

A COMPILATION OF STORMWATER AND OTHER RELATED WATER NEWS

By S. Wayne Rosenbaum Foley & Lardner LLP

NATIONAL NEWS

Where to Park the Water?

(Land Development Today, April 2006) Parking lots are the biggest challenge for land development professionals when it comes to stormwater management. While pipes and storage options will never disappear, some new low impact alternatives are emerging - such as porous pavement. [Full story](#)

Wetlands – EPA and Army Corps of Engineers to Amend Rules on Compensatory Mitigation –

(Water Quality News Flash, April 10, 2006) U.S. EPA and the U.S. Army Corps of Engineers have proposed revisions to the regulations governing compensatory mitigation for activities authorized by Clean Water Act section 404 permits (dredge & fill). The goal of the revisions is to improve the effectiveness of compensatory mitigation, expand public participation in the decision-making, and increase the efficiency and predictability of the process.

The new regulations implement Public Law 108–136 (Nov. 24, 2003) which required the development of performance standards and criteria for on-site, off-site, and in-lieu fee mitigation and mitigation banking as compensation for lost wetlands functions. The Corps and EPA have expanded the regulations to address not only compensatory mitigation for wetlands but also mitigation for other types of impacted aquatic resources such as water quality in streams. The revisions will not alter the threshold for determining when compensatory mitigation is required and will not increase compensatory mitigation requirements, but rather focus on where and how compensatory mitigation will be provided. The revisions also introduce a watershed approach:

Within a watershed context...it may be environmentally preferable to replace hydrologic and water quality functions at the impact site with a mitigation project that performs these functions, and to replace habitat functions at an off-site location, such as a mitigation bank or a compensatory mitigation project site near a park or nature reserve.

Comments are due May 30. Posted: <http://www.epa.gov/wetlandsmitigation/>

Wetlands – Net Gains?

(Water Quality News Flash, April 10, 2006) The Fish & Wildlife Service reported net gains in total wetland acreage since 1997, but the quality has been questioned: <http://www.msnbc.msn.com/id/12094052/>

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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EPA Report Shows Decrease in Toxic Chemicals

(EPA News Release, 4/12) "[The amount of toxic chemicals released into the environment decreased four percent from 2003 to 2004 according to the Environmental Protection Agency's Toxics Release Inventory \(TRI\) released today.](#)"

Pollutant Levels Rising in Open Water

(ScienceNOW Daily News, 4/04) "[A notorious class of environmental contaminants appears to be increasing in the open ocean despite regulations, according to a new study. Researchers say the trend is threatening endangered bird species and potentially humans as well.](#)"

Protection in Jeopardy?

(SD Union Tribune, 4/03) "[When U.S. Fish and Wildlife Service officials asked for \\$141 million to fund the endangered species program next year, they inserted a startling note: They can't prove how well their past efforts have worked.](#)"

CALIFORNIA NEWS

Wetlands and Riparian Areas – SF and North Coast Boards to Amend Basin Plans to Provide Protections –

(Water Quality News Flash, April 10, 2006) In what may eventually evolve into a major statewide effort, the North Coast and San Francisco Bay Regional Water Quality Control Boards propose to develop amendments to their Basin Plans to protect stream and wetlands systems, including measures to protect riparian areas and floodplains. The two boards will propose a single policy that is intended to serve as a “model for other Regional Water Boards and for the state in the protection of water quality.”

The stream, wetland, and riparian provisions will be linked to existing relevant permit conditions and provisions in 401 water quality certifications (for section 404 dredge & fill projects), timber harvesting plans, waste discharge requirements (WDRs), WDR waivers, and NPDES MS4 permits (urban runoff). The Policy will also be linked to monitoring efforts (e.g., Surface Water Ambient Monitoring Program), grant programs, and local offset programs for project applicants when on-site avoidance of impacts is impossible. The first workshop (for SF Bay Board) is scheduled for May 1, in Oakland.

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

Polybrominated Compounds – OEHHA Report Urges Pollution Prevention –

(Water Quality News Flash, April 3, 2006) As discussed in *NewsFlash 04-39*, the legislature banned two polybrominated diphenyl ethers (PBDE) – pentaBDE and octaBDE – effective June 1 of this year. These are two of the three common commercial mixtures of PBDEs. The third type - decaBDE - is considered possibly less of a risk. These compounds are used primarily as fire retardants and have been increasing rapidly in the environment. For unknown reasons, some of the highest levels of PBDEs measured worldwide have been in California human and wildlife populations. Levels of these compounds have

been doubling in human tissues and breast milk every few years and levels measured in humans in the US and Canada are typically at least 10 times higher than those in Europe.

