

### A COMPILATION OF STORMWATER AND OTHER RELATED WATER NEWS

By S. Wayne Rosenbaum Foley & Lardner LLP

#### NATIONAL NEWS

##### **EPA, Corps Propose Better Wetlands Protection**

(EPA News Release, 3/27) "[Swamps, bogs, fens, marshes and estuaries – in short, wetlands – are as vital to our environment as coral reefs and rain forests. With that in focus, the U.S. Environmental Protection Agency \(EPA\) and U.S. Army Corps of Engineers \(Corps\) are proposing a new rule to ensure more effective wetlands restoration and preservation nationwide.](#)"

##### **Judge Invalidates Exclusion of Land from Critical Habitat**

(CBIA Monday Morning Report) In a set-back for homebuilders and property owners, a U.S. District Court Judge for the Northern District of California ("the judge") has determined that the U.S. Fish and Wildlife Service (USFWS), when conducting a cost-impact analysis of a critical habitat designation, may not consider the whole cost of protecting the habitat and the species but only the difference between "recovery" of a species and the lower standard of "survival" of the species. The decision affects the authority of the USFWS to reduce the number of acres designated as critical habitat based upon the economic impacts of the designation. The case, *Center for Biological Diversity (CBD) v. USFWS*, dealt with a critical habitat designation in the Imperial Valley which was proposed to be reduced by about 60 percent to account for the impact it would have on the Imperial Sand Dunes Recreation Area. At issue was how the USFWS calculated the cost impacts of critical habitat designations. Guided by the decision in *New Mexico Cattle Growers v. USFWS*, the federal agency was in the practice of determining the cost impacts based on the full cost of mitigation following the listing of a species. However, using the decision in *Gifford Pinchot Task Force v. USFWS*, the judge essentially eliminated any assessment of the full cost of mitigation, ruling that only the incremental difference between the "survival" costs and the "recovery" costs could be used in the USFWS's economic-impact analysis. The judge also said that the data used by the USFWS to conduct its analysis was not scientific and, therefore, inadequate. It is unknown at this time whether this trial court decision will be appealed.

##### **Sixty Percent of Big U.S. Factories Violate Water Law**

(Gannett News Service, 3/24) "[More than 60 percent of the nation's biggest factories and sewage plants have violated the Clean Water Act by spewing pollution into the nation's rivers, lakes and bays, according to a report released Thursday.](#)"

For more information on the matters discussed in this issue of the *Stormwater News* please contact the following Foley & Lardner LLP professional, or the member of the firm who normally handles your legal matters.

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## **CALIFORNIA NEWS**

### **EPA Settles With Metal Finishing Company for \$25,000 Over Hazardous Waste Violations**

(EPA News Release, 3/28) "[The U.S. Environmental Protection Agency has fined the California Technical Plating Corporation of San Fernando, Calif., \\$25,000 for violating federal hazardous waste regulations, including storing hazardous waste without a permit.](#)"

### **Lake Tahoe – Presentation on Pollutants, BMPs, TMDLs**

(Water Quality News Flash, March 27, 2006) A recent presentation summarized current information on pollutant sources and control efforts. Fine inorganic particles are the major pollutants affecting lake clarity. Atmospheric deposition of nitrogen, a nutrient, represents 40-50% of total nitrogen loading. Streams and direct runoff are also significant pollutant contributors. [http://www.waterboards.ca.gov/nps/docs/conference2005/presentations/m330a3\\_reuter.pdf](http://www.waterboards.ca.gov/nps/docs/conference2005/presentations/m330a3_reuter.pdf)

### **Enviros, Much to Their Surprise, Like Guv's Water Board Picks**

(Capitol Weekly Published March 16th, 2006) California environmentalists have been pleasantly surprised by Republican Gov. Arnold Schwarzenegger's appointments to the State Water Resources Control Board. But with two seats now open on the powerful, five-member panel, they are wondering if their good fortune will hold.

