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RESTORING THE SAN JOAQUIN RIVER

RESTORATION PROGRAM UPDATE & STATUS REPORT

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BACKGROUND

The Settlement

In 1988, a coalition of environmental groups, led by the Natural Resources Defense Council (NRDC), filed a lawsuit challenging the renewal of the long-term water service contracts between the United States and the Central Valley Project Friant Division contractors. The Central Valley Project (CVP) is a US Bureau of Reclamation (Reclamation) water project in California serving the Central and San Joaquin Valleys.

After more than 18 years of litigation of this lawsuit, known as *NRDC, et al., v. Kirk Rodgers, et al.*, a Stipulation of Settlement (Settlement) was reached. On September 13, 2006, the Settling Parties reached agreement on the terms and conditions of the Settlement, which was subsequently approved by the Court on October 23, 2006. The "Settling Parties" include the NRDC, Friant Water Users Authority (FWUA), and the US Departments of the Interior and Commerce. (See Dunning, TWR #33)

The Settlement's two primary goals are:

Restoration: To restore and maintain fish populations in "good condition" in the main stem of the San Joaquin River below Friant Dam to the confluence of the Merced River, including naturally reproducing and self-sustaining populations of salmon and other fish.

Water Management: To reduce or avoid adverse water supply impacts to all of the Friant Division long-term contractors that may result from the Interim Flows and Restoration Flows provided for in the Settlement.

SETTLEMENT IMPLEMENTATION

Implementing Agencies

The Settlement states that the US Secretary of the Interior (Secretary) will implement the terms and conditions of the Settlement. Additionally, the Settling Parties agreed that implementation of the Settlement will also require participation of the State of California (State). Therefore, concurrent with the execution of the Settlement, the Settling Parties entered into a Memorandum of Understanding with the State (State MOU) by and through the State's Natural Resources Agency, Department of Water Resources (DWR), Department

San Joaquin River Restoration

Restoration Area

Implementation Plans

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of Fish and Game (DFG), and the California Environmental Protection Agency (Cal EPA) regarding the State's role in the implementation of the Settlement.

The San Joaquin River Restoration Program (SJRRP or Program) is the program established to implement the Settlement. The "Implementing Agencies" responsible for the management of the Program include the Bureau of Reclamation (Reclamation), the US Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS) as well as the State's DWR and DFG.

San Joaquin River Restoration Area

The geographic area for the SJRRP includes California's Central Valley from the Sacramento-San Joaquin Delta (Delta) to the base of the Tehachapi Mountains south of Bakersfield. This area includes the San Joaquin River (SJR) from Friant Dam to the Delta, the Friant Division of CVP, other water service areas potentially affected by changes in water deliveries or restoration of SJR, and tributaries to SJR downstream of the river restoration area. The river restoration area is 153 miles long and reaches from Friant Dam to the confluence of the Merced River. This stretch of river crosses the counties of Fresno, Madera, Merced, and Stanislaus. For the purposes of the Program, the river has been divided into five primary reaches (see Map). The Program will also evaluate the Eastside and Mariposa Bypasses for carrying restoration flows.

Reaches of the San Joaquin River under evaluation include:

- Reach 1 – Friant Dam to Gravelly Ford
- Reach 2 – Gravelly Ford to Mendota Dam
- Reach 3 – Mendota Dam to Sack Dam
- Reach 4 – Sack Dam to the confluence of Bear Creek and the Eastside Bypass
- Reach 5 – Eastside Bypass/Bear Creek confluence to the Merced River confluence

Authorization & Funding

Federal participation in the SJRRP is currently authorized under the San Joaquin River Restoration Settlement Act (SJRRS Act), part of the Omnibus Public Land Management Act of 2009, now Public Law 111-11. The SJRRS Act, signed in March 2009, authorizes and directs the Secretary to fully implement the Settlement.

Federal funding obligated for the SJRRP in Fiscal Year 2009 for the planning and environmental compliance activities under the Central Valley Project Improvement Act and SJRRS Act was approximately $13.3 million. For the current Fiscal Year 2010, approximately $23 million will be available.

State and Third Party Involvement

The State has committed its support of the Settlement by entering into the State MOU with the Settling Parties that outlines a collaborative role for the State in planning, design, funding and implementation of the actions set forth in the Settlement. In the November 2006 election, State propositions 84 and 1E were passed by the California voters and should provide about $200 million of State bond funds for projects that will directly contribute to the restoration efforts.

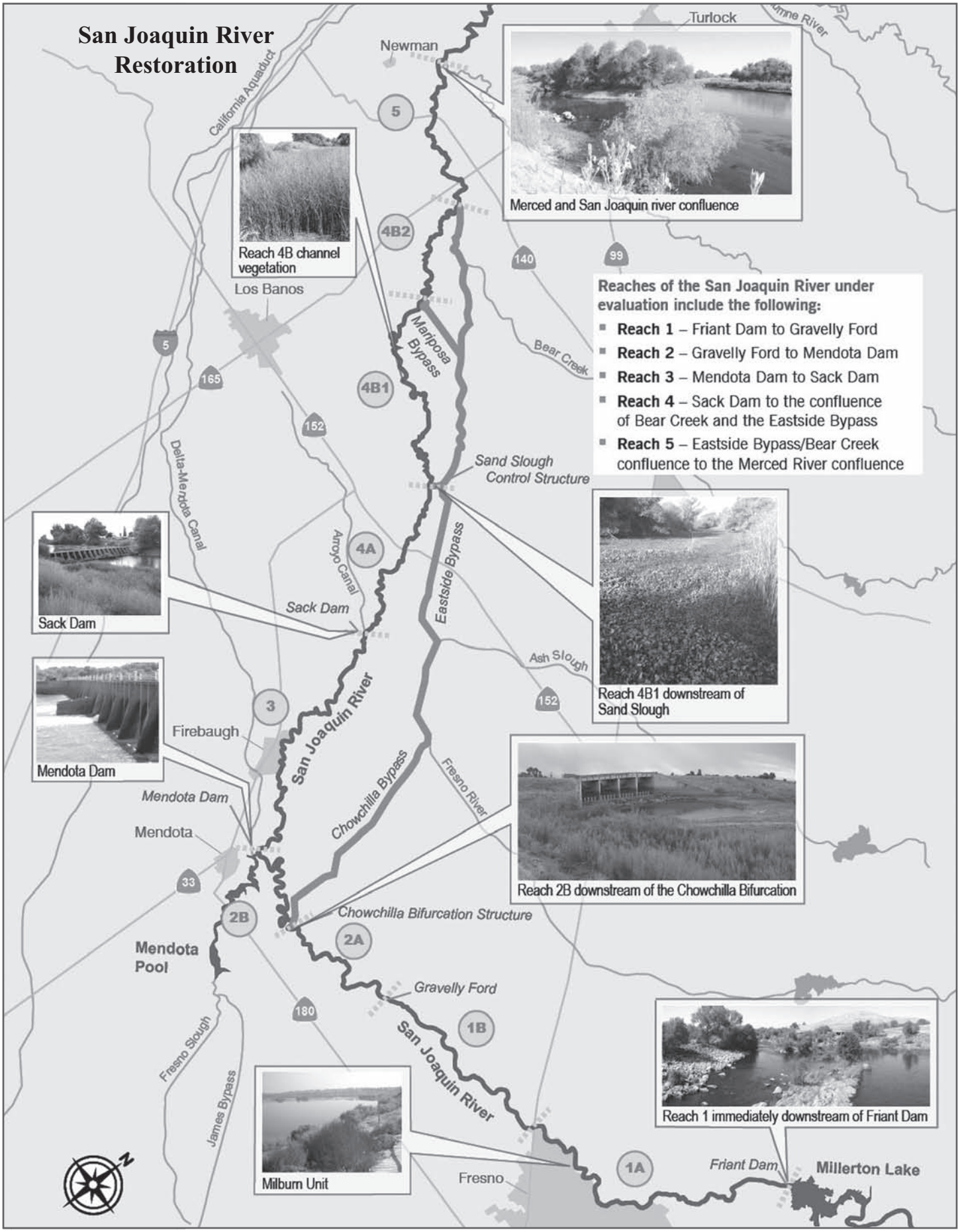
The Settlement included clear commitments that the Settling Parties and downstream water and land interests (referred to as Third Parties) would be involved in the development of implementation plans by the Secretary. Court approval of the Settlement initiated a series of actions that resulted in a program approach structured to provide for effective oversight, management and transparency of the SJRRP. Key among these actions was the development of MOUs with the State of California and Third Party Stakeholders.

Settlement MOU's, briefly described:

- State MOU – Signed at the same time as the Settlement, the State MOU recognizes that the State, through DFG, DWR, the Natural Resources Agency, and Cal EPA, will play a major, collaborative role in the planning, design, funding, and implementation of the actions on SJR called for by the Settlement.
- Third Party Stakeholders MOU – Signed in February 2007, this MOU recognizes that the Third Parties will play a collaborative role in the planning, design, implementation, and potential adaptation of the actions on SJR called for by the Settlement and in the implementing legislation.

  Third Party MOU signators include:

  - Entities along the San Joaquin River, including: San Joaquin River Exchange Contractors Water Authority; Central California Irrigation District; Firebaugh Canal Water District; San Luis Canal Company; Columbia Canal Company; San Joaquin River Resource Management Coalition
  - Downstream Tributary Water Users, including: Merced Irrigation District; Turlock Irrigation District; Modesto Irrigation District; Oakdale Irrigation District; South San Joaquin Irrigation District; San Joaquin Tributaries Association
  - Other CVP Water Users, including: Westlands Water District; San Luis & Delta-Mendota Water Authority



San Joaquin River Restoration

Restoration Administrator & Technical Advisory Committee

The Settlement specified the roles and responsibilities for a Restoration Administrator who is supported by a Technical Advisory Committee. The SJRRP management structure integrates these resources to obtain timely input on technical issues related to the Restoration Goal.

Roles & Responsibilities include:

Restoration Administrator – The Restoration Administrator, selected jointly by the NRDC and FWUA, provides recommendations to the Secretary regarding specific elements of the Settlement and certain issues related to the SJRRP's Restoration Goal and consults with the Technical Advisory Committee. Restoration Administrator: Rod Meade

Technical Advisors

Technical Advisory Committee – The Technical Advisory Committee (TAC) features six voting members selected by and representing FWUA and NRDC. Voting members of the TAC assist and advise the Restoration Administrator regarding areas outlined in the Settlement, have relevant technical or scientific background or expertise in fields related to river restoration or fishery restoration, and serve for three years. Two non-voting members representing the State agencies serve as liaisons to the Restoration Administrator and TAC. The Federal agencies have three liaisons to the TAC to ensure coordination and information-sharing with the Implementing Agencies.

TAC includes:

Voting Members: Monty Schmitt (Senior Water Resources Scientist, NRDC); Bill Luce (Consulting Resources Manager, FWUA); Scott McBain (McBain and Trush); Chuck Hanson (Hanson Environmental); Peter Moyle (University of California, Davis); Ed Solbos (Independent Consultant)

Non-voting Members: Paula Landis (DWR); Dean Marston (DFG)

Federal Liaisons: Jason Phillips (Reclamation); Rhonda Reed (NMFS); Robert Clarke (USFWS)

ENVIRONMENTAL IMPACT STATEMENT/ENVIRONMENTAL IMPACT

DRAFT PROGRAM REPORT TO BE RELEASED SOON

Upcoming Comment Period

With the acceptance of the Settlement by the Court in October 2006, work immediately began on the environmental documentation needed to implement the SJRRP consistent with the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA). As a result, the Draft Program Environmental Impact Statement/Environmental Impact Report (Draft PEIS/R) is anticipated to be released towards the end of June 2010. Once released, the draft document will be available for a 60-day public comment period and public hearings will be held in various locations within the program area.

The Draft PEIS/R evaluates the direct, indirect, and cumulative effects of implementing the Settlement consistent with the SJRRS Act. The document presents the program-level or "first tier" of analysis for a reasonable range of alternatives by considering the broad environmental effects of the SJRRP. The alternatives considered include actions that will be implemented to work towards achieving the Settlement's Restoration and Water Management goals. The Draft PEIS/R analyzes most activities that would be implemented at a general or program level of detail. These activities would require future project-specific environmental compliance documentation.

SPECIFIC NEAR-TERM SETTLEMENT ACTIONS

The Parties acknowledge that to achieve the Restoration Goal will require a combination of channel and structural improvements along SJR below Friant Dam, and releases of additional water from Friant Dam to the confluence of the Merced River for restoration purposes. The near-term channel and structural improvements are outlined in Paragraph 11(a) of the Settlement. The near-term release of additional water from Friant Dam is outlined in Paragraph 15 of the Settlement.

Channel Improvements

Settlement Paragraph 11(a), Phase 1 Improvements

Mendota pool bypass & reach 2b channel improvements

- Creation of bypass channel around Mendota Pool to ensure conveyance of at least 4,500 **c**ubic **f**eet per **s**econd (cfs) from Reach 2B to Reach 3. (Requires completion of a structure capable of directing flow down the bypass and allowing deliveries of SJR water into Mendota Pool when necessary.)
- Channel capacity modifications (incorporating new floodplain and riparian habitat) to ensure conveyance of at least 4,500 cfs in reach 2B between Chowchilla Bifurcation Structure and new Mendota Pool bypass channel.

San Joaquin River Restoration

Structural Improvements

Fish Passage

Seasonal Barriers

Interim Flows

Interim Flow Restoration

Status: Combining these actions because of their related functions, Reclamation and DWR began the planning, NEPA and CEQA environmental documentation, and appraisal-level design for this project with public scoping meetings held in July 2009. An Initial Options Technical Memorandum was released in April 2010, along with a Technical Memorandum on Existing Environmental Conditions: Data Needs and Survey Approach. Work will continue on this project with a target release date of mid 2011 for a Draft EIS/R and the final document in early 2012 followed shortly after with the Record of Decision and Notice of Determination. Construction is estimated to start in 2013 and be completed in 2015.

Reach 4B, eastside bypass & mariposa bypass low flow channel, structural improvements

- Modifications in SJR channel capacity if necessary to ensure 475 cfs through Reach 4B
- Modifications at Reach 4B headgate on the SJR channel for fish passage and to enable flow routing of between 500 cfs and 4,500 cfs into Reach 4B
- Sand Slough modifications to ensure fish passage
- Modifications to structures in the Eastside and Mariposa Bypass channels to the extent needed to provide anadromous passage on an interim basis until completion of Phase 2 improvements
- Modifications in the Eastside and Mariposa Bypass channels to establish a suitable low flow channel (if Secretary in consultation with Restoration Administrator determines necessary)

Status: Work for these combined projects began with Reclamation and DWR beginning the planning, NEPA and CEQA environmental documentation and appraisal-level design, and public scoping meetings in September 2009. The Draft EIS/R is scheduled for mid 2011 and the Final EIS/R in early 2012 followed by the Record of Decision and Notice of Determination in mid 2012. Construction is anticipated to start in 2013 and be completed in 2015.

Arroyo canal fish screen & sack dam fish passage improvements

- Screening of Arroyo Canal water diversion upstream of Sack Dam to prevent entrainment of anadromous fish
- Modifications at Sack Dam for fish passage

Status: Reclamation and DWR began the planning, NEPA and CEQA environmental documentation, and appraisal-level design for this project in 2009. A Draft Environmental Assessment/Initial Study (EA/IS) is anticipated in late 2010, with a Final EA/IS in mid 2011. Construction is anticipated to start in 2012 and be completed in 2014. Reclamation is currently working with the Henry Miller Reclamation District as the lead CEQA agency.

Salt & mud slough seasonal barriers

- Modifications to enable deployment of seasonal barriers to prevent adult anadromous fish from entering false migration pathway in area of Salt and Mud Sloughs

Status: Reclamation anticipates beginning planning, environmental documentation and appraisal-level design for this project in late 2010. Construction is estimated to start and be completed in 2013.

