

A COMPILATION OF STORMWATER AND OTHER RELATED WATER NEWS

By S. Wayne Rosenbaum Foley & Lardner LLP

SPECIAL REPORT

Supreme Court Considers Reach of Clean Water Act

[Case tests court's wetlands leanings](#)

[Supreme Court cases threaten scope act](#)

Roberts, Scalia See Limits to the Reach of Act

(LA Times, 2/22) ["The Supreme Court, led by Chief Justice John G. Roberts Jr., gave a skeptical hearing Tuesday to the government's contention that it has broad powers to block development on private wetlands that are far from rivers or bays."](#)

Justices to Study Scope of '72 Clean Water Act

(LA Times, 2/21) ["The Supreme Court will take up a property rights case today that could greatly curtail the federal law credited with cleaning up the nation's rivers, lakes and bays after decades of industrial pollution."](#)

Supreme Court to Hear Suits on Dry-River Laws

(Arizona Republic, 2/21) ["The U.S. Supreme Court will hear arguments Tuesday in two cases that ask the question on the lips of most Arizona newcomers: If there's no water in a riverbed, is it still a river?"](#)

Water Wars Await Alito in Debut on High Court

(LA Times, 2/21) Thanks to John Dickerson for this one: ["Samuel Alito will make his Supreme Court debut with a splash this week when the justices hear two cases that could determine the future of the Clean Water Act."](#)

NATIONAL NEWS

Extension of Compliance Dates for the CAFO NPDES Program

EPA has modified the 2003 CAFO Rule to extend two compliance deadlines for operators of CAFOs. Newly defined CAFOs will have until July 31, 2007 to seek NPDES permit coverage, while all CAFOs will have until that date to implement

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nutrient management plans. The extension is in response to changes required by the Second Circuit Court of Appeals decision in *Waterkeeper Alliance et al. v. EPA*. For more information, please visit www.epa.gov/npdes/caforule.

Illicit Discharge Detection and Elimination (IDDE) Trainers

Preventing, finding, and fixing illicit discharges to municipal storm sewer systems presents unique and sometimes significant challenges for small and medium-sized communities. A small group of people have completed EPA's IDDE train-the-trainer course and are available to help train communities on how to implement the IDDE requirements of the Phase II stormwater program. Please visit www.epa.gov/npdes/stormwater/iddetrainers for more information.

New Smart Growth and Stormwater Publications

There are three new publications that will be of interest to stormwater managers at the local and state level.

- **Protecting Water Resources with Higher-Density Development (EPA publication 231-R-06-001)** The U.S. Census Bureau projects that the U.S. population will grow by 50 million people, or approximately 18 percent, between 2000 and 2020. This study is designed to help communities better understand the impacts of higher and lower density on water resources. The findings indicated that low-density development may not always be the preferred strategy for protecting water resources. Higher densities may better protect water quality - especially at the lot level and watershed scale. www.epa.gov/smartgrowth/water_density.htm
- **Using Smart Growth Techniques as Stormwater Best Management Practices (EPA publication 231-B-05-00)** This publication reviews nine common smart growth techniques and examines how they can be used to prevent or manage stormwater runoff. This publication will help communities encourage smart growth and meet the new regulatory requirements. www.epa.gov/smartgrowth/stormwater.htm
- **Parking Spaces/Community Places: Finding the Balance through Smart Growth Solutions (EPA publication 231-K-06-001)** This report highlights proven approaches that balance parking with broader community goals. An oversupply of unnecessary parking wastes money and creates places that degrade water quality and encourage excess driving and air emissions. The highlighted solutions cover a range of supply management, demand management, and pricing strategies. Communities have found that combinations of parking pricing, shared parking, demand management, and other techniques have helped them create vibrant places while protecting environmental quality and still providing for necessary vehicle storage. www.epa.gov/smartgrowth/parking.htm

Accelerated Bacteria Test

Results From 2-hr. Test Correlate with Adverse Health Effects

(Water Quality Newsflash, February 20, 2006) U.S. EPA researchers have announced the results of an assessment of a new

2-hour rapid method for testing beach water quality. Current bacteria testing methods require 24 hrs during which beach water quality conditions can change dramatically. The EPA reported that the new DNA-based accelerated method accurately predicted possible adverse health effects at two Great Lakes freshwater beaches. *Study:*

<http://ehp.niehs.nih.gov/members/2005/8273/8273.pdf> *Additional information:* <http://www.epa.gov/NEEAR/>

