able to authorize loans or grants with applicants that have a total household income no greater than 150 percent of the state median adjusted household income (as determined by the Utah Tax Commission's most recently published data: currently $34,801).

Eligible Activities

Eligible OWS activities include:

- Septic tanks
- Absorption fields and appurtenant facilities
- Conventional or alternative OWS
- Connection of the residence to an existing centralized sewer system, including connection fees (if this is determined to be the best means of resolving the system failure)
- Costs associated with permits, legal expenses, engineering and administration

Nonpoint Sources

OWS Limits

Ineligible OWS project components include:

- Acquisition of land
- Interior plumbing components
- Impact fees, if connecting to a centralized sewer system
- OWS for new homes or developments
- Operation and maintenance costs

Loan Specifics

These loans can be zero percent interest or up to 60 percent of the interest rate on a 30-year US Treasury bill. The loans must be secured with real property or other appropriate security. The ratio of loan amount to the value of the pledged security must not be greater than 70 percent. The OWS loan must be paid in full at the time the property serviced by the project is sold or transferred, or at the end of 10 years — whichever occurs first. OWS grants may be made to recipients that are unable to secure a loan but are otherwise eligible for funding.

Supplementing EPA's CWA § 319 Nonpoint Source Management Program

Agricultural Sources

The EPA's CWA § 319 Nonpoint Source Management Program is primarily focused on funding NPS projects that address agricultural-related pollution sources. Estimated to account for over 34 percent of all sources of stream water quality impairment within Utah, NPS pollution from agricultural operations in the State includes pollution from: animal feeding operations; irrigation return flows; grazing practices; and nutrient loading and erosion from farming operations. In addition, water quality agricultural outreach through Utah State University Extension Office and aquifer classification studies are partially funded with § 319 grants.

Watershed Funding

Addressing another priority, rules were recently implemented to require additional training courses for onsite wastewater system inspectors and designers (UAC R317-11). Utah also utilizes the § 319 grant funding to support local watershed coordinators. These coordinators provide educational or technical assistance to individuals and local governments for the purpose of improving watershed conditions. They also oversee implementation of water quality improvement projects and best management practices, and facilitate funding assistance.

However, only $700,000 to $800,000 in § 319 funding has been available annually to be allocated to new and ongoing "on-the-ground" water quality improvement projects or pollution studies.

Match Requirements

The EPA § 319 Grant Program has had some success in rehabilitating streams and lakes and has documented improvements in water quality in localized water bodies. There have been delays in spending the grant dollars, however. Federal § 319 grant administrators have stated that watersheds have deteriorated over many decades from overuse or misuse and States have been under increasing pressure to expend the funds and to produce results. Unfortunately, progress can be stalled when individuals are unable or unwilling to provide the forty percent funding match or in-kind service cost share required as a condition of a § 319 grant. Many projects are left unfunded or funding is delayed due to a lack of resources. Increased federal Farm Bill grant funding has also reduced the participation in funding programs that require cost share or loans.

Intent of NPS Grants

It is the intent of Utah's NPS Grant program to provide a significant increase in resources for "on-the-ground" projects that target critical water quality needs and that implement TMDLs in high priority watersheds. Where projects can provide significant water quality improvement, especially in an impaired water body, UDWQ has the ability to provide NPS grant dollars of up to 100 percent of a qualifying project's cost. Qualifying projects include those which would not otherwise be economically feasible or where individuals are unwilling or unable to cost share. It is anticipated that priority watersheds will be "targeted" for cleanup and concentrated efforts will be made in one or two watersheds to achieve accelerated water quality improvements.

Grants for TMDL Implementation

Increasing Costs

Costs for the development and implementation of TMDLs projects — including operating budgets, water quality monitoring, equipment/materials and labor — have increased in Utah's booming economic climate that has occurred since the 2002 Winter Olympic Games. Due to the increasing workload of NRCS to implement Farm Bill programs, technical and engineering resources have had to be contracted to private sector companies. In order to develop more accurate, science-based TMDLs, special studies and additional data gathering must be completed. In the past, chemical monitoring data was collected by UDWQ staff but inadequate funding has prevented important biological monitoring data from being gathered and assessed.

Monitoring Needs

As TMDLs studies are completed, additional questions surface that require intensive data collection to understand specific stream function and the degree of impairment. In addition, nutrient loading criteria requires long-term stream monitoring to establish science-based standards. Stream processes that affect

Nonpoint Sources

TMDL Issues

Shelly Quick has a B.S. degree in Microbiology and has worked with the Division of Water Quality for over 10 years providing National Environmental Policy Act (NEPA) review for Municipal Wastewater Projects, managing the EPA Special Project Grants Program and coordinating the NPS Financial Assistance Program.

Funding for NPS Pollution

pollutants change seasonally and are affected by water quantity and nutrient uptake (and release of nutrients) by plants. Pollutant source identification is a critical step when developing TMDLs strategies. Partner agencies rely on UDWQ to monitor post-project results and improvements.

Providing grant funding to address these TMDL resource issues should help improve pollution abatement for TMDL listed waters. It will also help to adequately document where TMDL project implementation is most effective, including the project components that make the most significant beneficial impacts. NPS Grants may take some pressure off of the § 319 Grant program resources. The timeframes to address a TMDL would be shortened if projects are not required to follow the lengthy § 319 Grant process, which can take more than 18 months to provide project funding. As a result, urban rivers — such as the Jordan River that flows through Salt Lake City — may receive a more intensive focus for stream bank stabilization, natural flood plain function evaluation, and riparian habitat restoration projects in a more timely fashion.

As is true throughout the country, Utah municipalities face the continuing financial burdens of complying with CWA Stormwater (Phase I and II) permits. NPS Grants may eliminate some funding conflicts for those municipal projects that have been difficult to fund with § 319 Grants. Educational resources for stormwater improvement can be increased to encourage low impact commercial and residential developments and for erosion control at construction sites.