Interim flows

Paragraph 15 of the Settlement calls for a program of Interim Flows that includes releases of additional water from Friant Dam to start no later than October 1, 2009, and continue until full Restoration Flows begin. The Restoration Administrator, in consultation with the Technical Advisory Committee, the Secretary of the Interior, and other appropriate Federal, State and local agencies, is tasked to develop and recommend to the Secretary implementation of an Interim Flows program to collect relevant data concerning flows, temperatures, fish needs, seepage losses, recirculation, recapture and reuse.

San Joaquin River Restoration

Interim flows (continued)

Status: As called for in the Settlement, Interim Flow releases from Friant Dam into SJR began on October 1, 2009. An EA/IS was completed to meet the NEPA and CEQA requirements for the first year of Interim Flows. A supplemental EA/IS is being prepared to continue the second year until the Program EIS/R is completed. The flow schedule is closely coordinated with the Restoration Administrator and the release rate varies throughout the year to assist with particular data needs and mimic various natural conditions that may be encountered once flows are permanently reestablished to better understand the best solutions that will assist with the reintroduction of spring run Chinook salmon scheduled to happen no later than December 2012. The release schedules also vary from year to year depending on the restoration type year.

Impact on Groundwater

The experimental Interim Flows will continue for several years until full Restoration Flows begin. The flows are being monitored very closely and a huge amount of coordination is taking place with the Implementing Agencies and landowners near the river that could be affected by potential seepage of groundwater from the Interim Flows. The SJRRP has placed approximately 90 groundwater monitoring wells in strategic locations to track the movement of the groundwater and is working with specific landowners to determine safe groundwater levels for crop root zones and making sure the groundwater is staying below those levels. Reclamation works to make critical data available on the Interim Flows online at www.restoresjr.net. This website includes hourly and daily flow data, weekly groundwater data, and periodic water quality data.

MEETING THE WATER MANAGEMENT GOAL

Recovered Water

The Settlement states that a plan for recirculation, recapture, reuse, exchange or transfer of the Interim Flows and Restoration Flows will be developed to reduce or avoid impacts to water deliveries to all Friant Division long-term contractors. It also calls for the development of a Recovered Water Account to make water available to Friant Division long-term contractors who provide water to meet Interim Flows or Restoration Flows. These actions are part of the Water Management Goal that SJRRP staff is working aggressively to meet.

Recapture & Recirculation

The Water Management Work Group is currently examining opportunities for recapturing Interim and Restoration Flows. The water recapture effort is conceptually looking at the volumes potentially available at critical points along SJR below the Merced River confluence and through the Delta, the timing of that availability, and issues and opportunities associated with various recapture scenarios. Volume, timing, and associated issues will have a significant influence on how water will be recirculated back to the Friant Division long-term contractors and made available for reuse. The plans for recirculation, Recovered Water Account, and Restoration Flow Guidelines will be incorporated into Program-level alternatives for evaluation in the Draft and Final PEIS/R.

Reverse Flow Feasibility

Progress continues on the feasibility studies for two additional projects specifically called out in Part III of the SJRRS Act to help achieve the Water Management Goal: 1) the Friant-Kern and Madera Canals Capacity Correction Feasibility Study to look at restoring the capacity of the canals to their previous design and construction; and 2) the Friant-Kern Canal Reverse Flow Pumpback Feasibility Study to look at potentially constructing three pumping plants along the Friant-Kern Canal in order to lift water upstream in the canal from the intertie with the Cross Valley Canal (CVC). This reverse-flow operation would reach approximately 40 miles, gaining approximately 20 feet in elevation, to reach upstream water users. This project would facilitate transporting Central Valley Project water via the California Aqueduct and Delta-Mendota Canal, directly from the Banks and Jones Pumping Plants in the Delta, to and through the CVC in Kern County.

SALMON REINTRODUCTION PLAN

USFWS Application

Paragraph 14 of the Settlement requires the reintroduction of spring run and fall run Chinook salmon to SJR between Friant Dam and the confluence of the Merced River by December 31, 2012. USFWS is working diligently to complete a permit application for the reintroduction of spring-run Chinook salmon by September 30, 2010. Consistent with the Settlement, NMFS shall issue a decision on the permit application no later than April 30, 2012. [Information on this process is available at http://swr.nmfs.noaa.gov/sjrrestorationprogram/salmonreintroduction.htm]

San Joaquin River Restoration

2026 Evaluation

Stephen Lee, Reclamation Hydrologist, Checks Monitoring Well Along the San Joaquin

PUBLIC INVOLVEMENT

From the inception of the SJRRP, there has been a tremendous emphasis on creating an open and transparent process for interested parties and the public. The continued public involvement includes Technical Feedback Group meetings for three different areas of the SJRRP: 1) Water Management; 2) Fisheries Management; and 3) the Restoration Goal. Landowner meetings are held, Field Advisories are posted, Draft Technical Memoranda are made available as early as possible on the web, a quarterly newsletter is mailed to interested persons, and daily updates are made to the website. Coordination with landowners and other organizations and groups takes place on a daily basis. An undertaking this extensive can only be successful by working with everyone involved or affected by the river restoration, and the Implementing Agencies will continue to work within an open and transparent process.

CONCLUSION

The Settlement recognizes the long term nature of this effort with a date of 2026 for the Settling Parties to evaluate the progress and process for the restoration. There are no shortcuts, no lack of controversy, and no easy solutions, and the Implementing Agencies are committed to successfully accomplishing the task at hand for the many years of work that lay ahead.

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Stormwater Compliance

STORMWATER PERMIT COMPLIANCE

NEW WASHINGTON STATE INDUSTRIAL PERMIT POSES CHALLEMGES

by Neil Alongi, Maul Foster & Alongi, Inc. (Vancouver, Washington)

BACKGROUND

New Challenges & Opportunities

Washington State's new Industrial Stormwater General Permit (ISGP) became effective January 1, 2010. The basic requirements of the ISGP were discussed in the May 2010 issue of The Water Report (see Kray, TWR #75). The purpose of this article is to identify some of the challenges and opportunities presented by the ISGP requirements with the objective of providing a perspective as to how a permittee might reach compliance. Permit compliance is an important goal for the environment as well as for limiting the permittee's exposure to regulatory and third-party challenges.

PERMIT REQUIREMENTS FOR BMPS

SOME QUESTIONS PERSIST

Mandatory BMPs

The requirements for a Stormwater Pollution Prevention Plan (SWPPP) under the new ISGP introduced a mandatory Best Management Practices (BMPs) approach. This new approach defines a number of mandatory operational, structural, and treatment BMPs that must be implemented unless the permittee can show that they are unnecessary, they are infeasible, or there are other, equally effective BMPs (that the permittee must justify). The updated SWPPP and the mandatory BMPs are required to be in place by July 1, 2010.

Treatment BMPs

One part of the mandatory BMPs requirement that deserves additional discussion are the Treatment BMPs covered in Section S3.B.4.b.iii of the permit. The ISGP would seem to imply that permit holders need to implement some level of Treatment BMPs by July 31, 2010 from the Western or Eastern Washington stormwater management manuals available from the State's Department of Ecology (see: www.ecy.wa.gov/pubs.shtm). These manuals contain a process to determine whether "Basic" or "Enhanced" treatment is required. They also address whether oil control and phosphorus removal are required. However, the Western Washington Stormwater Manual Volume V ("Runoff Treatment BMPs") limits the requirement to implement Treatment BMPs to new developments or redevelopment projects (Section 1.2). Volume IV, Source Control BMPs, clarifies in Section 1.5 that: "treatment BMPs must be implemented if 'action' values (i.e., benchmarks) of certain pollutants are exceeded despite the application of operational and source control measures." One interpretation of this rather confusing set of statements is that, if benchmarks are being met, the permittee does not have to implement further Treatment BMPs. However, the permit does specifically mention the need to employ BMPs to control oil and grease (these BMPs qualify as Treatment BMPs).

Benchmark Exceedances

In cases where a permittee has benchmark exceedances, it appears to be a requirement of the permit and the manuals that Treatment BMPs be implemented. The typical Western Washington Basic Treatment menu includes passive treatment such as biofiltration swales, wetponds, and wetland treatment (see *Stormwater Management Manual for Western Washington*, Volume V Runoff Treatment BMPs, Section 3.5 *Basic Treatment Menu*, Washington State Department of Ecology, 2005). It's likely that many industrial sites covered by the ISGP that have had benchmark exceedances do not currently use any of the Basic Treatment methods at their facilities.

Infiltration Option

There are a couple of alternatives to providing the Treatment BMPs; however, they require that certain specific conditions be met and documented. The first option is infiltration, but this is available only if the soil meets a specific set of nine soil suitability criteria (*Id.*, Volume III *Hydrologic Analysis and Flow Control Design/BMPs*, Section 3.3.7 *Site Suitability Criteria*). Otherwise, a Basic Treatment method may still be required ahead of infiltration. Soil infiltration characteristics may eliminate this option outright. The second option is to propose an alternative to the BMP treatment menu listed in the manuals — however, the alternative must meet a five-part "Demonstrably Equivalent" test described in the ISGP (see ISGP, Appendix 2, Definitions, "Demonstrably Equivalent"). Each option would require a significant amount of work to demonstrate that the option is appropriate.

Biofiltration Swales

The necessary space to install biofiltration swales (one of the less costly BMP Treatment methods listed in the manual's menu) is often a challenge for existing industrial facilities. This tends to force permittees to implement more costly advanced treatment approaches that require less space or that can be installed

Stormwater Compliance

Costs-Benefits

underground. Permit holders should select a BMP from the Treatment BMP menu, using a cost-benefit analysis.

Pertinent cost-benefit analysis categories include:

Capital cost: equipment, materials and installation of the Treatment BMP

Operating cost: the cost of the ongoing operation of the Treatment BMP

Land cost: the value of the land on which the stormwater facility is located

Impacts to ongoing operations: inefficiencies caused by loss of available operational areas

PERMIT COMPLIANCE

DOES THE ISGP ALLOW TWO PATHWAYS TO COMPLIANCE?

Benchmarks & Compliance

To demonstrate compliance with the ISGP, the permit holder must meet all of the administrative requirements of the ISGP and meet benchmarks most of the time. Occasional benchmark exceedances are still considered in compliance with the ISGP if they occur only once per year and as long as the required Level 1 response is completed. Even two benchmark exceedances for a single parameter per year would not be a permit compliance issue if the permittee followed the requirements of installing Structural Source Control BMPs within the required schedule (see ISGP, Appendix 2, Definitions, Structural Source Control BMPs). This approach to permit compliance is fairly straightforward and intuitive.

A second approach to ISGP compliance that seems to be provided for in Section S10, Compliance with Standards, is more complicated. This section describes several conditions that are necessary to demonstrate compliance with Washington State Water Quality Standards. The demonstration is based on presumptive compliance with these standards as long as certain conditions are met.

Presumptive Compliance

Presumptive compliance conditions include:

- Fully complying with all ISGP conditions, including planning, sampling, monitoring, reporting and recordkeeping
- Fully implementing (applicable) BMPs contained in the technical manuals, or demonstrably equivalent practices
- Applying All Known and Reasonable Methods of Prevention, Control, and Treatment ("AKART"—which is explained in Section S10.C) and consists of implementing an adequately prepared SWPPP and meeting the first two bullets in this list

Section S10 states that, if you do all of the above, you are in compliance with water quality standards, which is one of the basic requirements of permit compliance. The other basic requirement is that you have done everything that is required by the ISGP. If you have had repeated benchmark exceedances, and you have complied with all of the Corrective Actions process requirements, including the installation of Treatment BMPs that meet AKART, then you have demonstrated permit compliance regardless of whether you have consistently attained the ISGP benchmarks. This may be a permit "off-ramp" that could protect the permittee from further jeopardy if benchmark exceedances continue. This potential "off-ramp" is likely not a cheap one to get to, but the permittee needs to understand what happens if it is reached.

CHANGES TO THE ADAPTIVE MANAGEMENT APPROACH

Corrective Actions Timeframe

The term "adaptive management" was used in the previous ISGP to describe the iterative process for a permittee to reach compliance. Before determining the need for any additional BMPs, the previous ISGP provided for an opportunity to make changes at the site by implementing BMPs and then evaluating if those BMPs resulted in compliance. In contrast, the time in which to respond to a Level Two or Three Corrective Action has been defined in the new ISGP to be no later than September 30 of the year following the trigger of the Action Level. This response time may be about the same as the old permit (12 months); however, it could be shorter if the trigger is late in the fourth quarter, or it could be longer if the trigger is earlier in the year. Nonetheless, the timeframe for a permittee to plan for and implement the corrective actions remains narrow. The new ISGP does not allow much time to test the actions and adaptively manage your response.

Level Three Trigger

The new ISGP language has clarified the expected responses and eliminated the need for duplicative reporting each time another corrective action is triggered. The old permit required a Level Three Response Treatment BMP if any four samples exceeded the benchmark anytime during the five-year permit period for a specific contaminant. This made it very easy to trigger a Level Three Response. The new ISGP reduces the Level Three trigger to three samples that exceed the benchmark, allowing the permittee to reset the tracking of benchmark exceedances each year — which lessens the chance to trigger a corrective action requiring treatment.

Stormwater Compliance

Sampling Period Expanded

Averaging Samples

COMPLIANCE OPPORTUNITIES IN THE SAMPLING PROGRAM

The new ISGP has defined the acceptable period for sampling as the first 12 hours of stormwater discharge events as opposed to the one-hour requirement of the old permit. This allows the permittee to determine when best to take a representative sample within the allowed period. This could be especially important during the "first fall storm event," which may have the greatest exposure to contaminants that have accumulated during the dry summer season.

It is important to make sure that the monitoring point(s) and sample collection techniques are set up to achieve the best chance of getting a representative sample. All too frequently, the facility's drainage system is not conducive to collecting a sample representative of stormwater quality. For example, taking samples from the bottom of catch basins or manholes can lead to the entrainment of sediments that may be rich in contaminants. The cost of setting up a good sampling point is far less than the cost of nearly any corrective action response.

The ability to take additional samples during the quarter and then average the results may be an advantage under certain circumstances. If an initial benchmark exceedance is not too high and the problem causing the exceedance is known and corrected, then the computed average of the sample exceeding the benchmark and several subsequent lower sample results may allow the permittee to report a concentration lower than the benchmark. There is no formula for this determination, but one can easily calculate whether additional improved sample results will make enough of a difference to make it worthwhile.

CONCLUSION

Permit compliance in the current environment is driven as much by the environmental groups as it is by the permitting agency. There is a need for a comprehensive compliance strategy that addresses the ISGP and considers the opportunities mentioned in this article to avoid determinations by Ecology or other groups that the permit holder is out of compliance.

For Additional Information
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Climate Change Response

Adaptation for Water Suppliers

Fundamental Considerations

Geographic Diversity

Eye on Earth Portal

CLIMATE CHANGE IMPACTS ON WATER

WATER CLIMATE FORUM BRINGS INTERNATIONAL INSIGHTS TO US ADAPTATION STRATEGIES

ADAPTATION PRINCIPLES FINALIZED

by Erica Brown, Director of Regulatory Affairs and Scientific Program Development
Association of Metropolitan Water Agencies (Washington, DC)

INTRODUCTION

PUSHING THE USAGENDA

Last January, national and international leaders in water management and climate change embarked on an ambitious campaign to push water adaptation issues onto the American policy agenda. To help insure the broadest possible perspectives on these issues, they used input from an international forum to help develop a set of climate adaptation principles for US water utilities.

The "Climate Change Impacts on Water: An International Adaptation Forum" (Forum), held in Washington, DC, January 28-29, brought together more than 200 water utility executives, water policy makers and climate scientists from across the country and around the world. The meeting organizers — Association of Metropolitan Water Agencies (AMWA), the Water Research Foundation, the International Water Federation, the American Water Works Association and the Water Utility Climate Alliance — hoped to raise the profile of the critical issue of climate change adaptation, particularly as it relates to water suppliers.

"American leadership on water adaptation issues is at the ground level, and we're tapping the international community to raise the profile and importance of adaptation among our nation's political leadership," said AMWA Executive Director Diane VanDe Hei. "Climate change may be commonly recognized today, but no one is talking about its affects on water supply, despite the broad consequences on everything from our quality of life to our economy."