"So far, there's more transparency, more openness, and there's more outreach to certain people, but it's hard to say what Schwarzenegger's (state) board will ultimately be like," said Jim Metropulos, a legislative representative for the Sierra Club's California chapter.

Gov. Gray Davis, a Democrat, had a strong record for signing environmental legislation, but his board appointments were often at odds with environmentalists because they were often seen as overly friendly to agricultural and industry.

Schwarzenegger's green leanings have led him to appoint environmentally-friendly candidates to the state and regional boards. During his campaign, Schwarzenegger said he would keep the environmental boards balanced--a promise the industry and agricultural interests want kept with the two open positions.

Environmentalists' hopes for the board got a substantial boost this month, when the panel issued a sweeping order blocking state and federal agencies that pump water from the Sacramento-San Joaquin Delta to southern parts of the state from tampering with the salinity levels in the delta. A 1968 Supreme Court ruling affirmed California's decision to protect the waterway, through which most of California's drinking water flows, but previous water boards had not enforced the decision.

"It's been all downhill since Reagan was governor, (with) both Democrat and Republican appointments. But in the past couple of months, there's been a glimmer of hope, like the board's awakened from slumbering to take a hard look at water rights," said Thomas Graff, California regional director of Environmental Defense. He has been following the agency almost since its inception in 1967.

The Water board voted 3 to 1 in favor of the cease-and-desist order, with Schwarzenegger's two past appointments-- Democrats Tam Doduk, a civil engineer, and Jerry Secundy, a former federal environmental lawyer-- siding with majority.

The two new appointees would give the board, which controls the allocation of water for public and private use as well as enforcing California's high water quality standards, a 4-1 Schwarzenegger majority. Arthur Baggett, an environmental lawyer with a water background, will be the sole Davis holdover.

Schwarzenegger's staff declined to comment on the vacancies. But several names are circulating among industry advocates and environmental groups, and a handful are appearing on both lists.

The most surprising is Cindy Tuck, the assistant secretary for policy at the state Environmental Protection Agency.

Schwarzenegger appointed Tuck to chair the State Air Resources Board, but in August her appointment was rejected by the Senate Rules Committee, following protests from environmentalists who said she had a long history of siding with industry.

"The governor doesn't want to have another Cindy Tuck incident, but most of the groups who opposed her were environmental justice groups who seem to be less involved with this appointment," said Mike Rogge, Environmental Policy Director of the California Manufacturers and Trade Association. "We would support [her]. We've felt the Board has been leaning over to the environmentalists in the past, and we'd like to see it swing back with these two appointments."

The Sierra Club opposed Tuck's appointment to the ARB and said it would oppose her appointment to the Water Board if the governor named her.

Other names circulating include Charles Hoppin, a member of the California Rice Industry Association, and several members from Regional Water Control Boards, including Linda Adams, who has served as a consultant to the state Senate Agriculture and Water Resources committee. Adams also served as Davis' legislative secretary. Industry and environmental interests are given the opportunity to interview candidates before Schwarzenegger sends them to the Senate.

Despite his mixed history on appointments, Schwarzenegger won the Sierra Club and The California League of Conservation Voters' highest rating for any Republican in the state for his environmental performance last year. But that 58 percent rating is still well below Davis' lowest score of 72 percent in 2002. In 2003, Davis won a 100 percent rating.

Agriculture, food processing, timber, manufacturing, energy, sewage and other industries are all subject to permits for water usage from the state board or from one of the nine regional boards. Since taking office, Schwarzenegger has appointed a mix of Democrats and Republicans to about a third of the positions on the regional boards.

The nine regional boards, which all have nine part-time members, tend to be more responsible for quality enforcement issues as well as creating regional water use plans. The Central Valley Regional Water Board fined Hilmar Cheese Co., the largest single-site processor of cheese in the country, \$4 million for repeated violations of chemical leeching into groundwater at its Central Valley plant.