Possible Cleanup Program Innovations

UDWQ and the Utah Division of Environmental Response and Remediation have discussed the possibility of NPS grant funds being used to enhance the capabilities of the Superfund and Brownfield Volunteer Clean-Up programs. Under current proposals, the UDWQ's TMDL program staff will shoulder some of the responsibility to identify projects based on critical water quality needs and their extensive knowledge of watersheds and pollution sources throughout the State. Whenever feasible, NPS project(s) will be coupled with CWSRF point source projects.

Conclusion

The intended outcome of the expanded NPS grant program is to provide substantial funding to tackle NPS pollution problems, thereby improving impaired water to meet beneficial uses. The programs discussed above will provide an increased ability to accomplish these goals. However, internal and external resources may be stretched thin while trying to manage the anticipated increase in NPS projects. Procedures must be developed that will encourage government agencies, municipalities and grant/loan recipients to work together more efficiently to coordinate successful projects.

For Additional Information: Shelly Quick, Utah Department of Environmental Quality, 801/ 538-6516 or email: squick@utah.gov

Water Update

WESTERN STATES WATER UPDATE

WESTERN STATES WATER COUNCIL MEETS IN MONTANA

by David C. Moon, Editor

Council Purposes

The 154th Meeting of the Western States Water Council (WSWC or "Council") was held in Bozeman, Montana on August 8-10, 2007. WSWC is an organization consisting of representatives appointed by the governors of 18 western states, including the heads of the water resources (quantity) and water quality departments of those states. Council members and staff work closely with the Western Governors' Association (WGA) staff on water policy issues of concern to the governors. The purposes of the Council are: (1) to accomplish effective cooperation among western states in the conservation, development and management of water resources; (2) to maintain vital state prerogatives, while identifying ways to accommodate legitimate federal interests; (3) to provide a forum for the exchange of views, perspectives, and experiences among member states; and (4) to provide analysis of federal and state developments in order to assist member states in evaluating impacts of federal laws and programs and the effectiveness of state laws and policies. As always at the WSWC meetings, a wide variety of water issues was discussed with a few new wrinkles and concerns coming to light.

Water Update

Control Areas

Groundwater Declines

IGUCA Review

CREP Purposes

Retirement of Water Rights

New Mexico Limitations

Texas Mandate

Kansas Incentives

Agency Authority

Tribal Concerns

Groundwater Issues: State's Approaches and Limitations

Paul Graves, Assistant Chief Engineer of Kansas, reported on some groundwater actions in his state. In 1978, the Kansas Legislature enacted the Groundwater Management District Act, which contained specific provisions (K.S.A. 82a-1036, K.S.A. 82a-1037 and K.S.A. 82a-1038) for designation of Intensive Groundwater Use Control Areas (IGUCAs). These statutes allow the Chief Engineer to implement additional corrective control provisions in areas where certain determinations are arrived at through a public hearing process.

Such determinations include:

- Groundwater levels are declining excessively
- The rate of groundwater withdrawal exceeds the rate of groundwater recharge
- Unreasonable deterioration of groundwater quality has occurred or may occur
- Other conditions exist warranting additional regulation to protect public interest

Last June, Phase I of the Pawnee Valley IGUCA hearing concluded and the Chief Engineer ordered an expansion of the IGUCA area to include a larger part of the Pawnee Creek and Buckner Creek subbasins (tributaries of the Arkansas River). Phase II will involve determining what controls are needed to address groundwater declines in the area. See KSDA website: www.ksda.gov/news/id/120 for more details.

Meanwhile, in the recent Kansas legislative session, a bill was narrowly defeated that proposed sunsetting the provisions of existing IGUCAs and placing a moratorium on new IGUCAs. The bill was requested by a special interest group seeking to avoid curtailment of water use in an area where an IGUCA hearing was underway. A legislative interim committee was established to consider IGUCAs, particularly to evaluate whether periodic reviews should be implemented and to examine the relationship between IGUCAs and the Water Appropriations Act (see Kansas Dept. of Agriculture website: www.ksda.gov/statutes/).

Senate Bill 123 was recently passed establishing a Conservation Reserve Enhancement Program (CREP) in the upper Arkansas River Basin in Kansas. The purpose of that Program is to reduce withdrawals from the High Plains Aquifer, improve water quality, and stabilize erosive soils, among other benefits. The Program provides incentive payments for voluntary retirement of water rights and is jointly funded by state and federal funds. The maximum area eligible is limited to 40,000 acres. It is further limited to no more acres than one-half of those that have come out of previously established conservation reserve program (CRP) contracts the prior year.

Bill Hume, New Mexico's Policy and Planning Director in the Governor's Office, noted some limitations of the State Engineer's authority over groundwater due to some older statutes. Authority is limited to wells to a depth of 2500 feet, but some new wells have been drilled that reach as deep as 3000 feet. Contamination of groundwater is becoming an issue in New Mexico, as elsewhere, yet groundwater quality is not under the State Engineer's authority. Meanwhile, some water users are attempting to treat the contaminated groundwater for "M&I use" (municipal and industrial use).

Instream Flows

The Texas legislature recently passed a law mandating that environmental flows be established for all streams in Texas. "This was a major step for pretty much a property rights state," said Weir Labatt of San Antonio, Texas. (See Water Briefs, TWR #22, #24 and #25 regarding Texas instream flows; and Texas Instream Flow Program website: www.twdb.state.tx.us/InstreamFlows/index.html).

Kansas also has another new program, know as WaterTap or WTAP, which created a voluntary, incentive-based water management tool for retiring water rights in depleted stream courses and associated aquifers. State funds are limited to $1.5 million per year for a five-year pilot program. Two targeted areas are Prairie Dog Creek in northwest Kansas and the Rattlesnake Creek in the Arkansas River basin. The first sign-up period for the program was to begin September 1 and continue through November 15. (For details on the Rattlesnake Creek program, see KSDA website: www.ksda.gov/subbasin/content/201/cid/749).