The Forum was also designed to help water utilities and resource managers identify and promote successful responses to the evident and growing climate-related challenges to water security and sustainability. American cities from Atlanta to Las Vegas are already dealing with severe water shortages, while other cities struggle with rising sea levels or catastrophic water events like hurricanes or excessive stormwater runoff. The Forum brought speakers from around the globe to share their experiences in confronting these climate adaptation challenges.

In advance of the Forum, the organizers developed a draft set of adaptation principles for the water sector. The document represented a distillation of the fundamental considerations that water utilities must address to effectively plan for climate change and raise awareness among policy makers and leaders of the needs of the water sector in its climate change planning and response. Presentations at the forum were used to inform the final version of the principles, which was introduced in March.

THE FORUM

Since the US includes geographic diversity perhaps unmatched anywhere on earth, the Forum featured speakers from a variety of climates. Speakers came from hot and dry climates like Australia and Jordan, mountainous snowpack-dominated areas like Switzerland and Canada, and rain dominant and coastal areas like Singapore and The Netherlands. Each brought a different experience and expertise that has an application to US adaptation issues. The Forum also included research panel discussions, case studies and the sharing of best practices for water adaptation.

Jacqueline McGlade, Executive Director of the European Environment Agency (EEA) was the Forum's honorary chairwoman, and Jane Lubchenco, Administrator of the US National Atmospheric and Oceanic Administration (NOAA), was the keynote speaker. Those committing their support for the Forum as honorary committee members included the following key policymakers: Senator Jeff Bingaman (NM), Senator Ben Cardin (MD), Senator Sheldon Whitehouse (RI), Representative Lois Capps (CA), Representative Diana DeGette (CO), Representative Jay Inslee (WA), Representative Ed Markey (MA) and Representative Henry Waxman (CA).

During her presentation, Dr. McGlade, described the central role her agency plays in gathering and analyzing data on Europe's environment and presenting it in ways that are relevant to policymakers, academics, and the wider public. EEA's new "Eye on Earth" portal — a collaboration between the agency and Microsoft, provides fast, interactive, near real-time information on water and air quality across the continent (see: http://eyeonearth.cloudapp.net/). Now, she said, EEA is sharing its Eye on Earth experience with the Puget Sound Partnership.

Climate Change Response

National Climate Service

Dr. Lubchenco stated that climate change is a high priority for the Obama Administration. She highlighted numerous efforts. These include the Interagency Climate Change Adaptation Task Force, which she co-chairs along with Nancy Sutley of the Council on Environmental Quality and Shere Abbott of the Office of Science and Technology Policy (who also addressed the Forum). This Task Force coordinates interagency adaptation actions and develops strategies to enhance adaptive capacity of communities. Administrator Lubchenco also made the case for establishing a "National Climate Service" — saying that the nation needs such a service to provide authoritative, reliable, timely and relevant climate information and services to assist the nation's leaders and citizens in making climate-related decisions that enhance their lives and livelihoods.

CALL TO ACTION

Beyond its international sharing of climate change adaptation knowledge, the Forum was a call to action for greater engagement from local, regional and national governments. Although water management happens at the local and regional level, a national commitment to climate research and federal resources can give water managers tools for better forecasting and planning.

Uncertainty Element

"Water resource management is about planning for the worst, but our worst-case scenarios are getting more severe as climate change introduces a significant additional element of uncertainty," stated VanDe Hei. "How do you plan 30 years out when you don't know how bad it's going to get? We need federal support for funding, research and tools for water adaptation planning at the local level. Municipalities and regional water utilities are on the front lines of this charge, but we can't do it alone," she added. "We see that this is going to take government commitment, involvement, research and funding at all levels. We need the political leadership of this country to step up and support us, and the forum will help identify the path forward."

Sustainability

Speaking at the Forum's conclusion, AMWA President Jim McDaniel, Senior Assistant General Manager of Los Angeles Water and Power, said that the event "has shown us that — regardless of whether the worst-case scenarios of water shortage and rising sea levels come to fruition — we can view climate change as an opportunity to generate local, state, federal and private investments in planning, infrastructure renewal, research, and long-term sustainability and resilience."

The Forum provided insights on the power of collective leadership and the importance and benefits of global collaboration and cross-pollination among utility managers, scientists and policy makers, as well as other sectors, such as the energy sector. McDaniel expressed hope that "through our collective leadership we can shine a spotlight on the water/climate nexus and make a positive impact on climate change policy."

ADAPTATION PRINCIPLES

Forum organizers took ideas and comments from the presenters to enhance their statement of climate adaptation principles for water utilities. In addition, breakout sessions allowed all forum participants to consider and respond to the document.

FOLLOWING ARE THE FINAL PRINCIPLES, WITH EXPLANATORY INFORMATION FOR EACH:

Principles of Water Utility Adaptation to Climate Change

Water Sector Needs

The purpose of this document is to provide a brief overview of the fundamental considerations that must be addressed for water utilities to not only effectively plan to adapt to climate change but also to raise awareness among government and non-government policy makers and leaders of the needs of the water sector. The Intergovernmental Panel on Climate Change (IPCC) acknowledges the urgency of addressing adaptation by noting that "…water and its availability and quality will be the main pressure on, and issues for, societies and the environment under climate change." Water utilities will experience some of this pressure given that utilities provide a key service to the public for the benefit of society. Without reliable water service, a functioning society breaks down. Climate change presents many new challenges and exacerbates existing challenges to water utilities. Managing these challenges will require adaptation, attention and commitment of water utilities, as well as local, national and international governments. Additionally, climate change adaptation and mitigation options are increasingly interrelated. While this document focuses on adaptation, it is also critical that greenhouse gas mitigation and engagement in policy discussions on the energy/water nexus be part of a water utility's overall climate change strategy.

Overall Strategy

All must work together to develop policy frameworks that support adaptation at the local level and identify and pursue research that addresses the needs of the water sector. All must also ensure that critical information and tools gathered from research and observations are disseminated to water utility managers

Climate Change Response

and decision makers so that the long-term viability of water supply and society can be sustained while ecosystem function is maintained. And most importantly, all must support the implementation of integrated and well-developed climate adaptation options for water utilities.

Given the critical role of water in adapting to climate change, we believe that:

Impacts on Systems

1. Understanding the range of impacts and implications of climate change, developing appropriate adaptation options and effectively communicating these issues to its stakeholders are core responsibilities of a sustainable water utility.
   Utilities should be responsible for understanding the implications of climate change and its impact on the system or systems they manage. This analysis is the foundation for developing adaptation options and should include an assessment of simultaneous impacts on multiple sources, the impacts on hydrology and demand patterns, and assessments on water quality and ecosystem impacts that are related to water supply and or quality. Effective communication of impacts, implications and response strategies is essential for water utilities to achieve the public support needed to implement the required adaptation strategies.

Public Support

Coordinated Response

2. Adaptation takes place on the local level but regional and national initiatives are necessary in order to assess the impacts of, and maintain a coordinated response to, climate change.
   Water utilities are essential community entities that routinely interact with a number of other local government offices. Utilities and municipalities at large must recognize the importance of integrating utility planning for climate change with other local and state planning efforts. Relevant and implementable adaptation options must involve water utilities.

Research Needs

3. Engagement with the climate research community is essential in order to ensure that the water sector has access to the best available climate information.
   The water sector should engage with the research community to make certain it has access to the best available climate research. Engagement is pivotal to ensuring that the water sector can help shape research agendas that reflect the research needs of the water sector. Utilities should explore potential collaborations with federal programs, such as NOAA's RISA program in the United States, or with regional climate centers that exist at various universities. Access to extensive and continuous monitoring and observation data is critically important for understanding potential trends and for enabling dynamic system operations.

Uncertainty Amplified

4. Including climate change factors in decision support analyses is essential for planning and preparing for a range of potential impacts, from average to extreme in nature, and for managing the uncertainty of climate change.
   Traditionally, water utilities have relied upon a variety of decision analysis methods to inform long-term planning decisions in the context of uncertainty. To date, this planning has assumed a stationary climate. Climate change calls into question that assumption and amplifies the uncertainty utilities have always faced. While advancements in climate modeling and downscaling can help to project what the changes in climate will be, there will continue to be, at least in the short term, significant uncertainty associated with projecting the impacts of climate change. Therefore, utilities should include climate change factors in decision support analyses in order to enable the development and implementation of appropriate adaptation options.

System Resiliency & Flexibility

5. Important early steps for water utilities include identifying, preserving and developing adaptation options that enhance system resiliency, maintain management flexibility under a range of possible climate impacts, and consider the energy/water nexus.
   Instead of waiting for truly actionable science or preparing for one of many possible climate change impacts, water utilities should consider preserving and developing adaptation options that can be implemented in the future when more is known about the timing and/or magnitude of actual impacts. This process would include assessing/testing the adaptive capacity for operational adjustment of the existing system as well as re-engineering of water systems in tandem with making investments in infrastructure renewal and replacement. Utilities should also consider enhancing their existing data monitoring programs to include new information that would help identify triggers for when climate adaptation options should be implemented. Consideration of the energy/water nexus by water utilities is important when evaluating the range of climate adaptation options.

Organizational Collaboration

6. Collaboration among water utilities, other governmental agencies, non-governmental organizations and other sectors can generate synergies that enhance the adaptive capacity within a region.
   Water plays an important part in the development of a sustainable city. Integrating utility planning for climate change with other local and state planning efforts, including sustainable urban design, is a critical success factor for water system resiliency and reliability. Direct collaboration with other local utilities is important in order to evaluate the potential benefits of regionalization, efficiencies in some aspects of service delivery, reliability and stability.

Climate Change Response

7. Engagement with local/national/international governments is essential for transferring knowledge, establishing policy frameworks and climate services, and developing funding mechanisms that support adaptation at the local level and adapting regulatory frameworks.
Climate change is a global challenge that will necessitate international/national/local governments working cohesively in the development of strategies resulting in the greatest benefit. Innovation should be encouraged by increasing incentives, reducing barriers and investing in applied research and development.

CONCLUSION

The Statement of Principles spans the spectrum from engaging key users of climate data and tools (such as water utilities) at the start of research initiatives, to providing easy access of usable climate data to those users, to relating information in a way that can be implemented in decision-making. It also includes the development of federal legislation and the modification of regulatory frameworks to reflect the impact of climate change on species, habitat, water quality, and flow regimes.

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Forum website: All of the Forum presentation slides and audio files at the "Principles of Water Utility Adaptation to Climate Change" are available to the water community at: www.waterclimateforum.org.

Texas Water Litigation

TEXAS WATER LAW LITIGATION

by Brian L. Sledge and Jason T. Hill, Lloyd Gosselink Rochelle & Townsend, P.C. (Austin, TX)

Introduction

This article presents information concerning pending cases and decisions relating to surface and groundwater law in Texas. In addition, the article addresses areas likely to generate litigation in the future. The article is divided into groundwater and surface water issues and cases. Not all cases reported directly present issues of "water law," but do affect water rights, regulation of rights, enforcement of rights, or transactions.

GROUNDWATER RIGHTS, REGULATION, and PLANNING

Reservation of Rights

City of Del Rio v. Clayton Sam Colt Hamilton Trust, 269 S.W.3d 613 (Tex. App.—San Antonio 2008, pet. denied)

Deed Reservation

The City of Del Rio (City) purchased a small tract of land out of a larger tract owned by the Clayton Sam Colt Hamilton Trust (Trust). The deed to the City included a reservation clause that purported to reserve all water rights to the Trust from the small tract, yet under the conveyance the Trust had no right of access to the surface estate. Neither of the respective properties were located within any groundwater conservation district, thus groundwater withdrawals were limited only by the common law rule of capture. The City later drilled a groundwater well on its tract. The Trust in turn sued the City, asserting the deed reservation. The City defended by claiming that the reservation was ineffective because: (1) under the rule of capture, a landowner does not have a sufficient ownership interest in uncaptured groundwater to affect a reservation of the groundwater in place; and (2) with no legal access to the surface estate of the City's tract, the Trust would never be able to perfect the rights that had been reserved. The City argued that with no right of access to the surface overlying the *in situ* reserved groundwater, the Trust's groundwater rights in the City's tract would never vest, which meant that the reservation violated the Texas Constitution's prohibition against the establishment of perpetuities.

Rule of Capture

Absolute Ownership

The San Antonio Court of Appeals held that under the absolute ownership doctrine — what it called a corollary to the rule of capture — a landowner/grantor could sever groundwater from its surface estate and reserve the same to itself in a conveyance of all or a portion of its property to a purchaser/grantee. A grantee that takes a tract of land from the grantor under such conditions can be legally precluded

Texas Water Litigation

Hydrogeologic Access

Artesian Well

Surface Impoundment

Groundwater Character Lost

Comingled Water

Takings Claim

Application Deadline

from exploring for, drilling a well for, and producing groundwater from within the tract. Further, when a landowner has hydrogeologic access to groundwater from an adjacent property, the relinquishment of rights to enter a surface estate is not a relinquishment of a right to capture the water beneath the tract. Accordingly, the court held the Trust's reservation did not violate the constitutional rule against perpetuities. The City's petition to the Supreme Court of Texas for review was denied on September 23, 2009 and its motion for rehearing was denied on December 11, 2009.

Change in Type of Water: Groundwater Becomes Surface Water

Edwards Aquifer Authority v. Day, 274 S.W.3d 742 (Tex. App.—San Antonio 2008, pet. granted).

Burrell Day and Joel McDaniel owned real property located within the jurisdiction of the Edwards Aquifer Authority (Authority), a political subdivision of the State of Texas charged with managing the groundwater within a certain portion of the Edwards aquifer formation. The Day/McDaniel Tract contained a malfunctioning artesian groundwater well that discharged water from the Edwards Aquifer formation uncontrollably for many years. The predecessors in interest of the Day/McDaniel Tract had previously constructed a ditch to direct the discharges from the well into a surface water impoundment. The owners then pumped water from the impoundment to irrigate several hundred acres of land. Day and McDaniel filed an application with the Authority for a groundwater production permit based on their purported beneficial use during the Authority's historical use period (June 1, 1972 through May 31, 1993). The Authority granted the applicants a permit for only a fraction of their requested production volume. It denied the balance of their request on the basis that the water they used from the impoundment for irrigation had lost its character as groundwater — and therefore was beyond the jurisdiction of the Authority to regulate — once it entered a state watercourse. Day and McDaniel appealed the Authority's decision, asserting numerous constitutional claims, including a claim for takings, and a claim regarding substantive due process.

The San Antonio Court of Appeals held that water loses its character as groundwater and becomes instead surface water when it enters a watercourse — thus making it subject to the regulatory control of the Texas Commission on Environmental Quality (TCEQ) as State water — particularly in the absence of any control over the groundwater discharges or knowledge of the volumes discharged into the watercourse. Accordingly, the court held that once groundwater from an uncontrollable artesian well became comingled with State water in a watercourse during the Authority's historical use period, it lost its character as groundwater. Subsequent withdrawals from that watercourse could therefore not be used to show beneficial use of groundwater during the applicable review period. The court concluded that there was substantial evidence to support the Authority's decision to deny the portion of the applicants' request for the production permit that was based on withdrawals of water from the watercourse.

However, the court held that under its recent decision in *City of Del Rio*, a landowner has "some ownership rights in the groundwater beneath" his or her property. Thus, the court held, the applicants had a vested right to groundwater beneath their property that is entitled to constitutional protection against uncompensated takings. The court remanded the applicants' takings claim for further proceedings.

Overall, the court reversed the part of the trial court's judgment that overturned the Authority's Final Order and affirmed the Final Order; reversed the take-nothing judgment against the applicants on their unconstitutional takings claims; remanded the case to the trial court for consideration of the Authority's request for attorney's fees and the unconstitutional taking claims of Day and McDaniel; and affirmed the judgment in all other respects. Oral Argument was heard by the Texas Supreme Court on February 17, 2010. An opinion has not been released.