The ruling sparked a demand for more uniform decisions among the regional boards, which are largely autonomous unless decisions are contested. Those disputes are sent to the state board, and then the state Supreme Court. No formal action has been taken to regulate the decisions of the regional boards whose members take home \$100 a day. State board members earn a salary of more than \$114,000 a year.

### **Factsheet on the Effect of Urbanization on the Water Cycle**

OEHHA has been working with the California Water and Land Use Partnership (CA WALUP, formerly the CA NEMO Partnership) to develop a series of factsheets that address the relationship between land use and aquatic resources. CA WALUP is an affiliate of the National NEMO Network (<http://nemonet.uconn.edu>)<sup>1</sup>. The Partnership is a collaboration of various local, state, and federal agencies in California that provides assistance to local government through non-regulatory, research-based education and outreach programs that emphasize watershed science basics, natural resource-based land use planning, and better site design. Our goal is to educate land use decision makers and their staff about the link between land use and natural resource protection. Some of our activities to accomplish this objective are:

- *The development of technical tools:* We are currently working on an Impervious Surfaces Analysis Tool which will facilitate the analysis of impervious cover associated with urbanization. It can be used for land use planning as well as an indicator of watershed health.
- *Education:* We are developing a series of factsheets that addresses important issues, one of which is the ways in which urbanization alters the hydrological cycle. Future factsheets will address issues related to chemical, physical, and biological stressors of aquatic ecosystems, watershed indicators, better site design, and low impact development technologies.
- *Outreach:* Holding workshops with city and county staff to promote an understanding of their decisions on aquatic resources and to provide the tools to support better decision-making.

In this first factsheet, developed by UCSB intern Emily Ruby, we address the issue of how urbanization alters the water cycle. [Comments and questions are welcome.](#) Follow this link to download the fact sheet as a pdf file: [The Effect of Urbanization on the Water Cycle](#).

### **Bacteria TMDLs – Action on NAPA River, LA Region –**

(Water Quality News Flash, March 18, 2006) The proposed Napa River Pathogen TMDL sets a “density-based” wasteload allocation for municipal runoff of 126 CFU/100 ml (geometric mean) for *E. coli*. River sampling showed that about 20% of samples exceeded targets for both wet and dry seasons with exceedances most common in urbanized tributaries. For comparison, the Caltrans *Discharge Characterization Study Report* in statewide sampling found a median value in highway runoff for fecal coliform of 362 MPN/100ml (the fecal coliform group consists mostly of *E. coli*). Caltrans is completing

research on pathogen detection techniques in this area, which may yield information that will aid in monitoring and adaptive implementation of the TMDLs (see *NewsFlash 06-05*). NAPA River TMDL:

<http://www.waterboards.ca.gov/sanfranciscobay/napariverpathogentmdl.htm>. Similar TMDL for Sonoma Creek:

<http://www.waterboards.ca.gov/sanfranciscobay/sonomacrkrpathogenstmdl.htm>.

In related news, the LA Board is planning to approve five resolutions in support of implementation plans for Bacteria TMDLs in the Region including those for the Jurisdictional Groups of the Santa Monica Bay Beaches Bacteria TMDL. The TMDLs generally establish a specific number of days that a beach can have detected exceedances above the Basin Plan standards for bacteria levels for recreational use (fecal coliform density < 400/100 ml; single sample). The number of allowable exceedance days is based on the exceedances at a relatively uncontaminated reference beach where the exceedances are assumed to be caused by natural sources, such as birds and other wildlife. Caltrans is participating in the Jurisdictional Groups.