State Regulation of Water Rights Prior to General Adjudication

John Utton, a private attorney with Sheehan, Sheehan & Stelzner in Albuquerque, New Mexico discussed a decision that was recently handed down in district court. The litigation challenged the Lower Rio Grande Active Water Resource Management rules and the State Engineer's authority to regulate water rights *prior* to a general adjudication of those rights. The court held that the State Engineer "can administer priorities from court decrees and licenses issued by him, but he cannot determine priorities from other sources." (*Tri-State Generation, et al. v. John D'Antonio, Jr., New Mexico State Engineer*, Case No. D-0725-CV-05-03 (May 16, 2007), p. 33). For a more detailed description of the case, see TWR #40 or request a copy of the Memorandum Decision from The Water Report.

Editor's Note: Another decision involving the administration of water rights *prior* to a general adjudication of rights was recently handed down in Montana. The *Confederated Salish and Kootenai Tribes v. Bud*

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Clinch and DNRC, 2007 MT 63 (2007) case dealt with a change in use application (purpose of use) by non-Indian owners of two appropriative water rights located on the Reservation that was objected to by tribal authorities. The Montana Supreme Court overturned a district court decision and ruled that the change proceeding could go forward despite the fact that the tribal rights had not been adjudicated. The Tribes argued that it was not possible for the state water resources agency to properly evaluate "adverse affect" under Montana's "no injury rule" for such a change, when their rights had not been adjudicated. See Moon, TWR #39 for a discussion of this case.

Water Availability and Energy Projects

North Dakota State Engineer Dale Frink pointed out the nexus where water availability is colliding with energy needs in his state. Water permit applications are taking a long time to process, Frink noted, while ethanol producers are gearing up for production even though they are doing so in areas without much water available. Frink related one example where construction of an ethanol plant costing approximately $100 million was 80% complete despite the fact that the owners have not obtained a water permit.

Coalbed Methane

The Wyoming Coalbed Methane Task Force is wrapping up its work on two issues: (1) what protection is necessary for landowners who don't want water from coalbed methane production discharged into ephemeral streams; and (2) some coalbed methane producers are selling groundwater that their operations bring to the surface, even from operations not producing any gas — what regulation is appropriate for these operations? Sue Lowry, the Interstate Streams Administrator in the Wyoming State Engineer's Office, noted that the second issue involves both water rights questions and the issue of energy leases.

Editor's Note: One of the water courts in Colorado recently decided that the Colorado State Engineer has a statutory duty to require well permits and augmentation plans when groundwater, which is hydraulically connected or tributary to surface water, is diverted in the course of coalbed methane production. *Vance v. Simpson*, District Court, Water Division 7, Colorado Case No. 2005CW063 (July 2, 2007). See Water Briefs, TWR #43.

Paul Frohardt, Administrator of the Water Quality Control Commission of Colorado, noted that energy development (oil and gas) is taking off in western Colorado and is resulting in water quality problems from stormwater runoff and coalbed methane produced waters. There is also new development of uranium mining in the state that has resulted in groundwater quality impacts and concerns.

Uranium mining is also an issue in New Mexico, according to Bill Hume. The "water quality issue is due to the technique" that is being used in the mining process, Hume said. He also noted that the Navajo Nation is adamantly opposed to any uranium mining, which has brought US Environmental Protection Agency jurisdiction issues into play. Hume also discussed problems with oil and gas development in New Mexico. A currently "untapped aquifer" in southern New Mexico, which contains perhaps as much as 100,000 acre-feet per year in sustainable yield, faces a potential water quality threat from oil and gas development in the area.

Climate Change

The Council heard an excellent report on "Climate Change and Western Water Resources" by Dr. Alan F. Hamlet of the Climate Impacts Group at the University of Washington. Hamlet stressed the necessity for adaptive management. In general, Dr. Hamlet told the Council that they must expect significant changes, and start planning and adapting for those changes. While future precipitation amounts may fall within our range of experience, the variability of precipitation patterns appears to be increasing. One can expect precipitation at different times than what has been considered normal. The West will see a warm and wet season, followed the next year by a warm and dry season. Hamlet also said to expect both droughts and floods to be more extreme than our history suggests. This observation, as well as others, prompted the current Chair of the WSWC, Duane Smith (Executive Director of the Oklahoma Water Resources Board) to remark that "I suppose that means we should be getting people out of the flood plain."

As has been publicized widely, one aspect of climate change is that there will be dramatic reductions in snowpack — especially in lower elevation mountain areas such as the Cascades Range in the Northwest. A timing shift will also occur in snowpack runoff, according to Hamlet. The top or peak of the hydrograph will be "chopped off" and the runoff will come much earlier in the year. Modeling shows that these differences will bring about substantial impacts to water users. For instance, earlier runoffs will result in a great reduction in summer water availability for all uses.

Dr. Hamlet also focused on the need for changes in flood control evacuation and refill schedules of reservoirs. The timing shift and the extreme variability of precipitation will make existing "flood rule curves" and reservoir fill schedules of dubious reliability in the future. This will cause difficult tradeoffs based on the objectives one has: for example, is a reservoir basing its refill schedule on the need for a water supply for hydroelectric use or for environmental services related to instream flows? This situation

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also emphasizes the need for adaptation. "Flood control evacuation" flows, i.e. fill curves for reservoirs, absolutely must be changed since existing rule curves do not account for climate change. In the future, reservoir storage systems must be optimized and rebalanced to account for both flood control and refill. Continual adaptation will be required as climate change takes hold. Adaptation must be considered every year based on the specific forecasts and precipitation for that year. When dealing with long-term infrastructure, Hamlet urged decision-makers to adjust the rules that have hitherto been accepted planning practices, such as "100-year flood" risk. Director Dave Tuthill of the Idaho Department of Water Resources mentioned that Palisades Reservoir did not fill last year precisely because its operators did not adapt and instead relied on pre-existing refill schedules.

Water quality changes will also occur due to climate change. One can expect increasing water temperatures, altered chemical and biological processes, and altered sediment transport processes (snowpack armors sediment and there won't be as much of that). These changes will demand an increased use of water storage that is specifically managed to maintain dilution flows in the summer for water quality purposes.