Deadline for Permitting Applications

Edwards Aquifer Authority. v. Chemical. Lime, Ltd., 291 S.W.3d 392 (Tex. 2008)

Chemical Lime, Ltd. owned Edwards Aquifer wells that had been used for industrial purposes during the historic period established by the EAAA. Chemical Lime, Ltd., for a variety of alleged reasons, filed its application for a historic use permit in January *after* the December 31, 1996 deadline set by the Authority (deadline was set at six months after the effective date of the EAAA). The Authority ultimately denied Chemical Lime's application because it was not filed by the deadline. Chemical Lime challenged this decision, and argued that the "effective date" of the legislation did not occur, at the earliest, until after the Court denied motions or the rehearing of a June 28, 1996, decision and therefore the application deadline should have been February 15, 1997. Alternately, Chemical Lime requested a declaration that it had substantially complied with the permit requirements. The Fourth Court of Appeals ruled that the actual effective date of the legislation was the date the mandate issued from the Texas Supreme Court some six months after the decision. The Authority and its agents petitioned for review by the Texas Supreme Court.

Texas Water Litigation

The Texas Supreme Court held that the EAAA became effective on the date of the court's decision in *Barshop v. Medina County Underground Water Conservation Dist*., 925 S.W.2d 618 (Tex. 1996), that the deadline was appropriately set six months after the Authority began operations, and that Chemical Lime, Ltd. did not substantially comply with the statute's permitting requirements. The court found that the Authority began operations the same day as the opinion in *Barshop*, and noted that it had interpreted the EAAA to require declarations of historical use to be filed six months after the Authority became effective. As a result, the Authority acted in accordance with its statutory delegation when it set the filing deadline for production permits approximately six months following the date the Authority became effective. The Authority did not have the discretion to provide extensions or consider late filings. In addition, the court concluded that the Texas Legislature intended the Authority's permit application filing deadline to be an essential component of the EAAA, and therefore a late filing could not substantially comply. Therefore, the applicant failed to substantially comply with the Authority's application process when it failed to submit its production permit application before the expiration of the filing deadline. Accordingly, the Authority properly denied a request for a production permit on the grounds that the application was not filed on time. The Supreme Court of Texas denied Chemical Lime, Ltd.'s motion for rehearing on September 25 2009.

Authority Discretion

Groundwater Permit Rules

Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1, 209 S.W.2d 146 (Tex. App.—El Paso 2006), rev'd in part, 263 S.W.3d 910 (Tex. 2008)

Three Permit Types

The Hudspeth County Underground Water Conservation District No. 1 (District) amended its rules regarding groundwater production permits in 2002 as part of the implementation of its groundwater management plan. The District created with the rules amendments three types of permits: validation, operating, and transfer.

Validation, Operating, & Transfer Permits

Validation permits were issued to landowners that demonstrated a beneficial use of groundwater during the District's historical and existing use period. Validation permit holders could withdraw set annual amounts of groundwater with limited restrictions. Persons that did not qualify for validation permits could obtain operating permits that allowed for more restricted withdrawals of groundwater based on aquifer levels. Finally, a transfer permit allowed the holder of any validation or operating permit to export produced groundwater to use outside of the District's regulatory boundaries. Transfer permits were not production permits themselves, but instead were linked to applicable validation or operating permits.

Historical Use

Guitar Holdings Co. (Guitar) applied to the District for validation permits for a series of existing and proposed groundwater wells on the company's ranch, as well as a transfer permit to export water produced from those wells to use outside of the District. Despite the fact that the application was made prior to the enactment of the new rules, the District applied the new rules to the Guitar application. Because Guitar was operated as a ranch during the District's historical and existing use period, it had little beneficial use to show in its application for validation permits. As a consequence, smaller landowners that produced water for agricultural irrigation during the historical use period were able to obtain validation permits authorizing greater amounts of, and less restricted, groundwater production than what Guitar qualified for under its application. When coupled with transfer permits, these large volume validation permit holders were better able to market groundwater to potential customers outside of the District.

Issues

Guitar filed administrative appeals of the District's decisions on its validation permit application to the trial court, and then to the El Paso Court of Appeals, where it contended that the District exceeded its authority in adopting new rules for transfer permits that discriminated against similarly-situated landowners and by adopting rules for production permits that limited production based on the historical use period. Guitar further complained that the new transfer rules violated its equal protection rights under the US and Texas Constitutions, and that the District violated Guitar's vested rights by considering its application under the new rules. The District filed a limited cross-appeal challenging the denial of attorney fees, expert fees, and administrative costs. Further, the District challenged the court's ruling for Guitar on its claim for a refund of administrative fees and the court's apportionment of partial court costs against the District.

District Authority

The Court of Appeals affirmed in part, reversed in part and remanded in part. The court reversed the trial court's judgments as to the denial of the District's attorney's fees, expert witness fees and other costs. The court also reversed the trial court as to the partial refund order for administrative costs due to lack of substantial evidence. However, the court found that the District "waived its complaint on the trial court's adjudication of costs." The court remanded to the trial court for further proceedings consistent with the opinion. The court affirmed the judgment in all other respects, as it disagreed with Guitar's contentions. The court found that the District did not exceed its statutory authority "when it adopted rules regarding production limitations that consider a landowner's prior use of groundwater for irrigation purposes during a specific historic use period" or when it set a historical use period. The court disagreed with Guitar's assertion that the District did not have authority to link transfer permits with production permits and the

Texas Water Litigation

Limiting Withdrawals

assertion that all transfer permit applications were new permit applications. The court held that the rule did not deprive Guitar of equal protection rights, as the District's "decision to adopt the pre-established groundwater production and withdrawal limitations" furthered "the District's legitimate goal of limiting annual groundwater withdrawals for all non-exempt wells as the primary means of protecting the average water elevation levels" of the aquifer. Finally, the court found that the District did not violate Guitar's vested rights in considering its application under the new rules as that consideration was consistent with the prevailing statute. Guitar appealed the El Paso Court's decision to the Supreme Court of Texas.

Guitar Holding Co. v. Hudspeth County Underground Water Conservation Dist. No. 1, 263 S.W.3d 910 (Tex. 2008)

Transfer Decision

The Supreme Court of Texas granted Guitar's petition for review, and considered the validity of the District's rules, its permitting decision on the Guitar application, and whether the transfer authorizations constituted new uses of groundwater. The court invalidated the District's transfer permit rules and transfer permits issued pursuant to those rules on the grounds that the rules provided certain production / transfer benefits to one class of landowner (historical irrigators with validation permits) while not extending the same production / transfer benefits to another class of landowner (ranchers with little beneficial use during the important historical use period), in violation of Tex. Water Code § 36.113(e). The court concluded that the coveted transfers themselves were a new "use" of groundwater that required equal treatment under § 36.113(e) for all similarly situated "new users."

Transfer Revisions

As a result of the Texas Supreme Court's decision, the District has signaled its intent to publish revised transfer rules. In addition, an *ad hoc* committee of parties involved on both sides of the litigation has been meeting since early summer 2009 on its own accord to consider how the rules should be revised to comply with the Guitar decision. The District has indicated that it will refrain from publishing rules it has developed until the committee of landowners has finalized its proposed rules revisions. The *ad hoc* committee is currently working on finalizing its suggestions for rule revisions and will provide those to the District Board of Directors during the summer of 2010 for the consideration by the Board.

The Supreme Court of Texas granted the District's subsequent motion for rehearing to clarify that the El Paso Court of Appeals' judgment was reversed only with respect to the validity of the District's transfer rules and related permits. The case was remanded to the trial court for further proceedings consistent with the opinion.

New Permit Application

Fort Stockton Holdings, L.P. v. Weatherby and the Middle Pecos Groundwater Conservation, No. 4:10-CV-00003-RAJ (W.D. Tex. dismissed Apr. 26, 2010)

Water Export

Fort Stockton Holdings, L.P. (Fort Stockton) filed an application with the Middle Pecos Groundwater Conservation District (District) seeking authority to produce approximately 47,000 acre-feet of groundwater annually for municipal and industrial purposes and to transport the water to potential customers outside of the District's boundaries. The District refused to declare the applications administratively complete because Fort Stockton failed to specifically describe the beneficial use to which the water would be put; did not provide a contract or agreement reflecting a beneficial use for the water; and failed to specify the place or purpose of use with sufficient specificity. Fort Stockton argued that the application was in fact administratively complete because it had described the 22 counties where the water might possibly be transported, and because it indicated that the water would be used for municipal and industrial uses (a recognized beneficial use in the Texas Water Code). Fort Stockton had attached a letter of intent for possible purchase of approximately 20% of the water sought to be permitted, although the letter of intent did not describe the quantity or rate of delivery except to indicate that it would be up to 10 million gallons per day.

Beneficial Use

Fort Stockton filed suit against the general manager and the District, claiming among other things that the District had deprived Fort Stockton of equal protection of the laws.

The District subsequently determined the application to be administratively complete, and Fort Stockton thereafter had the case voluntarily dismissed on April 26, 2010.

Fort Stockton Holdings, L.P. v. Ruben Falcon, No. CV47191 (142d Dist. Ct., Midland County, Tex., filed December 17, 2009)

Slander Lawsuit

In a related case, Fort Stockton and its President and General Partner Clayton Williams sued the mayor of the City of Fort Stockton, Texas (City) — a protesting party to the application before the District—for slander, based on comments made by the mayor about the adverse impacts created by Fort Stockton's proposed water transport efforts on the City's and other area landowner's water rights. The parties filed a joint motion to dismiss the suit on May 10, 2010. An order is pending.

Texas Water Litigation

Hydraulic Connection

Surface Water Impact

Ripeness & Jurisdiction

Existing Wells

Groundwater Access

Award for GW Valve

Groundwater/Surface Water Connection

Real-Edwards Conservation and Reclamation Dist. v. Save the Frio Foundation, Inc., 2010 WL 547045 (Tex. App.—San Antonio Feb. 17, 2010, no pet h.) (mem. op.)

This case arises from a permit application to the Real-Edwards Conservation and Reclamation District (District) for a groundwater production well located adjacent to a tributary to the Frio River. Save the Frio Foundation (Foundation) protested the application and claimed that the well was producing surface water, not groundwater, given its location near a stream feeding the Frio River. After a contested case hearing — during which the landowner presented evidence distinguishing the waters of the stream from the well water — the District issued the requested permit. On the same day of the District's decision on the application, and before the issuance of the permit, the Foundation filed a declaratory judgment action in state court. The petition requested that the trial court determine the rights, status, and legal relations of and between the Foundation, the District and the applicant, and further declare that the district exceeded its authority on several grounds, including issuing a permit authorizing the pumping of waters of the State (surface water), and issuing the permit without adequate testing and determinations. The District had voted to issue the requested permit with a special condition requiring further testing to ensure the absence of influence of the production on surface water, and suspending the permit in the event it becomes apparent that surface water is influenced by the production.

The District filed a plea to the jurisdiction asserting that the Foundation failed to exhaust the administrative remedies associated with the District's permit hearing process and that the Foundation's claims were not ripe, and therefore not justiciable. The court ultimately denied the plea and the District filed an interlocutory appeal to the San Antonio Court of Appeals. Oral argument was held in January 2010.

Ruling on the issue of the justiciability of the Foundation's claims, the San Antonio court noted that in the context of declaratory judgment actions affecting administrative determinations, ripeness depends on whether the claim is based on a pure question of law, or whether the resolution of the dispute requires the development of additional facts by the administrative agency. The court reasoned that, because most of the Foundation's claims were at their essence a challenge to the District's exercise of its regulatory discretion, the claims were not purely legal in nature. Since the resolution of the Foundation's dispute required the development of additional facts by the District, the San Antonio Court of Appeals held that the Foundation's claims were not ripe, and therefore their declaratory judgment action lacked justiciability. The court issued a Memorandum Opinion on February 17, 2010 reversing the trial court, instructing the court to dismiss the Foundation's claims, and remanding the case for consideration of the District's request for attorney's fees.

Condemnation and Groundwater Valuation

State v. 7KX Investments, No. 50,896 (Co. Ct. at Law No. 1, Bell County, Tex. Nov. 23, 2009)

In 2004, the Texas Department of Transportation offered approximately $500,000 to the owners of a 378-acre tract of land south of Salado, Texas, for a 27.7 acre portion of the property. The State identified the property as a target location for a proposed highway rest area. The 378-acre property had nine "commercial grade" groundwater wells drilled throughout, with six of the nine wells located within the 27.7 acre portion sought by the State. After the owners refused the State's offer, the State initiated condemnation proceedings.

Before trial on the condemnation action began, the judge struck the testimony of the State's hydrogeology and water systems expert witnesses. The leading water expert for the property owners testified that before the State took possession of the land, the property owners received interest from potential buyers in the water that would be produced from the six large wells located on the tract, but the property owners could no longer access the wells. The court found that the only reasonable means of accessing the water underlying the 27.7 acres was by wells drilled vertically from within the tract, and that the State's condemnation of the property materially and substantially impaired the property owners' access to the groundwater underlying the condemned tract.

On June 30, 2009, jurors awarded the property owners $5.8 million for the 27.7 acre tract. The court's November 10, 2009, judgment ordered the State to compensate the property owners for the full amount awarded by the jury, along with post-judgment interest, for a total of $6.87 million plus additional prejudgment interest. The State filed a notice of appeal with the Austin Court of Appeals on February 8, 2010.

Texas Water Litigation

Desired Future Conditions

Available Groundwater

Takings Claim

Exempt Wells

Incompatible DFCs

Takings Claim

DFC Limits

TEXAS GROUNDWATER MANAGEMENT

In 2005, the Texas Legislature enacted a new process for Texas groundwater management. The State was divided into 16 Groundwater Management Areas (GMAs), with most of each containing multiple groundwater conservation districts. The groundwater conservation districts within each GMA are required to develop a comprehensive management plan using the district's best available data to quantify, by September 1, 2010, and every five years thereafter, the district's desired future condition of each productive groundwater formation that is subject to its regulatory jurisdiction. When two or more districts are within one GMA, they are required to develop their respective desired future conditions (DFCs) — or hydrogeological condition goals — through joint planning efforts. The districts submit their DFCs to the Texas Water Development Board (TWDB), which in turn is to provide each district with their respective estimated managed available groundwater (MAG). MAGs serve as a water budget for districts to follow in their efforts to ensure that they meet their DFCs. Most GMAs have yet to submit their DFCs to meet the September 1, 2010 deadline.

Of those DFCs that have been submitted to TWDB thus far, two have been subjected to administrative challenges by affected landowners. In a challenge to the DFCs developed by the districts in GMA 1 for the Ogallala and Rita Blanca formations, the petitioners asserted that the DFCs were unreasonable, were the product of an arbitrary and capricious exercise of the districts' statutory authority, and amounted to a taking of property without just compensation. TWDB ultimately determined that the DFCs were not unreasonable.

In GMA 9, petitioners made procedural complaints and argued that the data and modeling used by the districts in the development of their DFCs for the Edwards formation were flawed. TWDB staff concluded that the DFCs could not be achieved because estimated pumping from domestic and livestock wells — exempted from permitting requirements by the Texas Legislature — would exceed the MAG without even taking into account permitted production. The DFCs were remanded back to the districts for additional consideration and refinement. These challenges, as well as the *Mesa* case discussed below, demonstrate that we can expect to see similar protests as the remaining GMAs determine and submit their DFCs for review.

Takings Assertion and TWDB Authority

Mesa Water, L.P. v. Texas Water Development Board, No. D-1-GN-10-000819 (201st Dist. Ct., Travis County, Tex., filed Mar. 16, 2010)

Mesa Water, L.P. and G&J Ranch, Inc. filed a petition against TWDB alleging that the groundwater conservation districts within GMA 1 acted outside of their statutory authority by adopting what they consider to be incompatible DFCs. Tex. Water Code § 36.108(d) permits groundwater conservation districts to establish different DFCs for "(1) each aquifer, subdivision of an aquifer, or geological strata located in whole or in part within the boundaries of the management area; or (2) each geographic area overlying an aquifer in whole or in part or subdivision of an aquifer within the boundaries of the management area." One groundwater conservation district within GMA 1 adopted a DFC that required at least 40% of the volume of water stored in the Ogallala formation today to remain present in the formation in 50 years. Another district developed a DFC that required 50% of the stored water in the Ogallala to remain present in 50 years. And yet a third district developed a DFC that required 80% of the stored volume of Ogallala water to be present in the formation in 50 years.