A related EPA study examined five fresh and saltwater beach environments to determine the factors that most influence the measurement of beach water quality. The researchers found that, “the greatest single determinant of microbial indicator level was found to be the depth zone, or, roughly, distance from the shoreline at which the sample was collected. Bacterial densities became substantially lower as one moved from ankle-deep to kneedeep to chest-deep water.” The EPA work also showed that bacteria levels tend to be higher in the morning and also at higher water levels. This corresponds with work from Southern California showing that bacteria appeared to accumulate and possibly incubate in the wrack (debris) line along the beach (see *NewsFlash 05-18*). The results of the EPA study were used to develop model monitoring protocols that can be applied to similar beaches. *Study:* <http://www.epa.gov/nerlcwww/empact.pdf>

Erosion Control Regulations - Meeting & Exceeding Today's Requirements

Erosion control regulations and compliance measures are as diverse as development projects. The choice of preventative and mitigation measures greatly depends upon the specific problems facing the individual project. [Full story](#)

CALIFORNIA NEWS

Bioretention BMPs

Caltrans Building Several Facilities

(Water Quality Newsflash, February 20, 2006) The Department has completed construction of a pilot storm water bioretention best management practice (BMP) on State Route 73. Although widely used in the eastern U.S., bioretention BMPs are much less common in California. These BMPs are generally used for smaller volumes of runoff such as from parking lots or small sections of roadway. Typically, the runoff is directed to a vegetated area and forms a shallow (e.g., 6”) temporary pond.

For the Route 73 BMP, a 30” layer of planting soil is overlain by mulch, and underlain by a 1 ft. gravel layer separated by a geotextile. The gravel layer includes underdrains to remove runoff that has filtered through the planting soil. The design is intended to remove standing water within 72 hours to prevent mosquito breeding. In addition, a pretreatment unit removes litter and settleable solids. The vegetation in the Route 73 BMP have had 1 ½ years to become established and water quality monitoring will start this fall.

Caltrans will start construction soon on additional bioretention areas as part of the San Francisco-Oakland Bay Bridge project. Two bioretention areas will be divided into 3 cells each—a total of 6 cells—with the goal of investigating different soil and ponding depths, as well as different vegetation within the cells. Route 73 project:

<http://www.owp.csus.edu/research/papers/papers/PP061.pdf>

The Don't Trash California Storm Water Public Education Campaign

The campaign is the Department of Transportation (CalTrans) Storm Water Management Program's 22-month, \$6.4 million statewide effort to reduce the amount of pollutants (including litter) that enter the highway storm drains. The campaign is based on CalTrans' successful three-year, public education pilot program completed in the Fresno Metropolitan Area in 2003, and complements the Water Board's own Erase the Waste education campaign. <http://www.donttrashcalifornia.info/>

Officials Take to Sky for Flood Risk Survey

(Sacramento Bee, 2/22) "[Two contingents of high-ranking national politicians have scheduled helicopter tours to survey flood control problems facing Sacramento and the Central Valley. The first lifts off today just after lunchtime.](#)"

California Water Plan

Update 2005 Addresses Storm Water Runoff

(Water Quality Newsflash, February 27, 2006) The *California Water Plan* provides a framework for water managers, legislators, and the public to make decisions regarding California's water future, particularly in regards to water supply. The Department of Water Resources has finalized the latest version: *Update 2005*. For the first time, the plan includes a substantial section addressing urban runoff. In *Chapter 21 - Urban Runoff Management in California* the plan discusses problems and opportunities associated with runoff and identifies several objectives, including the following:

- Maintenance of the predevelopment hydrologic conditions (i.e., preventing increases in flow peaks or volume)
- Protection and augmentation of groundwater supplies
- Management of aquatic and riparian resources for active and passive pollution control

The plan states that the traditional approach to runoff management – generally flood channels – has been successful at preventing flood damage, but has not addressed loss of habitat or infiltration to groundwater. The plan notes that the Fresno-Clovis area manages to recharge more than 70 percent of its storm water runoff using retention basins. It also cites Santa Monica's goal of treating and reusing all urban runoff. The plan identifies funding and lack of coordination as impediments to its stormwater goals. <http://www.waterplan.water.ca.gov/docs/cwpu2005/vol2/v2ch21.pdf>

SOUTHERN CALIFORNIA

San Diego Water-Quality Board Goes From 'Worst to Best'

(SD Union Tribune, 2/17) "[Bit by bit, the San Diego Regional Water Quality Control Board is creeping into our everyday lives.](#)"