The impacts of climate change will not be equally distributed, either in terms of the areas hardest hit or the water users impacted. Dr. Hamlet set out three rules for adaptation: (1) accept that the future will not look like the past; (2) expect surprises, particularly as concerns precipitation; (3) increase flexibility and adaptability, i.e. don't lock into specific terms in an agreement to try and deal with issues or you will be unpleasantly surprised. In other words, don't look for no-regret strategies (e.g. protection against drought) because there simply are none — one must remain flexible and adaptable going forward.

Climate change will also produce disruptions of existing water allocation agreements. "The past does not provide the best planning tool for future," according to Hamlet and agreements were often based on rosy predictions. One can expect disruption of international transboundary agreements (Canada v. US and Mexico v. US) in addition to inevitable interstate issues.

Dr. Hamlet also spoke about the need for products that allow people at the local level to make their own predictions. For example, a model that could show reduced snowpack so that water managers could use the model to adapt to the changing conditions is desirable. "We are interested in getting tools into the private sector so they can use them [locally]," he said. Ward Staubitz of the US Geological Service noted that the USGS and Lawrence Livermore are currently working to do just that with 17 western states.

NPS: Nonpoint Source Pollution Issues

Jon Craig, Oklahoma's Water Quality Division Director, discussed his state's on-going efforts to implement Total Maximum Daily Loads (TMDLs) for bacteria. It is estimated that 70% of this impairment is coming from nonpoint sources. Oklahoma officials are wrestling how to achieve actual bacteria reduction following the establishment of a TMDL.

In California the issue of bacterial limits for stormwater permits has become a contentious issue before the Los Angeles Regional Water Resources Control Board, according to Darlene Ruiz of the Hunter & Ruiz law firm in Sacramento (California WSWC member).

Exempt Wells

Like all the western states, Montana is struggling with the impacts of "exempt wells." The Director of Montana's Department of Natural Resources and Conservation (DNRC) made a presentation to WSWC that focused on the "three Ds" — i.e. Drought, Development and Disagreement. Among other issues related to the three Ds, "exempt well" use is "one of our great concerns," Sexton stated. In Montana, any well that pumps less than 10 acre-feet per year at no more than 35 gallons per minute is automatically exempt from permitting requirements. The number of exempt wells is increasing rapidly. Approximately 4300 are expected to be drilled in 2007 alone. Sexton cited one example where 350 exempt wells now exist on a single 640-acre parcel of land. A bill was introduced into the last legislative session in Montana that would have eliminated exempt wells, but the "real estate industry came out in force to stop the bill," Sexton said. This issue and other related groundwater issues have become particularly important in Gallatin County where the Bozeman area is experiencing major growth and spreading subdivisions. Director Sexton also discussed Montana House Bill 831 — new legislation that requires DNRC to consider water quality issues when processing new groundwater water applications in any of Montana's five "closed" basins (i.e. closed to new water rights due to lack of available surface water). Director Sexton opined that this legislation may actually be discouraging people from developing a common water system, pushing them to rely instead on exempt wells.

For Additional Information: David Moon, 541/ 485-5350 or email: thewaterreport@hotmail.com; WSWC website: www.westgov.org/wswc/

WATER BRIEFS

ERRATA – TWR #38
"Water Conservation Initiatives"

Alert reader Kelly O'Rourke of HDR in Bellevue, WA, explained one minor flaw that in the article "Water Conservation Initiatives" in TWR #38. In reference to Washington's Municipal Water Law, the statement was made that under the law "all municipalities were required to implement cost-effective conservation measures." Actually, the law requires that municipalities implement *or evaluate* a certain number of conservation measures, the number being determined by the size of the utility. So technically, a municipality can get by with only evaluating conservation measures, rather than actually implementing them. If they choose not to implement the minimum number of measures, they do have to provide a demand forecast showing what their demand would look like if they implemented all the measures they evaluated that turned out to be cost effective. That requirement does provide some pressure on the municipality since it "daylights" to the public how their demand could be reduced by conservation.

As our author Craig Bell of the Western States Water Council noted later: "…regardless of whether the supplier actually implements or merely evaluates conservation measures, municipal water suppliers servicing one thousand or more connections must prepare 'a demand forecast projecting demand if the measures deemed cost-effective…were implemented.' (See WASH ADMIN. CODE § 246-290-100(4)(d)). As a practical consequence, forecasting demand requirements may well compel municipal water suppliers to implement conservation measures because the public will know how their demand could be reduced if such measures were employed."

NEW PERCHLORATE RULE CA

MAXIMUM CONTAMINANT LEVEL

New rules setting the legal limit for the chemical perchlorate will become effective on October 18, 2007, in California. Perchlorate is a regulated drinking water contaminant in California and the new rules set the maximum contaminant level at 6 micrograms per liter (µg/L). The new regulations are expected to require millions of dollars for the cleanup of contaminated groundwater in California.

The use of perchlorate and its salts in solid propellant for rockets, missiles, fireworks, and elsewhere (*e.g.*, production of matches, flares, and explosives) can lead to its release into the environment. Perchlorate interferes with iodide uptake during pre- and postnatal growth and development, as well as effecting normal metabolism. It can decrease production of thyroid hormones, which are needed for mental function. Perchlorate is highly soluble and mobile in groundwater, and is resistant to degradation.

Initial testing in 1997 by the California Dept. of Health Services (now Dept. of Public Health) and subsequent monitoring showed perchlorate to be a widespread drinking water contaminant in several hundred wells, primarily in southern California. Perchlorate is also found in the Colorado River, an important source of water for drinking and irrigation, where the contamination comes from ammonium perchlorate manufacturing facilities in Nevada.

For info: California Division of Drinking Water & Environmental Management website: www.dhs.ca.gov/ps/ddwem/chemicals/perchl/default.htm

GROUNDWATER ACCOUNT KS

FLEXIBLE TERM PERMITS

Kansas water right holders seeking leeway in how they use their water appropriation were able to apply for a term permit that allows for more flexible water use over a five-year period that begins January 1, 2008. The multiyear flex account option was available only to vested and certified groundwater water right holders. It is designed to deal with variations in precipitation. The option is based on historical use rather than authorized quantities.