The plaintiffs claim that their groundwater in the areas governed by the more restrictive DFC will be drained from areas governed by the more liberal DFC. Accordingly, they have complained that more restrictive DFC amounts to a compensable taking of their groundwater as well as a diminution in the present fair market value of their affected groundwater rights. The plaintiffs also assert that they were deprived of due process during the districts' consideration of their respective DFCs because they were precluded from conducting discovery, developing evidence in the record, and cross-examining witnesses during the districts' DFC hearings and during the TWDB hearing on the reasonableness of the districts' DFCs.

The plaintiffs requested that the TWDB ruling be set aside and that the court hold that the DFCs established in GMA 1 were unreasonable. The plaintiffs further seek declaratory judgment "to settle and afford relief from uncertainty and insecurity with respect to their rights, status and other legal relations as involved in the determinations of DFCs by the districts of GMA 1 and as involved in their appeals to TWDB." Plaintiffs requested declarations that, under Texas law,:

- "groundwater conservation districts may not establish DFCs, rules, production limits or other regulatory schemes that discriminate between groundwater rights owners in the same aquifer or subdivision of an aquifer"

Texas Water Litigation

DFCs Limitations

- "TWDB cannot, as a matter of law, approve DFCs that discriminate between groundwater rights owners in the same aquifer or subdivision of an aquifer"
- "political subdivisions are not a proper basis for assigning different DFCs with respect to an aquifer or subdivision of an aquifer" and should not be approved on that basis
- DFCs established by the districts of GMA 1 and approved by TWDB result in a taking of Plaintiffs' private property rights and are unconstitutional
- TWDB can require districts to revise DFCs and the districts must revise their DFCs in accordance with TWDB recommendations
- To the extent the DFC process in the statutes impacts private property rights without affording procedural due process rights to those affected, the process results in a deprivation of property without due process

TWDB filed a general denial and a partial plea to the jurisdiction on April 2, 2010. No motions or orders of the court have been filed at the time of this writing.

SURFACE WATER RIGHTS, REGULATION, AND PLANNING

TCEQ Permitting Decisions and ESA

Aransas Project v. Shaw, No. 2:10-CV-00075 (S.D. Tex. filed March 10, 2010)

Permitting Decisions

In December 2009, the Aransas Project — an organization of citizens, groups, and businesses that advocate for better water management of the Guadalupe River — sent a notice of intent to sue to TCEQ and the South Texas Watermaster under the federal Endangered Species Act (ESA) if actions were not taken to address certain of their wildlife habitat concerns. Specifically, the Aransas Project complained that existing permitted diversions of water from the Guadalupe River Basin have created a loss of whooping crane habitat, damage to their ecosystem, and a resulting loss of whooping cranes in violation of ESA.

ESA Section 9 "Take"

The Aransas Project filed suit on March 10, 2010, against TCEQ Commissioners, the TCEQ Executive Director and the South Texas Watermaster, each in their official capacities. The complaint seeks declaratory and injunctive relief "to eliminate or at least to reduce significantly, immense threats to the very existence of Whooping Cranes." The complaint alleges that TCEQ and its officials "cause these threats by agency actions, and refusals and failures to act, in managing freshwater uses and flows on the Guadalupe and San Antonio Rivers." The complaint alleges that the deaths last winter of 8.5% of the wintering flock "directly reflect a lack of sufficient freshwater flowing to San Antonio-Aransas Bay system," that the whooping cranes need the freshwater to drink, and that the water supports two essential food sources. The complaint alleges that the defendants, in their roles to regulate water uses and flows, harmed the whooping cranes "last winter in Aransas County, Texas, thereby violating Section 9 of the federal Endangered Species Act by causing a 'take' of this already endangered species." Additionally, Plaintiffs claim that unless the State alters its surface water appropriations, the harm and harassment of winter 2008-2009 will occur again, possibly leading to more severe damage.

Federal Preemption Issue

The Aransas Project requests a declaration of the State's obligations under the ESA; that the State has violated and continues to violate Section 9 of the ESA; and that the State's water diversion regulations are preempted by federal law and invalid under the Supremacy Clause. The plaintiff has also requested that the court enjoin TCEQ from allowing additional diversions of water from within the Guadalupe River Basin until it provides assurances that the additional diversions will not affect the Whooping Cranes. The group also seeks to enjoin the approval and processing of new or pending permits; order an inventory and accounting of certain water withdrawals; and order the development of an approved Habitat Conservation Plan for the San Antonio and Guadalupe River basins and San Antonio Bay.

NEPA Standards

City of Dallas v. Hall, 562 F.3d 712 (5th Cir. Mar. 12, 2009), petition denied sub nom. *Tex. Water Dev. Bd. v. Dep't of the Interior*, 130 S. Ct. 1500 (Feb. 22, 2010)

Refuge in Reservoir Footprint

The United States Court of Appeals for the Fifth Circuit upheld a ruling that dispensed of claims made by Dallas and TWDB that the US Fish and Wildlife Service (USFWS) did not prepare an adequate Environmental Assessment (EA) on USFWS's proposal to establish a wildlife refuge in the footprint of the Fastrill Reservoir project proposed in the State Water Plan. The court noted that the EA: (1) did not include a consideration of alternative sites that would have allowed establishment of both the reservoir and the refuge; (2) did not include a consideration of the effects that creating the refuge at the planned location would have on the water supplies in Dallas; (3) was based largely on information included in an earlier

Texas Water Litigation

Federal Action

Competing Suppliers

State v. Federal Authority

Physical Capacity

Oklahoma Moratorium

Interstate Commerce

EA prepared on the project in 1988; and (4) was based on a planning horizon and process that effectively excluded the concerns of the State of Texas and Dallas from consideration. Nevertheless, the court held that the EA was sufficient to satisfy the applicable standards under the National Environmental Policy Act and was not the product of an arbitrary and capricious action by USFWS.

The court also noted that the development of a refuge acquisition boundary that fell within the footprint of a proposed reservoir was not a conflict with existing State or local land use, but instead was a conflict with a potential State or local land use, where the State had taken no concrete action — such as considering permit applications — in developing the reservoir plan. Accordingly, the court held that the setting of the refuge acquisition boundary did not affect a change in the use or character of the land or in the physical environment, and was thus *not* a major Federal action that significantly affected the quality of the human environment. The court concluded that no Environmental Impact Statement was necessary. The court also held that the parties had waived their claims that the USFWS's actions were barred by the 10th Amendment to the US Constitution.

On June 10, 2009, Dallas and TWDB filed an appeal of the Fifth Circuit's decision to the Supreme Court of the United States. The Supreme Court denied the petitions for certiorari on March 12, 2009.

Water Service Provider

Creedmoor-Maha Water Supply v. Texas Comm'n on Envtl. Quality, 2010 WL 715385 (Tex. App.—Austin 2010, no pet. h.)

Creedmoor-Maha Water Supply Corporation (Creedmoor) appealed a decision upholding a TCEQ order to decertify a portion of Creedmoor's Certificate of Convenience and Necessity (CCN). A developer had applied for expedited decertification of Creedmoor's CCN so that its master planned community could receive retail water service from the nearby City of Austin (City). The City agreed to serve the development, but Creedmoor refused or was unable to provide service. TCEQ granted the release of Creedmoor's CCN, and overruled by operation of law a motion to overturn the order.

Creedmoor filed suit under the Uniform Declaratory Judgments Act (UDJA) claiming that TCEQ's order was invalid, and seeking injunctive relief to recertify the disputed area. Creedmoor also asserted that Tex. Water Code § 13.254, was trumped by 7 USC § 1926(b), which establishes a loan program through the Department of Agriculture, and prohibits local governments from encroaching upon the services provided by federally indebted water associations. A water association must meet several requirements to avail itself of the service area protections afforded by 7 USC § 1926(b), only one of which was disputed in this case — the requirement that Creedmoor provide or make service available to the disputed area.

Creedmoor stated that because a CCN holder has a legal duty to provide service to the residents in a certified area, this duty would suffice as a "legal equivalent" to the utility "making service available" to trigger §1926(b) protections. On appeal of the trial court's grant of TCEQ's plea to the jurisdiction, the Austin Court of Appeals closely scrutinized Creedmoor's § 1926(b) argument. It looked to decisions in other jurisdictions and determined that "provided or made service available" requires not just a legal duty to serve to trigger the encroachment protections, but it requires the actual provision of service, or the physical capacity and readiness to do so. The Austin Court concluded that § 1926(b) was intended to defend territory already served by a water association, and that Creedmoor could not show that it provided or made service available to the property at issue. The Austin Court of Appeals thus affirmed the judgment granting TCEQ's plea to the jurisdiction on March 3, 2010.

Interstate Transfers

Tarrant Reg'l Water Dist. v. Sevenoaks, No. CIV-07-0045-HE (W. D. Okla.)

The Red River Compact (RRC) was made among the States of Arkansas, Louisiana, Oklahoma, and Texas, and approved by Congress in 1980 to address water apportionment and access rights for the Red River and its tributaries. In January 2007, Tarrant Regional Water District (TRWD), a political subdivision of the State of Texas, filed a lawsuit against the members of the Oklahoma Water Resources Board (OWRB), challenging an Oklahoma moratorium on exports and sales of surface water and groundwater to points outside of the State. TRWD claimed that the Oklahoma moratorium violated the RRC and unlawfully impeded interstate commerce in violation of the federal Commerce Clause and Supremacy Clause. TRWD sought declaratory and injunctive relief. TRWD stated that it sought to appropriate surface water in Oklahoma to meet the long-range needs of Texas communities. In March of 2007, the Oklahoma Attorney General filed a motion to dismiss TRWD's claims. Oklahoma's motion was denied outright later that year and Oklahoma appealed. On December 27, 2008, the Court of Appeals for the Tenth Circuit affirmed the Oklahoma Federal District Court's denial of the motion to dismiss.

Texas Water Litigation

Transfer Amendments

Federal Supremacy

Compact

Amended Complaint

Tribal Intervention Denied

City-to-City Sale

Jurisdiction

Damage Claims

In June 2009, the Oklahoma Legislature enacted a series of amendments to Title 82 of the Oklahoma Statutes purportedly designed to provide an avenue for the State to consider applications for use of water out-of-state while at the same time giving Oklahoma the ability to ensure that such out-of-state use did not impair its existing in-state water needs. On July 10, 2009, Oklahoma filed a motion to dismiss on the grounds that the newly enacted legislation mooted TRWD's claims; that the primary jurisdiction of the dispute rests with the Red River Compact Commission; and that the RRC "constituted an expression of federal law sufficient to preclude any challenge" to the legislation. Following an October 2009 hearing, an order was issued on November 18, 2009 granting the motion to dismiss in substantial part. The court disagreed that primary jurisdiction warranted a stay or dismissal, or that the issue was moot. *Tarrant Reg'l Water Dist. v. Herrmann*, No. CIV-07-0045-HE, 2009 WL 3922803, slip. op. (W.D. Okla. Nov. 18, 2009)

Addressing the argument that the RRC operated to preclude TRWD's Commerce Clause and Supremacy Clause claims, the court stated that water is an "article of commerce" — where Congress regulates it, the determination of Congress controls, and where there is not an affirmative action to establish federal policy, there is still an implicit restraint on state regulation. However, the court concluded that Congress' approval of the RRC constituted "an adoption of standards that preclude a successful Commerce Clause claim" in the circumstances at hand where the water sought is within the scope of the RRC. In regards to Supremacy, the court determined that there was no suggestion that Congress had generally preempted the field of water law and there was no conflict between the RRC and the challenged state laws. The motion was denied with respect to Oklahoma's mootness and primary jurisdiction assertions, and summary judgment was granted with respect to its Commerce and Supremacy Clause arguments. Claims premised on the TRWD's efforts to acquire water not subject to the RRC were dismissed, without prejudice, based on ripeness. The court allowed TRWD 30 days to file an amended complaint.

On December 18, 2009, TRWD filed an amended complaint that stated it had filed applications with OWRB for Oklahoma surface water, and that it had secured contracts for the sale or transfer of Oklahoma groundwater and Indian reserved water rights by tribal nations. This included water both under the RRC and not under the RRC. While acknowledging the court's November 18, 2009 order, TRWD restated its claims to preserve its right to appeal.

This case is still pending. Most recently, the court denied a motion by the Apache Tribe to intervene and a Motion to Stay filed by Oklahoma. TRWD describes the outstanding issues to be considered as: "(1) Tarrant's Commerce claim as it relates to non-compacted ground water and federal reserved tribal water and (2) Tarrant's Supremacy Clause claim, where Tarrant asserts a conflict between Oklahoma's embargo and the Red River Compact's apportionment of water to Texas."

City of Hugo v. Nichols, No. CIV-08-303-RAW (E. D. Okla.)

In August 2008, the City of Hugo, Oklahoma (Hugo) filed suit in the Federal District Court for the Eastern District of Oklahoma against the members of OWRB challenging the constitutionality of the Oklahoma moratorium. Later that year, the City of Irving, Texas, (Irving) successfully intervened in the suit as a plaintiff with Hugo. Hugo intends to sell water to Irving. In September 2008, Oklahoma filed a motion to dismiss the plaintiffs' claims. The District Court denied Oklahoma's motion on April 1, 2009.

On September 10, 2009, Hugo and Irving filed a joint motion for summary judgment. On October 2, 2009, the parties held a settlement conference, but no settlement agreement was reached. The last action taken was the issuance of a Memorandum and Order on April 30, 2010 following an April hearing. The Memorandum and Order denied plaintiff's motions for summary judgment and granted in part and denied in part the defendant's cross motion for summary judgment. The order noted that the moratorium on out-of-state water sales under Oklahoma law expired on November 1, 2009, and that the Oklahoma Legislature enacted other legislation regulating the sale or use of Oklahoma water for out-of-state interests. On the subject of primary jurisdiction, the court determined that the plaintiff's claims involved issues of statutory construction and matters of law and that it was unnecessary to seek the Red River Compact Commission's expertise. The court declined to dismiss based on primary jurisdiction. The court disagreed that the 2009 Oklahoma legislation repealed the provisions of Oklahoma law contested by the plaintiffs and therefore the legislation did not render the controversy moot.

Recreational Use

Wynne v. Lower Colorado River Authority, No. D-1-GN-09-004422 (201st Dist. Ct., Travis County, Tex., filed Feb. 5, 2010)

A landowner (Wynne) with property fronting Lake Travis, a surface water reservoir on the Colorado River in Travis County, Texas, sued the Lower Colorado River Authority (LCRA) alleging that the LCRA's management decisions on water impounded in Lake Travis had adversely affected his significant investments in his lakefront property. Wynne complained that LCRA's management of the lake robbed

Texas Water Litigation

him of recreational opportunities otherwise available when lake levels were higher. Specifically, he claimed that in 2009 LCRA substantially drained Lake Travis in violation of its constitutional mandate to conserve and reclaim State water, and in violation of a statutory prohibition contained in its enabling legislation against denying public access to its property for recreational use. Wynne further alleged that this action by LCRA violates LCRA's public duty of providing for navigation of its inland waters by not providing sufficient water for boating. Thus, Wynne sought a declaratory judgment that LCRA has no constitutional or statutory authorization to have drained Lake Travis. He made additional arguments concerning LCRA's authority to own gas and coal-fired power plants and that LCRA's sale of water to the South Texas nuclear project was unconstitutional.

Public Access

Governmental Immunity

LCRA filed an answer February 5, 2010 generally denying Wynne's allegations, asserting governmental immunity, and asserting alternative pleadings including that all diversions made by LCRA from Lake Travis have been made "pursuant to certificates of adjudication, certified filings, permits, or orders issued by the Texas Commission on Environmental Quality, or its predecessor agency, pursuant to the statutory scheme for permitting the use of the State's surface water… ." This case is still pending.