The Santa Monica Beach TMDL proposes gradual reductions in exceedances with final targets met in 18 years (except for one area that already meets standards). As recommended by the Board, the Jurisdictional Group plans use an “integrated water resources approach that takes a holistic view of regional water resources management” by integrating other water resources and needs. Because of the uncertainties regarding whether the implementation plans will achieve final compliance with the TMDLs, Board staff is recommending that the responsible parties begin planning for potentially more costly regional solutions, presumably runoff collection and treatment. <http://www.waterboards.ca.gov/losangeles/html/bpaRes/bpa.html>

### **Sediment Quality Objectives (SQOs) - *Steering Committee Meets* -**

(Water Quality News Flash, March 18, 2006) The State Water Resources Control Board is developing sediment quality objectives (SQO) which will be used by the regulatory agencies in a similar fashion to water quality objectives. SQOs do not exist on the federal level and the development process for state SQOs has been lengthy. Some contaminated sediment sites were caused or contributed to by storm water discharges so MS4 agencies are likely to be impacted by the SQOs as contaminated sites are identified and cleaned up. The Scientific Steering Committee developing SQOs met February 28. The technical and policy presentations are posted: [http://www.sccwrp.org/meeting/sqo\\_ssc\\_2006.html](http://www.sccwrp.org/meeting/sqo_ssc_2006.html)

## **SOUTHERN CALIFORNIA**

### **San Diego County Municipal Permit - *Draft issued* -**

(Water Quality News Flash, March 20, 2006) The San Diego Regional Board proposes to reissue the municipal storm water permit applicable to the county and cities within the county. This Board has been innovative in its approach to regulating municipal storm water and this permit may set a precedent for future permits. One major goal of the permit is an expansion of the watershed-based requirements. Other highlights of this draft:

- Specifies a “triad approach” with monitoring for water chemistry, toxicity and bioassessment. “Persistent exceedance” of water quality objectives requires high priority follow-up only when the bioassessment shows indications of biota alterations. The Permit Fact Sheet notes that the monitoring data documents persistent exceedances of Basin Plan water quality objectives for various pollutants (metals, fecal coliform bacteria, total suspended solids, etc.)
- For construction projects, requires implementing agencies to designate a maximum disturbed area to be open at any one time. The Fact Sheet references Caltrans standard specifications generally limiting exposed areas to 17 acres or potentially less in the rainy season.
- At designated construction sites, the permit requires advanced treatment, defined as “using mechanical or chemical means to flocculate and remove suspended sediment...” The Board references similar requirements in the Central Valley. (Note: this permit regulates construction via the co-permittees who have responsibility to oversee construction projects within their jurisdictions; in addition, builders need to comply with the Construction General Permit under the dual regulatory system applicable to construction activities).
- Places restrictions on infiltration of urban runoff in order to protect the groundwater including requiring pretreatment such as sedimentation or filtration prior to infiltration; establishing a minimum vertical distance to groundwater of 10 feet (some exceptions), and prohibiting infiltration for areas subject to high vehicular traffic (25,000 or greater average daily traffic on main roadways or 15,000 ADT on intersecting roadways).
- Requires that treatment control BMPs for specified project categories have a removal efficiency rating that is higher than “low removal efficiency”; some exceptions allowed.
- Allows a waiver of treatment BMPs and a transfer of the cost savings to a fund for projects elsewhere within the same watershed.
- Establishes a maintenance tracking system and also requires a Program Effectiveness Assessment
- Requires development and implementation of a Hydromodification Management Plan to address increases in peak runoff and volume from new projects. (See NewsFlash 04-48.)

Comments are due June 14, which is also the date of the public hearing. Posted at:

[http://www.waterboards.ca.gov/sandiego/programs/sd\\_stormwater.html](http://www.waterboards.ca.gov/sandiego/programs/sd_stormwater.html)

### **State Water Resources Control Board TMDL for Toxic Pollutants in Marina del Rey Harbor**

This amendment to the Water Quality Control Plan for the Los Angeles Region (Basin Plan) establishes a Total Maximum Daily Load (TMDL) to reduce toxic pollutants in Marina del Rey Harbor. The TMDL: (1) sets numeric targets for sediments based on Effects Range–Low sediment quality guidelines (ERLs) compiled by the National Oceanic and Atmospheric

Administration; (2) sets numeric water quality and fish tissue targets based on standards established by the California Toxics Rule (CTR) for the protection of human health; (3) establishes a loading capacity to meet numeric targets for sediment based on the average annual total suspended solids loading to the harbor; and (4) allocates the loading capacities among point and nonpoint sources of toxic pollutants, with the majority of the capacity allocated to storm water sources.