Under this flex account term permit, water users establish a five-year allotment based on an average of their actual use between 1992 and 2002, less a 10 percent conservation amount required by law and excluding any amount used in excess of the authorized quantity. That base amount is drawn down each year by the amount of water that is used. Water use in any one year may exceed a water right holder's appropriated amount, and unlimited water use in a single year is possible, as long as overall use for the five-year period does not exceed the total allotment. Also, flex account use must not impair water use by others.

Applications are still being accepted, but these flex accounts will not go into effect until January 1, 2009. Staff in the Kansas Division of Water Resources field offices will answer questions about flex accounts and help water users complete the forms.

For info: Lisa Taylor, KDA, 785/ 296-2653, email: ltaylor@kda.state.ks.us or website: www.ksda.gov/

TOXIC DISCHARGES TX

CRIMINAL FINE

Fujicolor Processing (Fujicolor) agreed to pay a $200,000 criminal fine for discharging excessive amounts of silver-tainted photo processing waste to a Texas wastewater treatment plant. Fujicolor pleaded guilty to one count of negligently violating a requirement of its pretreatment permit at its photo-processing facility in Terrell, Texas.

Based on an internal investigation, Fujicolor discovered that from 1999 through July 2002 employees were selectively reporting only test results that fell within permit limits. Industrial facilities report results to local agencies for permit compliance purposes. Employees would send part of a sample to a laboratory for screening and, if the sample met permit limits, it would be submitted to the city. If a sample did not meet the silver limit, employees would keep collecting samples until they found one that fell within allowable limits. Fujicolor discovered similar problems at its facilities in New Britain, Connecticut, and Tukwila, Washington. "By 'cherry-picking' samples, Fuji's employees undermined federal and state permit programs," said Granta Nakayama, assistant administrator for the EPA's enforcement and compliance assurance program.

EPA requires that industry pre-treat toxic pollutants chemicals in their wastes in order to protect local sewers and wastewater treatment plants. Local agencies must regulate industrial facilities by issuing permits, conducting inspections, sampling wastewater and reviewing each facility's monitoring data. In July 2002, the city of Terrell fined the facility $105,725 for exceeding its monthly limit for silver, based on samples submitted by the facility.

Fujicolor disclosed the findings of its investigation to federal and local officials. The company has since taken action to address the environmental

problems, including firing employees responsible for violations and putting safeguards in place to prevent additional violations.

This investigation was conducted by EPA's Criminal Investigations Division, and the Texas Department of Environmental Quality. The case was prosecuted by the US Justice Department's Environmental Crimes Section and the US Attorneys Office for the Northern District of Texas.
For info: Roxanne Smith, EPA, 202/ 564-4355 or email: smith.roxanne@epa.gov; EPA's Criminal Enforcement website: epa.gov/compliance/criminal/index.html

COMPLIANCE ASSISTANCE US

EPA TRIBAL CENTER

EPA's new web-based Tribal Compliance Assistance Center provides comprehensive compliance assistance, pollution prevention information and regulations that may apply to tribal government operations. The Tribal Center is designed to help environmental professionals in tribal governments, others who work with tribes, and facility operators understand environmental requirements and other considerations for responsible environmental management.
For info: Jonathan Binder, EPA, 202/ 564-2516, email: binder.jonathan@epa.gov or EPA website: www.epa.gov/tribalcompliance

BIOLOGICAL TREATMENT CA

CHEESE WHEY AND MOLASSES

EPA has announced its proposed cleanup plan for the soil and groundwater contamination at the Romic Environmental Technologies Corporation (Romic) facility in East Palo Alto, California. Romic is a 14-acre hazardous waste management facility located in East Palo Alto. Waste management practices dating back to the 1950s resulted in the contamination of soil and groundwater below the facility.

The proposed remedy incorporates an innovative biological treatment process to clean up the soil and groundwater that is cost-effective and requires less energy than traditional pump and treat remedies, according to Nancy Lindsay, acting director of Waste Programs for the EPA's Pacific Southwest region. The process uses cheese whey and molasses as a food source for natural microbes living in the soil and groundwater and breaks down the contaminants into carbon dioxide, water and salt. Tests of this technology at the Romic facility have shown as much as a 99 percent decrease in the amount of contamination.

The proposal also includes soil excavation, land use restrictions limiting future property use, and a requirement for Romic to set aside financial resources to ensure cleanup completion. Contaminants include volatile organic compounds, which include dry cleaning chemicals, carburetor cleaning liquids, and paint thinners.

Public comments on the proposal can be sent to EPA (see website below). Comments must be postmarked, emailed or faxed no later than November 1, 2007.
For info: Dean Higuchi, EPA, 808/ 541-2711, email: higuchi.dean@epa.gov
EPA Romic website: http://www.epa.gov/region09/waste/features/romic-paloalto/

STORM & WASTEWATER CA

BOEING FINED FOR POLLUTION

The Boeing Company paid $471,190 in fines in response to a complaint issued on behalf of the Los Angeles Regional Water Quality Control Board. The penalties were for 79 violations of Boeing's permit, which occurred between October 2004 and January 2006 at Boeing's Santa Susana Field Laboratory in Simi Valley. The violations consisted of wastewater and stormwater run-off discharges with elevated levels of chromium, dioxin, lead, mercury and other pollutants that entered Bell Creek (tributary to the Los Angeles River) and the Arroyo Simi.

The California Water Code specifies how money collected for water quality violations can be allocated. In most cases, a portion of any fine for violating permit limits must be deposited in the Cleanup and Abatement Account (used for environmental cleanups throughout California). The remaining portion can be used to fund environmental programs that benefit the geographic area impacted by the violation. The Los Angeles Regional Board has a pre-approved list of environmental projects for this purpose.