Water Resource Development

San Antonio Water System v. Lower Colorado River Auth., No. D-1-GN-09-002760 (345th Dist. Ct., Travis County, Tex., dismissed Feb. 1, 2010)

Water Supply Purchase

The San Antonio Water System (SAWS) and the Lower Colorado River Authority (LCRA) entered into a long-term water resource development agreement in 2002. Under the multi-phase agreement, the first phase consisted of a seven-year study period to determine if up to 330,000 acre-feet per annum of water could be made available from sources within the Lower Colorado River Basin. The second phase consisted of an implementation period during which SAWS could reserve and purchase a firm supply of up to 150,000 acre-feet of water per year upon full development. SAWS has funded more than $30,000,000 in project studies since the execution of the agreement.

Breach Lawsuit

After a series of decisions by LCRA's board affecting the amount of water that might be available to the SAWS under the agreement, SAWS declared LCRA to be in breach of the agreement and filed suit in State District Court against LCRA. SAWS alleged that LCRA breached the agreement and that as the breaching party it owes all of the money provided for studies under the agreement and damages for the replacement cost of the water otherwise available under the agreement in the amount of $1.2 billion dollars. SAWS also made requests in the alternative, including approximately $53 million in restitution.

Sovereign Immunity

On February 1, 2010, the trial court dismissed SAWS claims on the grounds that LCRA was protected from liability based upon sovereign immunity. SAWS appealed and the case is now pending before the Austin Court of Appeals.

Wetlands Mitigation Banking and "Takings"

State of Texas v. Hearts Bluff Game Ranch, Inc., 2010 WL 1930216 (Tex. App.—Austin 2010, no pet. h.)

Mitigation Banking

Hearts Bluff Game Ranch, Inc. (Hearts Bluff) provides commercial "mitigation banking" services. A "mitigation bank is a preserved, restored, established, or enhanced wetland area set aside in perpetuity to compensate for unavoidable losses to similar wetland areas elsewhere." In exchange for this, the owner receives "mitigation banking credits" from the federal government. The US Army Corps of Engineers (Corps) is responsible for designating mitigation banks and issuing the credits. These credits are then sold to third parties who are required to offset "environmentally harmful activity."

Reservoir Site

When Hearts Bluff purchased its land, it was aware that the State had considered the site for a future water reservoir, but it thought reservoir development was unlikely. Hearts Bluff stated that it was informed by the Corps that there were no impediments to permitting the site and that "because mitigation banks are comprised of wetland, mitigation banks routinely are found in the footprint of potential reservoir sites." However, TWDB contacted the Corps and expressed concern that "the proposed mitigation bank would make the planned reservoir project less viable, if not entirely infeasible."

Agency Opposition

Following changes to the original application, Hearts Bluff was told that it had completed the technical requirements and was "all but assured" that its application would be granted. TWDB continued to work against the permit, and informed the Corps that it "would likely include the reservoir in its 2006 State Water Plan and recommend to the legislature that it be designated as a unique reservoir site." After indication that the Corps would delay its decision until after the next legislative session, Hearts Bluff requested that the Corps rule as soon as possible. The Corps denied the permit request, citing TWDB's opposition and the apparent conflict with Texas's long-term water needs. The Texas Legislature then passed TWDB's water plan and designated the site as a unique reservoir site. The Corps later denied a request to reconsider the application as a limited-term mitigation bank rather than a perpetual mitigation bank.

Texas Water Litigation

Inverse Condemnation

Source of Taking

Hearts Bluff sued the State of Texas for inverse condemnation, alleging that TWDB's actions with respect to the Corps's denial of the mitigation-banking permit for Hearts Bluff constituted a regulatory taking under the Texas and US Constitutions. Hearts Bluff alleged that the "actions stripped its land of 'all economically viable uses.'" The State filed a plea to the jurisdiction and asserted that Hearts Bluff "failed to plead a valid taking claim and, consequently, had failed to plead a claim for which sovereign immunity was waived." The plea was denied by the trial court, and an interlocutory appeal was filed. The State defendants argued: 1) that the conduct in announcing the plans to condemn Hearts Bluff's land did not present a "current, direct restriction [on] Hearts Bluff's land," and 2) that the conduct "did not 'cause' that restriction because 'neither [the State nor the TWDB are] empowered to grant or deny [the mitigation-banking permit].'" The court noted that implicit in the test for inverse condemnation are the requirements that: "(1) the governmental entity against whom the claim is brought must possess-or have possessed during the relevant time period-the regulatory power that effected the taking, and (2) the governmental entity's exercise of its own regulatory power must have imposed the current, direct restriction that gave rise to the taking." Here, the real source of the takings claim was the denial of the permit, which was the decision of the Corps under federal law and policy. The court reversed the trial court's order, and dismissed the case for a lack of subject-matter jurisdiction.

STATE AGENCY REGULATION

Oil and Gas Wellsaste

Tex. Citizens for a Safe Future and Clean Water v. R.R. Comm'n of Tex., 254 S.W.3d 492 (Tex. App.—Austin 2007, pet. granted).

Injection Well

The Texas Railroad Commission (RRC) granted a permit to Pioneer Exploration, Ltd. to operate a commercial injection well for the disposal of oil and gas waste. Prior to granting the permit, RRC held a hearing because the application was opposed by Texas Citizens and residents of the county. RRC's decision was affirmed by the District Court, and a subsequent appeal was filed by Texas Citizens for a Safe Future and Clean Water and James G. Popp (Texas Citizens). The appellants argued that RRC denied Texas Citizens due process and failed to adequately consider the public interest.

"Public Interest" Factors

The Austin Court of Appeals held that RRC did not deny Texas Citizens due process rights insofar as it did afford Texas Citizens a fair hearing. However, the court held that RRC did interpret "the public interest" too narrowly. The court held that RRC had authority to consider public interest factors beyond just those that affect oil and gas production in disputed applications for commercial injection disposal wells. Where evidence of other types of public interest considerations are presented in a contested case — such as evidence offered in support of a protestant's public-safety concerns — the court held that it is an abuse of RRC's discretion to fail to consider that evidence in the context of its public interest findings. The Austin Court of Appeals remanded to the commission for a reconsideration of the permit.

A petition for review was filed with the Supreme Court of Texas on August 7, 2008 and granted on March 12, 2010. The parties have fully briefed the merits of the appeal.

Rosenthal v. R.R. Comm'n of Tex., 2009 WL 2567941 (Tex. App.—Austin 2009, pet. denied) (mem. op.)

Title or Rights of Possession

RRC granted a permit to operate a previously completed oil and gas well as a commercial disposal well on a tract of land. The owner of the mineral estate lost a protest before RRC, and appealed the district courts' affirmation of RRC's order. The main issue was whether there was substantial evidence to support the legal conclusion that the surface owner had a good faith claim to the right to use the tract for saltwater disposal by underground injection. The court stated that it is up to courts to adjudicate questions of title or rights of possession. Even if a permit is granted, it grants no affirmative rights to occupy the property. If there is an issue, it is to be addressed outside of administrative appeals. However, a permit should not be granted if it does not appear there is a good faith claim to the property. The court determined that substantial evidence supported RRC's conclusion that the applicant had a good faith claim of the right to use the well for disposal into non-productive zones.

"Public Interest" Weighing

An additional issue was whether RRC's fact findings regarding the "public interest" were sufficient to support its conclusion that the applicant met its burden under the Water Code, including that the "use or installation of the proposed injection well is in the public interest." The court concluded that substantial evidence supported RRC's findings and conclusions regarding public interest considerations. The court emphasized that its decision in *Tex. Citizens for a Safe Future & Clean Water*, 254 S.W.3d at 504 — that RRC had statutory authority to consider public interest factors other than just those that effect oil and gas production — did not suggest how RRC was to exercise that authority in its weighing of evidence on the subject. The court affirmed upheld the judgment of the Travis County District Court affirming the Commission's order granting the requested commercial injection well permit.

Texas Water Litigation

Standing Requirements

Imminent Harm

Unrelated Interest

Plaintiff's Standing

Save Our Springs Alliance v. City of Dripping Springs, 304 S.W.3d 871 (Tex. App.—Austin, 2010)

The city and landowners entered into development agreements. An environmental advocacy group (Alliance) filed suit challenging the agreements, alleging they would result in added pollution to the Edwards Aquifer. The Alliance sought a declaration that the agreement violated the Texas Constitution, and alleged the public notices regarding the approval of the agreement did not meet the requirements of the Texas Open Meetings Act. A district court issued summary judgment on the Open Meetings Act claim in favor of the defendants, granted the defendants' pleas to the jurisdiction on the remaining claims due to lack of standing, and awarded attorney's fees. The Court of Appeals affirmed the district court's judgment.

The Austin Court of Appeals concluded that it was insufficient to confer standing for an associational plaintiff to merely allege that its members' environmental, scientific, and recreational interests would be injured by the challenged action. Instead, the court held that absent a statute that protects such general environmental interests, the plaintiff must show that a particular legally protected interest is threatened — i.e., a member's property will be subject to the alleged recreational or environmental injury.

The court also determined that it was insufficient to confer standing for the plaintiff merely to allege that its members' water wells that are located in the area of the proposed development could become contaminated from run-off created by the development. The plaintiff alleged that contaminated run-off from the development could find its way into the Edwards Aquifer, and that the general direction of flow in the aquifer was from the area of the proposed developments, so therefore its members' well water would be threatened. The court concluded that the plaintiff failed to allege that any of its members actually use the portions of the aquifer that the plaintiff contends would be subject to potential contamination from the development. Absent this showing of actual or imminent harm, the court held that the plaintiff had no standing to sue based on this argument.

The Austin Court of Appeals also held that — even when the interests that an association seeks to protect are germane to its organizational purpose — the association nevertheless does not gain standing by relying on a member who has an individual standing to sue when based on an interest that is *unrelated* to the association's interests. In this case, the court held that the plaintiff's members' concerns that the proposed development would lead to increased vehicle traffic, decreased property values, and light pollution were not germane to the plaintiff's organizational purpose of preventing the pollution of Barton Springs, and thus were insufficient to confer standing for the plaintiff.

CONCLUSION

Though this summary provides an overview of the most pertinent litigation in Texas water law today, there are likely dozens of proceedings or lawsuits not included. These additional cases, while relevant to the practice have not yet reached the appellate level or have been of low enough profile to avoid being included. The litigation summaries above are intended only as short overviews for the convenience of the reader and should not be relied upon for legal advice, or their underlying facts.

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WATER BRIEFS

EPA PROPOSES NEW PERMIT REQUIREMENTS FOR PESTICIDE DISCHARGES

Edited/condensed from EPA Documents

On June 2, 2010, EPA announced the public availability of a draft National Pollutant Discharge Elimination System (NPDES) permit for point source discharges from the application of pesticides to waters of the US. EPA's action is in response to an January 9, 2009, Sixth Circuit decision that found that certain pesticide discharges to US waters were pollutants subject to the federal Clean Water Act (CWA), and thus require an NPDES permit for certain applications.

LEGAL BACKGROUND

On January 19, 2007, EPA received petitions for review of the 2006 NPDES Pesticides Rule from environmental and industry groups. Petitions were filed in eleven circuit courts with the case, *National Cotton Council, et al, v. EPA*, assigned to the Sixth Circuit Court of Appeals.

On January 9, 2009, the Sixth Circuit vacated EPA's 2006 NPDES Pesticides Rule under a plain language reading of the CWA. *National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir., 2009). The Court held that the CWA unambiguously includes "biological pesticides" and "chemical pesticides" with residuals within its definition of "pollutant." Specifically, an application of chemical pesticides that leaves no excess portion is not a discharge of a pollutant, and the applicator need not obtain an NPDES permit. However, chemical pesticide residuals are pollutants as applied if they are discharged from a point source for which NPDES permits are required. Biological pesticides on the other hand are always considered a pollutant under the CWA regardless of whether the application results in residuals or not and require a NPDES permit for all discharges from a point source.

In response to this decision, on April 9, 2009, EPA requested a two-year stay of the mandate to provide the agency time to develop general permits, to assist NPDES-authorized states to develop their NPDES permits, and to provide outreach and education to the regulated community. On June 8, 2009, the Sixth Circuit granted EPA the two-year stay of the mandate.

On November 2, 2009, industry petitioners of the Sixth Circuit Case petitioned the US Supreme Court to review the Sixth Circuit's decision. On February 22, 2010, the Supreme Court denied the request to hear industry's petition, leaving the April 2011 effective date unchanged.

EPA RESPONSE: PESTICIDES GENERAL PERMIT, SOME LIMITATIONS

As a result of the Court's decision to vacate the 2006 NPDES Pesticides Rule, at the end of the two-year stay, NPDES permits will be required for discharges to waters of the US of biological pesticides, and of chemical pesticides that leave a residue. In response to the Court's decision, EPA's proposed Pesticides General Permit (PGP) covers only certain discharges resulting from pesticide applications. EPA Regional offices may issue additional general permits or individual permits if needed.

According to EPA, irrigation return flows and agricultural stormwater runoff do not require NPDES permits, even when they contain pesticides or pesticide residues, as the CWA specifically exempts these categories of discharges from requiring NPDES permit coverage. Additionally, other stormwater runoff is either: (a) already required to obtain NPDES permit coverage as established in section 402(p) of the CWA; or (b) classified as a non-point source discharge for which NPDES permit coverage is not required. Thus, neither EPA's 2006 NPDES Pesticides Rule, the Sixth Circuit Court vacatur of that rule, nor the currently proposed PGP have changed in any way the determination of whether certain types of stormwater runoff are required to obtain permit coverage or under which permit coverage is required. This is true whether the runoff contains pesticides or pesticide residues resulting from the application of pesticides. In particular, stormwater runoff that may contain pesticides would not be eligible for coverage under this permit, and is not required to obtain NPDES permit coverage unless it was already required to do so prior to the Sixth Circuit decision or EPA designates a source for future stormwater permitting. Existing stormwater permits for construction, industry, and municipalities already address pesticides in stormwater.

Specifically, the PGP covers the discharge of pesticides (biological pesticides and chemical pesticides which leave a residue) to waters of the US resulting from the following use patterns: 1) Mosquito and Other Flying Insect Pest Control; 2) Aquatic Weed and Algae Control; 3) Aquatic Nuisance Animal Control; and 4) Forest Canopy Pest Control.

EPA determined that the four use patterns included in the proposed PGP would encompass the majority of pesticide applications that would result in point source discharges to waters of the US and generally represent the use patterns intended to be addressed by the 2006 rule that is now vacated. The proposed PGP does not cover terrestrial applications for the purpose of controlling pests on agricultural crops or forest floors.

According to EPA, while other use patterns are not covered by the proposed PGP, the existence of this permit does not obviate the possibility that an individual permit would be necessary if other types of pesticide applications result in point source discharges to waters of the US.

DRAFT PGP ATTRIBUTES

Technology-Based Effluent Limitations

The draft permit (Part 2) requires all operators to minimize pesticide discharges into waters by doing the following: 1) Use the lowest effective amount of pesticide product per application and optimum frequency of pesticide applications necessary to control the target pest; 2) prevent leaks, spills, or unintended discharges of pesticides associated with the application of pesticides covered under this permit; and 3) maintain application equipment in proper operating condition by calibrating and cleaning/repairing such equipment on a regular basis to ensure effective pesticide application and pest control.

Integrated Pest Management

Operators that exceed an annual treatment area threshold must also implement Integrated Pest Management (IPM) practices that require these operators to: 1) Identify and assess the pest problem; 2) evaluate effective pest management; and(3) follow appropriate procedures for pesticide use.

WATER BRIEFS

FIFRA Labeling

If the permittee is found to have applied a pesticide in a manner inconsistent with the relevant water quality related Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) labeling requirements, EPA will presume that the effluent limitation to minimize pesticides entering the Waters of the US has been violated under the NPDES permit.

Water Quality-Based Effluent Limitations

In addition to the technology-based effluent limitations, the operator is required to control its discharge as necessary to meet applicable water quality standards. The PGP prohibits any discharges that causes or contributes to an excursion of any applicable numeric or narrative EPA-approved State, territory, or tribal, or EPA promulgated water quality standard.