LA River

City Creates Artificial Wetland; Helps Clean Runoff

(Water Quality Newsflash, February 27, 2006) Located in an industrial corridor, the Augustus F. Hawkins Nature Park is 8 ½ acres and includes a wetland that receives runoff from city streets. The wetland was designed to provide multiple benefits: treatment of dry and wet weather runoff, wildlife habitat, recreation, and education. During, wet weather, the wetlands increase in size allowing detention and treatment of the storm flows before they discharge to the Los Angeles River. By discharging after peak flows, the wetland also provides a flood control benefit. The City is planning several more wetlands and will collect performance data. Site description: <http://www.lastormwater.org/WPD/program/science/augustus.htm> Article: <http://www.latimes.com/news/local/la-me-wetlands5feb05.0.31080.story?coll=la-headlines-california>

Proposal Threatens Desalination Plans

(Monterey Herald, 2/15) Thanks to **Jim Graham** for this one: "[In a move that could jeopardize proposed desalination plants from Moss Landing to Carlsbad, the California State Lands Commission appears poised to prohibit the renewal of permits for 'once-through' cooling systems at power plants after 2020.](#)"

State Water Resources Control Board Approves TMDL for Nitrogen and Phosphorus in Rainbow Creek

This amendment to the Water Quality Control Plan for the San Diego Region (Basin Plan) establishes a Total Maximum Daily Load (TMDL) for nitrogen and phosphorus for the Rainbow Creek Watershed

Scientist Uncovers Mysteries of Beach Sand

(Orange County Register, 2/12) "[Like a weak but persistent heartbeat, the two bacterial hot spots pulse with a regular rhythm, turning up in the surf near shore about once every two weeks.](#)"

Agency OKs Sewage Plant for Mexico

A U.S. border agency announced yesterday that it has signed an agreement allowing a San Diego County company to build and operate a sewage treatment plant in Mexico.

http://www.signonsandiego.com/uniontrib/20060216/news_2m16bajagua.html

Encinitas Considers Improving Beach Counts

ENCINITAS - A San Francisco economist is recommending that the city upgrade its "people counters," the hidden devices that track visits to Encinitas beaches. <http://www.calcoast.org/news/beachrest.htm>

Two Environmental Reports Now Planned for Ponto Area

CARLSBAD - A developer who plans to build a 215-room hotel in the northern end of the coastal area known as Ponto said Monday that he's going to do his own environmental document instead of waiting for the city to produce one for the entire region. <http://www.calcoast.org/news/coast.htm>

Carlsbad Council Approves Permit System Changes

CARLSBAD - The City Council unanimously agreed Tuesday to revamp Carlsbad's conditional-use permit system to create a fast-track approval process for less controversial proposals. <http://www.calcoast.org/news/coast.htm>

Bluff Collapses in Encinitas

ENCINITAS - An 80-foot high sand bluff collapsed Sunday morning south of Swamis Beach, but no was injured, authorities said. <http://www.calcoast.org/news/beachrest.htm>

Escondido Businessman Admits to Illegal Dump

(NC Times, 2/15) "[An Escondido business owner accused of illegally dumping industrial waste into the city's sewer system ---- a move the city claims ultimately led it to face state fines nearing \\$1.2 million ---- has pleaded guilty to one count of unlawful discharge of pollutants.](#)"

ANNOUNCEMENTS

International Erosion Control Association Annual Conference

2006 LANDS Roundtable & Workshop

The Annual Roundtable & Workshop will be held April 8-9, 2006, in Carlsbad, California, at the [La Costa](#) Resort and Spa. The program will include a day and a half of discussion for attorneys on regulatory takings and eminent domain, due process, affordable/workforce housing, ethics in land use law, and an update on Oregon's Measure 37.

For a complete schedule of events, please click [here](#). You can find additional [travel and hotel information](#) by clicking here. [Networking events](#) are also scheduled during the Workshop.

Registration information is now available on the NAHB web site. Click [here](#) for online registration, or, if you prefer, you can download the [registration form](#) and submit your registration via facsimile.

UC Center for Water Resources 2006 Salinity and Drainage Conference

- Red Lion Inn
Sacramento, California

March 29, 2006
Continental Breakfast 7:30 - 8:00 am
8:00 am - 4:30 pm

Come and be updated on the most current salinity issues in the State. This year's conference will focus on salt management in the Central Valley and the salinity of downstream surface water bodies. The technical program is being planned. Please check our web site at <http://www.waterresources.ucr.edu/> for registration and hotel information. Updates on the technical program will be available soon.

Foley & Lardner LLP bulletins are intended to provide information (not advice) about important new legislation or legal developments in the stormwater area. The great number of legal developments does not permit the issuing of an update for each one, nor does it allow the issuing of a follow-up on all subsequent developments. This newsletter is not legal advice and should not be construed as legal advice. If you need legal advice please contact your attorney.

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