Boeing's fine will be allocated as follows: $235,595 to the Cleanup and Abatement Account (managed by the State Water Resources Control Board); $199,500 to fund a study on how trace metals, such as copper, are transported from watersheds to estuaries and to determine their impact on water quality, habitat and aquatic life (conducted by the Southern California Coastal Water Research Project); $22,000 to fund kelp bed restoration in Santa Monica Bay (managed by Santa Monica Baykeeper); $14,095 to fund the creation and distribution of a publication identifying environmentally beneficial ways to manage stormwater runoff (overseen by the Los Angeles and San Gabriel Rivers Watershed Council).
For info: Stephen Cain, Los Angeles RWQCB, 213/ 576-6694 or website: www.waterboards.ca.gov/losangeles/

CERCLA & TRIBES US

US RULED PRP

On August 21, a federal district court held that the United States, acting in its capacity as a trustee of Indian Lands, exercised sufficient "indicia of ownership" to give rise to liability under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) as a **p**otentially **r**esponsible **p**arty (PRP). As a PRP, the US is liable and responsible for a share of the costs of cleaning up the mine Superfund site, which is located on tribal trust land. *United States v. Newmont USA Limited*, Document No. 290 (8/21/07) (Opinion), 2007 WL 2386425, (E.D.Wash., August 21, 2007).

The Spokane Tribe (Tribe) and individual tribal members (descendants of the original allottee) leased land held in trust (Spokane Indian Reservation) to Dawn Mining Company (Dawn). The court's decision allows Dawn's parent company (Newmont USA Limited) and Dawn, who are defendants in a cost recovery action brought by the US, to proceed against the US with counterclaims for contribution under CERCLA §113. The court concluded that the oversight of the mining activities by federal agencies was a sufficient "indicia of ownership" and led to a rejection of the US' argument that it only held "bare title" to the land as trustee and did not possess a traditional property interest in the land.
For info: Connie Sue Manos Martin, Marten Law Group, 206/ 292-2603 or email: cmartin@marten.com

CALENDAR

October 15-17 MT
Western States Adjudication Conference, Helena, Great Northern Hotel. RE: Water Rights Adjudications in the West. For info: Montana DNRC website: http://dnrc.mt.gov/wrd/westernstates_adj_conf.asp

October 16 OR
Water Rights Sales & Transfers in Oregon Seminar, Salem, Red Lion Hotel. For info: Lorman Education Services, 866/ 352-9539 or website: www.lorman.com

October 16-18 MT
Northwest Power & Conservation Council Meeting, Missoula. For info: NWPPC, 800/ 452-5161 or website: www.nwcouncil.org

October 16-17 IL
The Big Deal: NBA Brownfields 2007, Chicago, Navy Pier. RE: Deal Making, Education & Networking Opportunities. For info: National Brownfield Association website: www.nbabigdeal.org/

October 17-18 WA
NW Environmental Summit & Trade Show, Tacoma, Greater Tacoma Convention & Trade Center, 1500 Broadway. For info: Sue Moir, NEBC, 503/ 227.6361 or 800/ 985-6322, email: Sue@nebc.org, or website: www.nebc.org/

October 17-18 MT
Large Lakes Conference, Polson, Kwa-Taq-Nuk Resort. Sponsors: Flathead Basin Commission (FBC), the Flathead Lakers, & Confederated Salish & Kootenai Tribes. RE: Protecting Water Quality in Large Lakes Experiencing Rapid Growth. For info: FBC, 406/752-0081 or website: www.flatheadbasincommission.org

October 17-19 ID
Pacific Northwest International Section (PNWIS) Annual Conference, Boise, RE: "Powering the Future." For info: Zach Klotovich, 208/ 373-0295 or email: zklotovi@cableone.net

October 18-19 MT
7th Annual Montana Water Law Conference, Helena. RE: Permitting Strategies, Water Rights, Technical Tools, DNRC Change Process, Adjudication Rules, Water Policy Updates, US Army Corps Updates, Groundwater Issues & Emerging Issues in Water (David Moon, Editor of The Water Report). For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

October 18-19 WA
Alternative Energy Conferencce, Seattle. RE: Regulatory Updates, Global Warming Effects on Enviro Law, Ocean Power, Project Finance, Hydropower Licensing Update. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

October 18-19 OR
Water Law Seminar — District Water Management & Conservation Plan Workshop, Welches, Resort at the Mountain. Sponsored by the Oregon Water Resources Congress. For info: OWRC, 503/ 363-0121, email: owrc_info@yahoo.com, or website: www.owrc.org

October 18-19 AZ
NEPA Conference, Phoenix, Arizona Biltmore Resort & Spa. For info: CLE Int'l, 800/ 873-7130 or website: www.cle.com

October 18-20 Mexico
US – Mexico Water Forum, La Paz. RE: Water Quantity/Water Quality Problems & Collaboration. For info: Mario Castenada, GateWay Community College, 602/ 286-8663 or email: Castaneda@gatewaycc.edu

October 19 OR
Combating Climate Change on the Regional Level: West Coast Policy & Litigation, Eugene, Knight Law Center, University of Oregon School of Law. For info: Christina Davis, ENR, 541/ 346-1395, email: cdavis6@uoregonl.edu or website: www.law.uoregon.edu/org/jell/climate.php

October 20 WA
Washington Water Trust Annual Benefit Evening, Seattle, McCormick & Schmick's Harborside. For info: Kelly McCaffrey, WWT, 206/ 675-1585 x103 or email: Kelly@thewatertrust.org

October 22 OR
Stormwater Conference, Portland, World Trade Center Two, 25 SW Salmon Street. For info: Holly Duncan, Environmetal Law Education Center, 503/ 282-5220, email: hduncan@elecenter.com or website: www.elecenter.com

October 22-23 CA
6th International Conference on Pharmaceuticals and Endocrine Disrupting Chemicals, Costa Mesa. RE: Analytical Methods, Sources, Regulatory Approaches & Technologies. For info: Cliff Treyens, National Ground Water Association, 800/ 551-7379, email: ctreyens@ngwa.org or website: www.ngwa.org

October 22-23 WA
Tribal Energy in the Northwest, Seattle, Red Lion Hotel. For info: Law Seminars Int'l, 800/ 854-8009 or website: www.lawseminars.com/

October 22-23 OR
Assessment & Remediation of Oxygenates and Other Fuel Components Conference, Portland, Red Lion Hotel. For info: NEIWPCC, 978/ 323-7929 or website: www.neiwpcc.org