### **Camarillo Appeals Maps of Food Plain**

(Ventura County-Star, 3/25) ["Camarillo officials have appealed to the federal government for more time before 10,000 people have their homes or businesses identified as being in a flood plain."](#)

### **Infiltration Impacts on Groundwater – LA Area Studies Show Groundwater Improvement for Some Pollutants**

(Water Quality News Flash, March 27, 2006) The Los Angeles & San Gabriel Rivers Watershed Council (LASGRWC) has completed the first two phases of a long-term infiltration study. The study evaluates infiltration for storm water control and as a method for groundwater recharge for increasing water supply. Their recent work has focused on the fate and transport of runoff-borne pollutants. Additionally, they evaluated a range of infiltration BMPs from simple landscaped swales to large-scale underground infiltration fields. They report no trends indicating that infiltration is negatively impacting groundwater. Some conclusions from the study:

- Soil is efficient at removing bacteria; total and fecal coliforms and E. coli were detected in most stormwater samples, but not in most lysimeter or groundwater samples.
- Concentrations of metals tended to be higher in stormwater than in subsurface water samples. Concentrations in subsurface samples were generally stable or decreasing.
- Most inorganic groundwater quality constituents do not show clear trends or show decreasing concentrations over the study period. Although this result is counterintuitive, it appears that the increased flow from the infiltration BMPs diluted pre-existing concentrations of some constituents in the groundwater
- Groundwater quality has generally improved for most constituents at sites with shallow groundwater.

Some LA Basin TMDLs assume that infiltration will be the major mode of attaining waste load allocations assigned to storm water runoff. However, groundwater contamination has been a concern. Some MS4 programs require treatment of runoff prior to infiltration or prohibit infiltration for runoff from heavily traveled roadways (e.g. >25,000 average daily traffic). In addition, some programs have minimum depth to groundwater requirements for infiltration trenches and ponds (but not for surface infiltration BMPs like swales). These restrictions limit the applicability of infiltration BMPs for many locations. An additional factor is that some increases in groundwater pollutants, although very limited, did occur in the study. A regulatory issue is whether even limited or de minimis increases in groundwater constituent concentrations from infiltration will trigger the State's Nondegradation Policy and place additional constraints on infiltration.

Los Angeles Basin Water Augmentation Study Phase II Final Report:

[http://www.lasgrwc.org/WAS/Documents/WAS%20Phase%20II%20Final%20Report\\_2005.pdf](http://www.lasgrwc.org/WAS/Documents/WAS%20Phase%20II%20Final%20Report_2005.pdf)

Slide presentation: [http://www.waterboards.ca.gov/nps/docs/conference2005/presentations/m330b2\\_dallman.pdf](http://www.waterboards.ca.gov/nps/docs/conference2005/presentations/m330b2_dallman.pdf)

## **A Restored, Revived L.A. River**

(The Planning Report, 3/22) "[In the long and often unfortunate history of the L.A. River, the next year may prove pivotal. The city of Los Angeles is currently in the midst of an 18-month process to draft a master plan for the rehabilitation and re-use of the neglected waterway, and that document will guide land use and environmental strategies that will make the river a true civic asset.](#)"

## **ANNOUNCEMENTS**

### **TMDL 2007 Call for Abstracts (DEADLINE: JULY 17, 2006)**

The Water Environment Federation, in cooperation with the Pacific Northwest Clean Water Association, is sponsoring TMDL 2007. Supporting organizations include the U.S. Environmental Protection Agency, the Association of State and Interstate Water Pollution Control Agencies, and the Water Environment Research Foundation.