Site Monitoring

Permittees must monitor for observable adverse incidents (as defined in the permit) in the treatment area and where pesticides are discharged to waters of the US.

Notice of Intent Requirement

An operator is required to submit a Notice of Intent (NOI) to obtain coverage under the PGP for discharges resulting from the application of pesticides if it has reason to believe it will exceed one or more of the annual (i.e., calendar year) treatment area thresholds. An operator is not required to submit an NOI if no application is made in excess of any applicable annual treatment area threshold during any calendar year of the permit cycle (typically 5 years).

Pesticide Discharge Management Plan

Distinct from the technology-based or water quality-based effluent limitation provisions in the PGP, the permit requires operators that exceed any annual treatment area threshold to prepare a Pesticide Discharge Management Plan (PDMP) to document the implementation (including inspection, maintenance, monitoring, and corrective action) of control measures being used to comply with PGP-specified effluent limitations. The PDMP must be kept up-to-date and modified whenever necessary to document any corrective actions as necessary to meet the effluent limitations.

Habitat Protections

The PGP includes certain requirements specific to the protection of federally-listed endangered and threatened species and its designated critical habitat. Procedures to assist in protecting listed species and critical habitat are currently being considered by EPA in consultation with the National Marine Fisheries Service (NMFS) and the US Fish and Wildlife Service (FWS) under section 7 of the federal Endangered Species Act (ESA). The PGP includes language that would incorporate as enforceable permit conditions any pre-existing requirements resulting from ESA Section 7 consultation and/or an ESA Section 10 permit that is issued to the operator by FWS and/or NMFS.

Corrective Actions

Corrective actions in the PGP are follow-up actions a permittee must take to assess and correct problems. They require review and revision of control measures and pesticide application activities, as necessary, to ensure that these problems are eliminated and will not be repeated in the future. The permittee is expected to assess why a specific problem has occurred and document what steps were taken to eliminate the problem. Compliance with many of the permit's requirements — for instance, those related to reporting and recordkeeping and some of those related to operation and maintenance — can be accomplished immediately, and therefore, are not considered problems that trigger corrective actions. A situation triggering corrective action is not necessarily a permit violation and, as such, may not necessarily trigger a modification of control measures to meet effluent limitations. However, failure to conduct (and document) corrective action reviews in such cases does constitute a permit violation.

PGP ADMINISTRATION

EPA's PGP is written for the specific areas of the country for which EPA remains the NPDES permitting authority (e.g., six States, Tribal lands, territories, or federal facilities), which includes areas in all ten EPA Regions. States that are authorized to issue NPDES permits for the control of discharges to waters of the US from the application of pesticides can opt to administer a functionally identical PGP or develop their own — equally protective — NPDES permits to cover such discharges.

While the CWA requires CWA- authorized States to administer programs at least as protective as EPA's program, EPA's fact sheet regarding the PGP makes a point of stating:

> This permit applies only to the areas in which EPA is the permitting authority and represents EPA's best professional judgment about what is required to meet the requirements of the Clean Water Act *in those areas*. Permit writers are to evaluate available information specific to the activities and areas covered under their own permits and in many instances, a state may determine based on that information that different requirements are necessary to meet the requirements of the Clean Water Act for those activities and areas. States should incorporate requirements that address public or environmental dangers specific to their state.
> *NPDES Pesticides General Permit Fact Sheet*, EPA 2010, page 7, emphasis in original

PUBLIC OUTREACH

EPA will accept written comments on the draft permit until July 19th.

EPA is holding three public meetings, one public hearing and one webcast on the draft PGP:

Public Meetings: Albuquerque, NM, 6/14; Boise, ID, 6/16; Boston, MA, 6/21 (see Calendar)

Public Hearing: Washington, DC, 6/23 (see Calendar)

Webcast: 6/17, 1pm-3pm EST (see www.epa.gov/npdes/training.)

EPA plans to finalize the permit in December 2010. It will take effect April 9, 2011.

For info: Jack Faulk, EPA, 202/ 564–0768 or faulk.jack@epa.gov — EPA WEBSITE: www.epa.gov/npdes

Federal Register, Vol 75, No 107, p 31775

WATER BRIEFS

EXEMPT WELLS WA
CORRECTION

The Water Report #75 reported on an exempt wells decision in Washington State. TWR noted that Judge Carrie Runge ruled from the bench on April 2 that the plaintiffs did not have "standing" in the case because their injury claims (negative impacts on their own wells) were speculative.

The Order on Cross-Motions for Summary Judgment was issued on May 5, 2010. In that Order at page four, the Judge states that "the Court concludes that there are genuine issues of material fact as to Defendant Easterday Ranches' motion for summary judgment on standing and therefore denies the motion on standing" (*Five Corners Family Farmers, et al. v. State of Washington, et al*., Franklin County Superior Court Cause No. 09-2-51185-6 (May 2010)). In other words, the Judge ruled that the plaintiffs did have standing.

Regarding the main issue in the case — the interpretation of the exempt wells statute concerning stockwater — the Judge held that "as a matter of law, RCW 90.44.050 is unambiguous and the plain meaning of RCW 90.44.050 is that permit-exempt withdrawals of public groundwater for stock-watering purposes are not limited to any quantity" (*Id.* at 5). The Order is the final judgment in the case before the Superior Court.

For info: WA Dept. of Ecology website: www.ecy.wa.gov/programs/wr/rights/easterday.html

***KANSAS V. NEBRASKA* KS/NE/CO**
INTERSTATE COMPACT

On May 3, Kansas Attorney General Steve Six asked the US Supreme Court to enforce a 2003 decree approving a settlement between Kansas and Nebraska outlining the states' rights to water from the Republican River basin. According to Kansas' filing, Nebraska has violated the Republican River Compact and has failed to take actions necessary to avoid future violations, especially in the inevitable dry periods to come.

Kansas' pleading argues that Nebraska should be held in contempt of Court for not obeying the Court's 2003 decree adopting the final settlement stipulation, that the Court should take action against Nebraska to ensure that Nebraska will not violate the compact again, and that Nebraska should pay damages to Kansas for violations of the decree. Kansas also asks the Court to take certain other actions to ensure Nebraska's compliance.

In June, 2009, Arbitrator Karl Dreher found Nebraska has not adhered to the compact and deprived Kansas of its vital water resources and that Nebraska must take additional action to comply with obligations. That non-binding arbitration exhausted Kansas' options under the Republican River Compact's dispute resolution process. The remaining recourse is to ask the Supreme Court to direct Nebraska to comply with the compact.

Kansas' pleading stated that Nebraska exceeded its Compact allocation by 78,960 acre-feet AF for the years 2005 and 2006, depriving Kansas of its rightful share of the Republican River. Kansas also asserted that Nebraska's current plan for achieving compliance is inadequate and that Nebraska must face and address the effects of its decades of overdevelopment, with the need to make significant reductions in its use.

Nebraska's Attorney General Jon Bruning issued a quick and concise statement on May 4 regarding Kansas' filing. "Thanks to the hard work of Nebraska's irrigators, the State has been in compliance since 2006. We are working with local natural resource districts to ensure we stay in compliance. We are prepared to vigorously defend the State."

For info: Kansas Department of Agriculture's Republican River Compact website: www.ksda.gov/interstate_water_issues/content/142

DELTA DECISIONS CA
SALMON & SMELT RULINGS

Judge Oliver Wanger of the Northern California Eastern District US Federal District Court (Fresno) recently issued two decisions that undoubtedly impact the pumping allowed from the San Francisco Bay Delta this spring.

On May 20, Judge Wanger issued a lengthy decision that sharply criticized the National Marine Fisheries Service's (NMFS') Biological Opinion (BiOp) findings for Central Valley endangered salmon and steelhead, and implied he would allow greater pumping from the San Francisco Bay Delta for Central Valley farmers. This opinion was in response to a motion for a preliminary injunction filed by plaintiffs San Luis & Delta Mendota Water Authority, and Westlands Water District, to prevent implementation of pumping restrictions NMFS has called necessary to prevent salmon extinctions in the Sacramento-San Joaquin River system. The ruling was somewhat unexpected, since Judge Wanger in 2008 threw out a prior Bush-era plan and ordered federal agencies to prepare the new BiOp to better protect endangered salmon runs from over-pumping. The Judge acknowledged that some pumping limits are necessary to protect the salmon, steelhead, and other dwindling fish populations from extinction, but nevertheless attacked the export limit proposed by the BiOp as "arbitrary and capricious" and not based on "best available science."

Judge Wanger found that numerous causes for the fisheries decline exist, including deteriorating ocean conditions, water blockage by dams, pollution, and predation. He also questioned whether the BiOp supported the general proposition that increased water diversion and exports reduced survival of salmon species in the interior Delta. The Judge accepted the Plaintiffs' argument that the reductions in water exports caused "destruction of permanent crops; fallowed lands; increased groundwater consumption; land subsidence; reduction of air quality; destruction of family and entity farming businesses; and social disruption and dislocation, such as increased property crimes and intra-family crimes of violence, adverse effects on schools, and increased unemployment leading to hunger and homelessness."

Following another hearing on May 25, the Judge struck down salmon protection rules in the BiOp that had restricted water pumping from California's San Francisco Bay Delta to protect endangered salmon. His order means that water agencies can take more water from the Delta than they otherwise would during the next three weeks. After that, the measures to protect salmon would be lifted anyway because the fish are presumed to be at sea and out of danger in the Delta. The ruling applies only to BiOp restrictions for this year, however, and it remains unclear what rules will apply next year.

On May 27, Judge Wanger issued a 126-page order regarding plaintiffs' motion for a preliminary injunction concerning the delta smelt and the operations of the Central Valley Project and State Water Project. The plaintiffs in this case are also San Luis & Delta Mendota Water Authority and Westlands

WATER BRIEFS

Water District and their motion was filed to prevent the implementation of US Fish & Wildlife's (FWS') proposed pumping restrictions (Reasonable and Prudent Alternative Component 2). Similar to his earlier ruling, Wanger ruled in favor of the plaintiffs and found that federal regulators "completely abdicated their responsibility to consider alternative remedies in formulating RPA actions that would not only protect the species, but would also minimize the adverse impact on humans and the human environment." *Order* at 121. In regard to the pumping limitations, the Judge found that the "FWS has failed to adequately justify by generally recognized scientific principles the precise flow prescriptions imposed by Component 2. The exact restrictions imposed, which are inflicting material harm to humans and the human environment, are not supported by the record, making it impossible to determine whether Component 2 [is] overly protective. Judicial deference is not owed to arbitrary, capricious, and scientifically unreasonable agency action." *Id.* at 122. A telephonic conference was scheduled for May 28 to discuss whether "plaintiffs have evidence that imminence of harm to Delta smelt does not exist to justify injunction of pumping restrictions... ." *Id.* at 126.

For info: Delta Smelt ruling and related news stories at: www.acwa.com/news/endangered-invasive-species/judge-wanger-rules-delta-smelt

DELTA SMELT DECLINE CA

NUTRIENT POLLUTION

A new study to be published in the academic journal Reviews in Fisheries Science recommends that efforts to restore the endangered California delta smelt and other declining pelagic fish should more sharply focus on reducing nutrient pollution to the species' native waters. The research indicates these fish populations would greatly benefit from reductions in the amount of nitrogen flowing into the Sacramento-San Joaquin Bay-Delta from wastewater treatment plants and balancing the ratio of nitrogen and phosphorus contained in the discharged water.

Dr. Patricia Glibert of the University of Maryland Center for Environmental Science analyzed 30 years of water chemistry, river flow, plankton, fish population, and effluent discharge data to determine possible linkages to the population of the delta smelt and other pelagic fish in the Bay-Delta system. The analysis reveals that declines in delta smelt population most closely coincide with effluent changes from the region's major wastewater treatment plant.

The article, "*Long-term Changes in Nutrient Loading and Stoichiometry and Their Relationships with Changes in the Food Web and Dominant Pelagic Fish Species in the San Francisco Estuary, California*," will appear in Reviews in Fisheries Science later this year. This research was supported by the National Science Foundation, California State Water Contractors, and San Luis & Delta-Mendota Water Authority.

For info: Study available at: www.umces.edu/news-events/news-releases

RAINWATER HARVEST UT

NEW LAW IN EFFECT

Rainwater harvesting is now legal in Utah, effective May 11, 2010. Senate Bill 32 was approved in the 2010 session providing for the collection and use of precipitation without obtaining a water right after registering on the Utah Division of Water Rights (UDWR) website. There is no charge for registration. Storage is limited to one underground 2500 gallon container or two above ground 100 gallon containers. Collection and use are limited to the same parcel of land owned or leased by the rainwater collector ("contiguous unit of property"). The right to rainwater is made from the "unappropriated public waters" of Utah and can only be made for a "useful and beneficial use." A right may not be acquired by adverse use or adverse possession. See 73-3-1. and 73-3-1.5 Utah Code Annotated 1953.

For info: UDWR website: www.waterrights.utah.gov/; SB 32 at: http://le.utah.gov/~2010/bills/sbillenr/sb0032.pdf

GROUNDWATER US

USGS CONTAMINATION STUDY RELEASED

More than 20% of untreated water samples from 932 public wells across the nation contained at least one contaminant at levels of potential health concern, according to a new study released by the US Geological Survey (USGS) on May 21. The USGS study focused primarily on source (untreated) water collected from public wells before treatment or blending rather than the finished (treated) drinking water that water utilities deliver to their customers.

About 105 million people — or more than one-third of the nation's population — receive their drinking water from one of the 140,000 public water systems across the US that rely on groundwater pumped from public wells.

Findings showed that naturally occurring contaminants, such as radon and arsenic, accounted for about three-quarters of contaminant concentrations greater than human-health benchmarks in untreated source water. Man-made contaminants were also found in untreated water sampled from the public wells, including herbicides, insecticides, solvents, disinfection by-products, nitrate, and gasoline chemicals. Man-made contaminants accounted for about one-quarter of contaminant concentrations greater than human-health benchmarks, but were detected in 64 percent of the samples, predominantly in samples from unconfined aquifers. Scientists tested water samples for 337 properties and chemical contaminants, including nutrients, radionuclides, trace elements, pesticides, solvents, gasoline hydrocarbons, disinfection by-products and manufacturing additives. This study did not assess pharmaceuticals or hormones. Most (279) of the contaminants analyzed in this study are not federally regulated in finished drinking water under the Safe Drinking Water Act.

For info: Patricia Toccaline, USGS Lead Scientist, 916/ 278-3090 or ptocca@usgs.gov; USGS website: www.usgs.gov/newsroom/article.asp?ID=2468

COLUMBIA RIVER TOXICS NW

ACTION PLAN COMMENTS

The Draft Columbia River Toxics Reduction Action Plan (Plan) was released May 5 for comments. The Plan is a follow-up to EPA's 2009 State of the River Report for Toxics (see Soscia/Johnson, TWR #58). It provides a plan to restore the health of the Columbia River Basin by reducing the inflow of toxic metals and chemicals to the river. As noted in the Plan's Introduction, "[T]he Columbia River Basin, in both United States and Canada, is one of the world's great river basins in watershed size, river volume; and environmental and cultural significance. However, public and scientific concern about the health of the Basin ecosystem is increasing, especially with regard to adverse impacts on the Basin associated

WATER BRIEFS

with the presence of toxic contaminants found in fish, wildlife, water and sediment...Salmon restoration together with toxics reduction in the Columbia River Basin is a key environmental justice issue for EPA."

The Plan focuses on five initiatives and the actions that can be accomplished in the next five years by citizens and government, through 2015, to better understand and reduce toxics in the Columbia River Basin. The five initiatives are as follows: increase public understanding and political commitment to toxics reduction in the Basin; increase toxic reduction actions; conduct monitoring to identify sources and then reduce toxics; develop a regional, multi-agency research program; and develop a data management system that will allow us to share information on toxics in the Basin.

EPA has requested that comments on the Plan be submitted to Mary Lou Soscia of EPA at soscia.marylou@epa.gov by June 25th. A final action plan is expected in late July.