October 22-25 LA
Interstate Council on Water Policy (ICWP) Annual Meeting, New Orleans, Le Pavillon Hotel. RE: Climate Change Impacts on Water Management; Disaster Risk Management & Recovery Planning; More. For info: Peter Evans, Executive Director, 703/ 243-7383, email: phe@riverswork.com or website: www.icwp.org

October 23-25 OK
Oklahoma Governor's Water Conference, Oklahoma City. For info: Oklahoma Water Resources Board's website: www.owrb.state.ok.us/

October 24-25 WA
Northwest Tribal Water Rights Conference, Shelton, Squaxin Island Tribe's Little Creek Casino & Hotel. Theme: "Climate Change: Impacts to Water, Fish Cultures, Economies and Rights." For info: The Center for Water Advocacy, 541/ 377-0960, website: www.wateradvocacy.org

October 24-26 CO
2007 Tamarisk Symposium, Grand Junction, Two Rivers Convention Center. RE: Revegetation, Tamasrisk Problem, Long-Term Solutions. For info: Tamarisk Coalition, 970/ 256-7400 or website: www.tamariskcoalition.org

October 25-26 WA
Wetlands in Washington Conference, Seattle. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

October 25-26 WA
"Getting in Step with Phase II: A Workshop for Stormwater Program Managers," Tacoma. Sponsored by EPA's Office of Water (OW). For info: EPA website: http://cfpub2.epa.gov/npdes/outreach.cfm?program_id=0&otype=1

October 26 AZ
Community Conversation on Water — Learn, Listen & Participate, Tucson, Doubletree Hotel, 445 S. Alvernon, 8:30am-2:30pm. For info: Water Resources Research Center website: http://ag.arizona.edu/AZWATER/

October 28-31 CO
2007 Geological Society of America Annual Meeting & Exposition, Denver. For info: GSA, 888/ 443-4472 or website: www.geosociety.org/meetings/2007/index.htm

October 28-November 2 AZ
International Symposium on Managed Aquifer Recharge (6th Biennial), Phoenix. For info: Symposium website: www.ismar2007.org/

October 29-30 CA
Water Quality Coordinating Committee Meeting, San Diego, Holiday Inn On the Bay, 1355 North Harbor Drive. RE: Strategic Planning Efforts & General Issues Concerning Management & Coordination Between State & Regional Water Boards. For info: Jeanine Townsend, SWRCB, 916/ 341-5600, email: jtownsend@waterboards.ca.gov or website: www.waterboards.ca.gov

October 29-November 2 VA
NPDES Permit Writers' Training Course, Woodbridge. Sponsored by EPA's Office of Water (OW). For info: EPA website: http://cfpub2.epa.gov/npdes/outreach.cfm?program_id=0&otype=1

October 30-November 1 China
International Methane Capture Marketplace Exposition, Beijing. RE: Project Opportunities for Investors, Latest Technologies, More. For info: Methane to Markets Partnership website: www.methanetomarkets.org or EPA website: www.epa.gov/methanetomarkets

October 31-November 2 WY
Wyoming Water Association 2007 Conference, Cheyenne, Little America Hotel & Resort. RE: Opportunities & Challenges in the Water & Natural Resources Realm. For info: John Shields, WWA, 307/ 631-0898 or email: wwa@wyoming.com

November 1-2 CA
Endangered Species Act Conference, San Francisco, Fairmount Hotel. For info: CLE International, 800-873-7130 or website: www.cle.com

November 1-2 OR
16th Annual Oregon Water Law Conference, Portland. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

November 1-2 CA
California Water Law Conference, Pasadena, Westin. For info: CLE Int'l, 800/ 873-7130 or website: www.cle.com

November 1-2 TX
Endangered Species Act Conference, Austin, Omni Hotel Downtown. For info: CLE International, 800-873-7130 or website: www.cle.com

November 2 AZ
Conservation Easements Conference, Phoenix, Hilton. For info: CLE International, 800-873-7130 or website: www.cle.com

November 5-6 TX
Petroleum Hydrocarbons and Organic Chemicals in Ground Water: Prevention, Detection, and Remediation Conference, Houston. Sponsored by the National Ground Water Association. For info: Cliff Treyens, NGWA, 800/ 551-7379, x 554, email: ctreyens@ngwa.org, or website: www.ngwa.org

November 5-6 CO
Intro to Environmental Regulations Conference, Denver. WQ Sessions include: Clean Water Act; NPDES Program; Industrial Discharge Permits; Stormwater Permits; More. For info: Trinity Consultants, 800-613-4473 or website: www.trinityconsultants.com

November 5-9 WY
State Board of Control Quarterly Meeting, Cheyenne, Herschler Building, Room 1699. For info: Alan Cunningham, Administrator, 307/ 777-6178 or website: http://seo.state.wy.us/news.aspx

November 6-9 WA
Pacific Salmonid Recovery Conference 2007, NW Environmental Training Center Presentation, Seattle, NWETC Headquarters, 650 South Orcas Street. For info: Renata Sobol, NW Environmental Training Center, 206/ 762-1976 or email: rsobol@nwetc.org or website: www.nwetc.org

November 7-8 TX
Economic Analysis for Ground Water Remediation Course, Houston. For info: National Ground Water Association, 800/ 551-7379 or website: www.ngwa.org

November 7-9 WA
Water in the Pacific Northwest: Moving Science into Policy and Action, Conference, Stevenson, Skamania Lodge. For info: Institute for Water & Watersheds website: www.water.oregonstate.edu/

November 7-9 NM
National Water Resources Association Annual Conference, Albuquerque, Hyatt Regency. For info: NWRA, 703/ 524-1544, email: nwra@nwra.org, website: www.nwra.org/meetings.cfm

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November 7-9 **CA**
2007 National Conference on Agriculture and the Environment, Monterey. Sponsored by Central Coast Agricultural Water Quality Coalition. For info: Nicole De La Rosa, CCAWQC, 408/ 776-1684 or email: Nicole.delarosa@agwaterquality.org