TMDL 2007 will be an opportunity for environmental professionals to discuss technical requirements for developing TMDLs, to learn about new research, such as model development and advancements in water quality monitoring, to hear from stakeholders with different perspectives and positions on TMDL issues, and to discuss regulatory and policy issues.

To obtain a copy of the Call for Abstracts, please visit:

<http://www.wef.org/NR/rdonlyres/07FCA1A4-54A8-4741-90AF-6978B3A4ABB4/0/TMDL07Call.pdf>

### **San Diego Coastkeeper is Proud to Announce the Launch of the 6th Grade Project SWELL (Stewardship: Water Education for Lifelong Learning) Curriculum**

Project SWELL teaches our children about the importance of our recreational waterways and human-water interaction through a well-balanced, comprehensive and hands-on water quality and pollution prevention curricula.

The intent of the Project SWELL curricula is to foster a sense of environmental stewardship among our children, the leaders and environmental caretakers of our future.

The 6th grade curriculum focuses on "Landforms" and will begin circulating to 10,019 students in the San Diego City Schools. In 2004, the 5th grade curriculum, which focuses on "Watersheds", was launched and currently reaches 10,668 students in San Diego City Schools.

Also to follow this year will be 4th grade curriculum, focusing on "Ecosystems" and the 2nd grade curriculum, focusing on "Pebbles, Salt, and Silt". Our ultimate goal is to develop and implement a water quality and pollution prevention curricula for K-12 classrooms in San Diego City Schools within the next 2-3 years, which will ultimately reach 138,000 students.

On Friday, March 24, 2006 San Diego Coastkeeper will be holding a media availability event to celebrate the launch 6th grade Project Swell at Chollas Creek Earthlab Science Education Center. If you are interested in attending or would like more information on Project Swell please contact Danielle Miller at 619-758-7743 or [danielle@sdcoastkeeper.org](mailto:danielle@sdcoastkeeper.org).

### **March 22 is World Water Day.**

The annual international observance of World Water Day is an initiative that grew out of the 1992 United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro.

The theme for World Water Day 2006 is **Water and Culture**.

For more information on Water and Culture, and/or World Water Day, please visit: <http://www.worldwaterday.org/>

There are several "Walk for Water" events being held across the country and three in California, in San Diego, Los Angeles, and San Francisco. If you are not near any of these locations - or just can't get out of the office - there is also a Virtual Walk that you can register for from your desk. For more information, please see: <http://www.worldwaterday2006.org/>

## **HEARINGS**

### **COMMITTEE HEARING AB 2515**

**SCHEDULE DATE: 04/25/2006, Tue**

Assembly Water, Parks and Wildlife Committee

9:00 am            Room 437

**AUTHOR:**        Ruskin (D)

**TITLE:**          Water Conservation

### **SUMMARY:**

Requires the Energy Resources Conservation and Development Commission to establish water efficiency standards for residential and commercial water-using appliances and other products. Requires the commission to prepare and submit to the Legislature a report that sets forth recommendations regarding the utilization of water use ratings for those appliances and products. Recommend an accounting method for evaluating the direct financial costs and benefits of water conservation and efficiency program.

**COMMITTEE HEARING CA AB 1877**

**SCHEDULE DATE:** 04/04/2006, Tue

**Assembly Water, Parks and Wildlife Committee**

9:00 am Room 437

**AUTHOR:** Nakanishi (R)

**TITLE:** Streambed Alteration Agreements: Levee, Flood Control

**LAST AMEND:** 03/13/2006

**SUMMARY:**

Deletes routine maintenance and operation of flood control facilities from notification exemption. Authorizes an entity, if it proposes an activity that involves the routine maintenance of a levee or flood control system that is substantially equivalent to a prior activity that was conducted in accordance with existing law, to submit to the Department of Transportation a written notification regarding the proposed maintenance.

*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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