For info: EPA website: www.epa.gov/region10/columbia; Plan available at: http://yosemite.epa.gov/R10/ECOCOMM.NSF/columbia/columbia/$FILE/columbia_draft-toxics-action-plan_may2010.pdf

SEWER OVERFLOWS US EPA RULEMAKING

EPA has initiated a rulemaking to better protect the environment and public health from the harmful effects of **s**anitary **s**ewer **o**verflows (SSOs) and basement backups. SSOs and basement backups occur because of blockages, broken pipes and excessive water flowing into the pipes. SSOs can discharge untreated wastewater that contains bacteria, viruses, suspended solids, toxics, trash and other pollutants into waterways. These overflows may also contribute to beach closures, shellfish bed closures, contamination of drinking water supplies and other environmental and health concerns.

EPA is considering two possible modifications to existing regulations: 1) establishing standard National Pollutant Discharge Elimination System (NPDES) permit conditions for publicly owned treatment works (POTWs) permits that specifically address sanitary sewer collection systems and SSOs; and 2) clarifying the regulatory framework for applying NPDES permit conditions to municipal satellite collection systems. Municipal satellite collection systems are sanitary sewers owned or operated by a municipality that conveys wastewater to a POTW operated by a different municipality. As a part of this effort, EPA is also considering whether to address long-standing questions about peak wet weather flows at municipal wastewater treatment plants to allow for a holistic, integrated approach to reducing SSOs while at the same time addressing peak flows at POTWs.

To help the agency make decisions on this proposed rulemaking, EPA will hold four public listening sessions in June and July (Seattle, WA, 6/24; Atlanta, GA, 6/28; Kansas City, KS, 6/30; Washington, DC, 7/13 — see Calendar).

In addition to the listening sessions, EPA will hold a "virtual" listening session via a webcast on July 14, from Noon-4pm EST (see http://cfpub.epa.gov/npdes/home.cfm?program_id=4)

EPA will accept written comments on the potential rule until 60 days after publication in the Federal Register.

For info: Charles Glass, EPA-HQ, 202/564-0418 or glass.charles@epa.gov

CAFO VIOLATIONS MIDWEST EPA ENFORCEMENT ACTIONS

EPA Region 7 has taken a series of civil enforcement actions against six beef feedlot operations in Iowa, Kansas, and Nebraska for violations of the Clean Water Act, as part of an increased emphasis aimed at ending harmful discharges of pollutants from **c**oncentrated **a**nimal **f**eeding **o**perations (CAFOs) into the region's rivers and streams.

Runoff from CAFOs contains pollutants such as pathogens, heavy metals, hormones, antibiotics, sediment and ammonia, as well as nutrients such as nitrogen and phosphorous, all of which can harm aquatic life and impact water quality.

Of the six enforcement actions, two include penalties where CAFOs failed to comply with their National Pollution Discharge Elimination System (NPDES) permits. The causes of the violations were addressed in previously issued administrative compliance orders. The two proposed penalty settlements with the CAFOs listed below are each subject to a 40-day public comment period before they may be finalized.

EPA PROPOSED PENALTIES INCLUDE:

Jewell County Feeders, LLC, Mankato, Kan., has agreed to pay a $10,800 civil penalty for NPDES permit violations associated with improper stockpiling of manure. These violations risked discharges of pollutants to waters of the US.

Platte Valley Feeders, LLC, Kearney, Neb., has agreed to pay a $20,000 civil penalty for NPDES permit violations associated with land application of manure and waste water from its storage lagoons at rates that exceeded nutrient management plan requirements. The over-application of manure created a significant risk that pollutants would reach waters of the US.

EPA compliance orders were also issued to the following large and medium CAFOs. Large CAFOs are cattle feedlots with greater than 1,000 head of cattle, and medium CAFOs are feedlots with between 300 and 999 head of cattle that are required to apply for NPDES permits or cease pollutant discharges. EPA has documented significant water quality problems associated with medium CAFOs and is making enforcement at these CAFOs a priority.

Sandhill Farm, Inc., Rock Valley, Iowa, must immediately reduce the number of cattle it confines below 1,000, apply for an NPDES permit, and complete wastewater controls at its facility to end unauthorized discharges of pollutants into waters of the US.

Kooima Custom Feed, Rock Valley, Iowa, must apply for an NPDES permit and implement a series of wastewater controls at its facilities to end unauthorized discharges of wastewater into waters of the US.

Albert Rens, Ireton, Iowa, must apply for an NPDES permit and complete wastewater controls to end unauthorized discharges of wastewater intowaters of the US.

Darwin Rus, Rock Valley, Iowa, must apply for an NPDES permit and complete wastewater controls to end unauthorized discharges of wastewater into waters of the US.

For info: Chris Whitley, EPA, 913/551-7394 or whitley.christopher@epa.gov

CALENDAR

June 15-16 OR
1st Annual Pacific Northwest Climate Science Conference, Portland. PSU, Hoffman Hall. Presented by Oregon Climate Change Research Institute. For info: OCCRI at: http://occri.net/

June 15-17 CA
Toward Sustainable Groundwater in Agriculture: An Int'l Conference Linking Science & Policy, Burlingame. Hyatt Regency Airport. Organized by UC Davis & Water Education Foundation. For info: Dr. Thomas Harter, UC Davis, email: ThHarter@ucdavis.edu or www.ag-groundwater.org/

June 15-18 BC
Infrastructure, Information & Environment: What is Our Water Legacy? Conference, Vancouver. Hyatt Regency. Canadian Water Resources Ass'n 63rd National Conf. For info: www.cwra.org/national_conference.html

June 16 WA
Cleaning & Restoring Water for our Communities - Washington AWRA Dinner Meeting, Seattle. Pyramid Ale House, 1201 First Ave. S. For info: http://earth.golder.com/waawra/ASP/Home.asp

June 16 ID
EPA RULEMAKING: Pesticides General Permit Meeting, Boise. Bureau of Reclamation, Rooms 206 & 219, 1150 North Curtis Road, 12-3pm. See Brief, This TWR. For info: Jack Faulk, EPA, 202/ 564–0768, faulk.jack@epa.gov or www.epa.gov/npdes

June 16 OR
Columbia River Treaty Issues: Oregon AWRA Dinner Meeting, Portland. Lucky Lab Beer Hall. For info: Brenda Bateman, OWRD, 503/ 986-0879 or brenda.o.bateman@wrd.state.or.us

June 16-18 CA
WESTCAS 2010 Annual Conference, San Diego. Catamaran Resort. For info: Dawn Moore, 770/ 424-8111, email: westcas@mindspring.com or www.westcas.org

June 20-23 MA
Urban Environmental Pollution Conference, Boston. Westin Waterfront Hotel. For info: www.uep2010.com

June 21 MA
EPA RULEMAKING: Pesticides General Permit Meeting, Boston. EPA Region 1, 5 Post Office Square, Suite 100, Conference Room 1529, 1-4pm. See Brief, This TWR. For info: Jack Faulk, EPA, 202/ 564–0768, faulk.jack@epa.gov or www.epa.gov/npdes

June 21-22 ID
Protecting Easements: Water Law & Resource Issues Seminar & Workshop, Sun Valley. Sun Valley Resort. For info: Idaho Water Users Ass'n, 208/ 344-6690 or www.iwua.org

June 21-23 CA
California Rapid Assessment Method Course (Riverine-Part I), Moss Landing. For info: UC Davis Extension, 800/ 752-0881 or http://extension.ucdavis.edu

June 21-24 CA
Clean Technology Conference & Expo, Anaheim. Convention Ctr. For info: www.techconnectworld.com/cleantech2010

June 23 CA
Water Supply & Conservation Planning in California Course, Sacramento. Sutter Square Galleria, 2901 K Street. For info: UC Davis Extension, 800/ 752-0881 or http://extension.ucdavis.edu

June 23 CA
Municipal & Industrial Water Shortage Policy for the Central Valley Project Workshop, Sacramento. Red Lion Hotel, 1401 Arden Way, 9am-3pm. Convened by Bureau of Reclamation. For info: Tammy Laframbois, Reclamation, 916-978-5269, TLaframboise@usbr.gov or www.usbr.gov/mp/cvp/mandi

June 23 DC
EPA RULEMAKING: Pesticides General Permit, Public Hearing, Washington. EPA East Building, Room 1153, 1201 Constitution Avenue, NW, 10am-1pm. See Brief, This TWR. For info: Jack Faulk, EPA, 202/ 564–0768, faulk.jack@epa.gov or www.epa.gov/npdes

June 23-24 ID
EPA's Numeric Limits to Construction Site Stormwater Discharge, Coeur d'Alene. Best Western Coeur d'Alene Inn. For info: NWETC, 206/ 762-1976 or www.nwetc.org/

June 23-24 NC
National Ecosystem Markets Conference, Raleigh-Durham. For info: www.regonline.com/builder/site/default.aspx?EventID=822073.

June 24 AZ
Evaluating Emerging Markets for Environmental Flows: Policy Reform & Implementation in the Columbia Basin, Tucson. Water Resources Research Ctr., 350 N. Campbell Ave. For info: Jane Cripps, AWRRC, 520/ 621-2526, jcripps@cals.arizone.edu or www.cals.arizona.edu/azwater

June 24 WA
EPA RULEMAKING: Sanitary Sewer Overflows, Listening Session, Seattle. EPA Region 10 Office, 1200 Sixth Avenue, 10am-3pm. See Brief, This TWR. For info: http://cfpub.epa.gov/npdes/home.cfm?program_id=4

June 24-25 CA
California Rapid Assessment Method Course (Estuarine-Part II), Moss Landing. For info: UC Davis Extension, 800/ 752-0881 or http://extension.ucdavis.edu

June 24-25 CA
Green Building Conference, San Francisco. For info: CLE International, 800/ 873-7130 or website: www.cle.com

June 24-25 FL
Florida Water Quality Regulation Conference, Tampa. Westin Harbour Island. For info: CLE International, 800/ 873-7130 or website: www.cle.com

June 25 CO
Water on the Land: Water Rights & Land Conservation Workshop, Granby. Presented by Colorado Water Trust. For info: CWT, 720/ 570-2897 or www.coloradowatertrust.org

June 27-29 MT
Western Governors' Association Summer Meeting, Whitefish. For info: www.westgov.org

June 28 GA
EPA RULEMAKING: Sanitary Sewer Overflows, Listening Session, Atlanta. EPA Region 4 Office, 61 Forsyth Street, SW, 10am-3pm. See Brief, This TWR. For info: http://cfpub.epa.gov/npdes/home.cfm?program_id=4

June 28-30 WA
Introduction to ArcGIS 9 & Environment Applications of GIS, Olympia. Evergreen State College. For info: NWETC, 206/ 762-1976 or www.nwetc.org/

June 30 WA
Lake Roosevelt Forum: Bus Tour, Kettle Falls. Lake Roosevelt. For info: Lake Roosevelt Forum, 509/ 535-7084, info@lrf.org or www.lrf.org/index.html

June 30 KS
EPA RULEMAKING: Sanitary Sewer Overflows, Listening Session, Kansas City. EPA Region 7 Office, 901 N. 5th Street, 10am-3pm. See Brief, This TWR. For info: http://cfpub.epa.gov/npdes/home.cfm?program_id=4

July 7 CA
Land Conservation: Trends, Techniques & Opportunities Course, Sacramento. Sutter Square Galleria, 2901 K Street. For info: UC Davis Extension, 800/ 752-0881 or http://extension.ucdavis.edu

July 8-9 NM
Natural Resources Damages Conference, Santa Fe. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

July 12-15 CA
American Membrane Technology Assn Annual Conference & Exposition, San Diego. Town & Country Hotel. For info: www.amtaorg.com/calendar.html

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

CALENDAR

(continued from previous page)

July 12-16 UT
Stream Restoration Principles: Short Course, Logan. For info: Gentri Green, Utah State U., 435/ 850-9029, gentri.green@usu.edu or www.cnr.usu.edu/streamrestoration

July 12-16 TX
Fifth Int'l Conf. on Environmental Science & Technology, Houston. Hilton Hotel. Sponsored by American Academy of Sciences. For info: www.aasci.org/conference/env/2010/

July 13 DC
EPA RULEMAKING: Sanitary Sewer Overflows, Listening Session, Washington. EPA HQ Office, Ariel Rios Building. See Brief, This TWR. For info: http://cfpub.epa.gov/npdes/home.cfm?program_id=4

July 13-15 WA
HydroFutures: Water Science, Technology & Communities: UCOWR/NIWR Annual Conference, Seattle. For info: Rosie Gard, UCOWR, 618/ 536-7571, gardr@siu.edu or www.ucowr.org

July 14
EPA RULEMAKING: Sanitary Sewer Overflows, Webcast. EPA webcast. See Brief, This TWR. For info: http://cfpub.epa.gov/npdes/home.cfm?program_id=4

July 14-15 CA
Introduction to the California Environmental Quality Act Course, Oakland. The Washington Inn. For info: NWETC, 206/ 762-1976 or www.nwetc.org/

July 15 AZ
Water Rights Sales & Transfers Conference, Tucson. Radisson Suites. For info: Lorman Education, www.waterlawresource.com/seminars/product.php?pid=210046

July 15-16 IL
Water Quality Regulation & Enforcement, Chicago. Millennium Knickerbocker Hotel. Use Discount Code TWR-1795 & save $400 off full price. For info: American Conference Institute, 888/ 224-2480 or www.AmericanConference.com/WaterQuality

July 15-16 NM
Natural Resources Damages Conference, Santa Fe. La Fonda Hotel. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

July 19-20 CA
California Water Quality & Impact on Supply Conference, San Francisco. Marriott Union Square. For info: Law Seminars Int'l, 800/ 854-8009, email: registrar@lawseminars.com, or website: www.lawseminars.com

July 20 CA
Municipal & Industrial Water Shortage Policy for the Central Valley Project Workshop, Sacramento. Red Lion Hotel, 1401 Arden Way, 9am-3pm. Convened by Bureau of Reclamation. For info: Tammy Laframbois, Reclamation, 916-978-5269, TLaframboise@usbr.gov or www.usbr.gov/mp/cvp/mandi

July 20-23 CA
Sustainable Resource Management - Lessons From Clean Water's Past & Present Conference, San Francisco. Fairmount San Francisco. For info: National Assoc. of Clean Water Agencies, 202/ 833-2672 or www.nacwa.org/

July 21-22 WA
Construction Site Erosion & Pollution Control, Shoreline. For info: UW Engineering website: www.engr.washington.edu/epp/cee/wet.html

July 21-23 NV
Western States Water Council Summer Meeting, Lake Tahoe. MontBleu Resort. For info: Cheryl Redding, WSWC, 801/ 685-2555, credding@wswc.state.ut.us or www.westgov.org/wswc/

July 22-24 Canada
Rocky Mt. Mineral Law Foundation 56th Annual Institute, Banff, Alberta. Fairmont Banff Springs Hotel. For info: Mark Holland, RMMLF, 303/ 321-8100 x106, mholland@rmmlf.org or www.rmmlf.org

July 26-28 CA
Tuolumne River: Ecology, Resource Management & Whitewater Course, Groveland. For info: UC Davis Extension, 800/ 752-0881 or http://extension.ucdavis.edu

July 27-30 NC
HydroVision International Conference, Charlotte. Convention Ctr. For info: www.hydroevent.com/index.html

July 29-31 CA
EngEx 2010 Conference & Exhibition, San Diego. San Diego Convention Ctr. RE: Technological Advances in Clean Water Supply. For info: www.engexpo.com/

July 30 CO
Conservation Easements Conference, Denver. Ritz-Carlton. For info: CLE International, 800/ 873-7130 or website: www.cle.com

August 5-6 WA
Renewable Energy in the Northwest Conference, Seattle. Crowne Plaza Downtown. For info: Law Seminars Int'l, 800/ 854-8009 or www.lawseminars.com

August 5-6 NM
New Mexico Water Law Conference, Santa Fe. Inn & Spa at Loretto. For info: CLE International, 800/ 873-7130 or website: www.cle.com