November 8 **WA**
Cleantech Investing in the Pacific Northwest, Seattle. For info: Colleen Gernhart, Stoel Rives, 503/ 294-9476, email: crgernhart@stoel.com or website: www.stoel.com/events/Cleantech2007.html

November 11-16 **CO**
National Congress of American Indians 63rd Annual Convention, Denver, Denver Hyatt Hotel. For info: NCAI, 202/ 466-7767, email: mcai@ncai.org, or website: www.ncai.org

November 12-15 **NM**
AWRA 43rd Annual Water Resources Conference, Albuquerque. RE: Growth, Drought, ESA Act Issues; Global Warming; More. For info: American Water Resources Association website: www.awra.org/meetings/New_Mexico2007/index.html

November 13 **CA**
Tribal Environmental Regulations in California, Workshop, Sacramento. For info: Kristine Robson, NW Environmental Training Center, 206/ 762-1976 or email: krobson@nwetc.org or website: www.nwetc.org

November 13-14 **ID**
Northwest Power & Conservation Council Meeting, Coeur d'Alene. For info: NWPPC, 800/ 452-5161 or website: www.nwcouncil.org

November 13-15 **TX**
Spring Ecosystems: Inventory, Monitoring, and Assessment Course, San Antonio. For info: National Ground Water Association, 800/ 551-7379 or website: www.ngwa.org

November 13-15 **WA**
Overview of Petroleum, Chlorinated Hydrocarbon, and Metal Behavior in the Environment Training, Seattle, NWETC Headquarters. For info: Renata Sobol, NW Environmental Training Center, 206/ 762-1976, email: rsobol@nwetc.org or website: www.nwetc.org

November 13-16 **OR**
Third Biennial Network of Watershed Councils Gathering, Hood River, Hood River Inn. For info: Watershed Councils website: www.oregonwatersheds.org

November 14 **OR**
Oregon's Cleanup Law & Washington's MTCA Conference, Portland, Red Lion Hotel on the River. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

November 14 **CA**
Implementing Sustainable Development Programs, San Francisco. For info: Trinity Consultants, 800/ 613-4473 or website: www.trinityconsultants.com/Training/

November 14-15 **CO**
Colorado Water Conservation Board Meeting, Denver. For info: www.cwcb.state.co.us/

November 14-16 **AZ**
Western States Water Council Meeting, Phoenix, Sheraton Crescent Hotel. For info: Cheryl Redding, WSWC, 801/ 561-5300, email: credding@wswc.state.ut.us or website: www.westgov.org/wswc/

November 15 **CA**
Managing Greenhouse Gas Emissions, Workshop, San Francisco, CA. RE: Preparing Effective Greenhouse Gas Inventories & Conducting Greenhouse Gas Emission Calculations According to Established Protocols. For info: Trinity Consultants, 800-613-4473 or website: www.trinityconsultants.com

November 15-16 **WA**
The Mighty Columbia, Seattle, Hotel Monaco. RE: State & Federal Rulings, Climate Change, Hatchery Reform, Quality/Quantity Interrelationship, Transfers & Marketing, Canadian Considerations, Hydropower & Windpower. For info: The Seminar Group, 800/ 574-4852, email: info@TheSeminarGroup.net or website: www.TheSeminarGroup.net

November 19 **CA**
Proposed Water Quality Control Plan for Enclosed Bays & Estuaries, Sediment Quality Objectives - State Water Resources Control Board Public Hearing, Sacramento, Resources Bldg., 1416 9th Street, 10am-12pm. RE: Draft Staff Report and Proposed Plan. For info: Chris Beegan, SWRCB, 916/ 341-5577 or email: (cbeegan@waterboards.ca.gov).

November 27-30 **CA**
2007 ACWA Fall Conference & Exhibition, Indian Wells, Renaissance Esmeralda Resort & Hyatt Grand Champions. Sponsored by: Association of California Water Agencies. For info: www.acwa.com//events/acwa_events.asp

November 28-29 **OR**
Pacific Coast Clean Energy R&D Forum, Portland, Portland Hilton Hotel & Executive Tower, 921 SW Sixth Avenue
Presented by the Consulate General of Canada in Partnership with the NW Environmental Business Council (NEBC). RE: Innovation in Energy Research & Development with a Focus on Successful Partnerships & Cross-Border Collaborations. FREE EVENT. For info: Nicole Brand, Consulate General of Canada, 206/ 770-4068 or email: Nicole.Brand-Cousy@international.gc.ca or website: www.123signup.com/calendar?Org=CGOC

November 28-30 **OR**
Oregon Water Resources Congress Annual Meeting, Hood River, Hood River Inn. For info: OWRC, 503/ 363-0121, email: owrc_info@yahoo.com, or website: www.owrc.org

November 29-30 **NM**
52nd Annual New Mexico Water Conference, "Beyond the Year of Water: Living Within Our Water Limitations," Santa Fe, La Fonda Hotel. Sponsored by the New Mexico Water Resources Research Institute. For info: Peggy Risner, NMWRRI, 505/ 646-4337, website: http://wrri.nmsu.edu/conf/conf07/conf.html

November 29-30 **NJ**
Natural Resources Damages Litigation Conference, Newark. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

November 29-30 **OR**
Oregon Water Resources Commission Meeting, TBA. For info: Cindy Smith, OWRD, 503/ 986-0876, or website: www.wrd.state.or.us/OWRD/COMMIS/calendar.shtml

November 29-30 **AK**
Permitting Strategies in Alaska, Anchorage. For info: The Seminar Group, 800/ 574-4852, email: info@theseminargroup.net, or website: www.theseminargroup.net

November 29-30 **FL**
Florida Wetlands Conference, Tampa, Marriot Waterside. For info: CLE International, 800-873-7130 or website: www.cle.com

November 29-30 **CO**
Land Use Law Conference, Denver. For info: CLE International, 800-873-7130 or website: www.cle.com

November 29-30 **CA**
14th Annual California Aquatic Bioassessment Workgroup (CABW) Meeting, Davis, UC Davis, 8am-4pm. For info: Jim Harrington, California Dept. of Fish & Game, 916/ 358-2862 or email: jharring@ospr.dfg.ca.gov

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