A Cal/EPA workgroup, led by the Office of Environmental Health Hazard Assessment (OEHHA), has issued a report to address continuing exposures of Californians to PBDEs after June 1. The mode by which PBDEs enter the environment is not known, however, wastewater (sewage) treatment plants are one possible source. PBDEs are used in transportation, including cars, trucks, and mass transit vehicles and may be present in automotive residue on roadways. The workgroup recommends reducing PBDE exposures through outreach and education, and voluntary pollution prevention.

http://www.oehha.ca.gov/public_info/pbderpt.html

Areas of Special Biological Significance – *Monitoring Q&A*

(Water Quality News Flash, April 3, 2006) The State Water Resources Control Board has posted questions and answers regarding the runoff and ocean monitoring that is necessary to support an application for an exception to the Ocean Plan. An exception is needed for storm water runoff that enters ASBS from roads and urban areas since the runoff is considered a waste and waste discharge is prohibited in the Ocean Plan. The document states that the receiving water sampling stations should be adjacent to the outfall, within the runoff “plume,” and preferably immediately outside the surf zone (i.e., seaward).

http://www.waterboards.ca.gov/plnspols/docs/asbs/preexcepmon_faqs.pdf

CA Homebuilding Industry Settles Critical Habitat Lawsuit

(CBIA Monday Morning Report) CBIA, joined by HBA/NC and the BILD Foundation, settled a challenge to the designation of critical habitat for five endangered species. The settlement provides that the U.S. Fish and Wildlife Service will reconsider habitat designations of the Monterey Spineflower, San Bernardino Kangaroo Rat, La Graciosa Thistle and Quino Checkerspot Butterfly and that homebuilders recover attorney’s fees. Original habitat designations will remain in effect while they are reconsidered.

Study Highlights Infill Development Opportunities in California

A new study examining the extent of infill development opportunities statewide was released last week by California’s Business, Transportation and Housing Agency. The study, “The Future of Infill Housing in California: Opportunities, Potential, Feasibility, and Demand,” was conducted by UC Berkeley land-use scholar John Landis and includes the “California Infill Parcel Locator,” designed to be an infill-parcel prospecting tool for policy-makers and investors alike. To view the study, go to http://infill.gisc.berkeley.edu/report_vol-1.pdf. To view the locator, go to www.infill.org.

Otter Deaths Blamed on Polluted Runoff

(San Luis Obispo Tribune, 4/12) "[For the past several years, wildlife managers have noticed an alarming trend: a disproportionately large number of sea otters washing up dead on San Luis Obispo County beaches.](#)"

Power Plants' Seawater Intake Spurs Outcry

(SD Union Tribune, 4/14) "[Each day, the 21 power plants along California's coast pull in nearly 17 billion gallons of seawater. The ocean water is used as a kind of radiator fluid to help cool the systems that generate 40 percent of the state's electricity. But the practice has killed billions of fish eggs, larvae and other marine life.](#)"

State Water Resources Control Board Amends Central Valley Water Quality Control Plan

This amendment to the Water Quality Control Plan for the Central Valley Region for the Sacramento and San Joaquin River Basins (Basin Plan) that established site-specific objectives for temperature for Deer Creek, located in El Dorado and Sacramento Counties, will change the word "discharges" to the words "controllable factors" in the following sentence: "For Deer Creek, source to Consumers River, temperature changes due to discharges controllable factors shall not cause creek temperatures to exceed the objectives specified in Table III-4A."

Water Board Shirks Its Hilmar Duty

(Sacramento Bee, 4/07) Guest **Opinion** from **Carrie McNeil**, director of the Deltakeeper: "[Just when we need it the most, the Central Valley's Regional Water Quality Control Board has let us down. While our demands for clean drinking water increase and Delta fish struggle to survive, the board is choosing to help polluters, not the public.](#)"

State Legislation

Bills that are posted at <http://www.calcoast.org/legis/general.htm>

SB 1601 (Lowenthal) - would impose strict regulations aimed at lowering pollution levels at ports by requiring that ports demand more pollution control as a condition of lease renewals for terminals, warehouses and shipping interests.

State Water Resources Control Board: Its Division of Water Rights Uses Erroneous Data to Calculate Some Annual Fees and Lacks Effective Management Techniques to Ensure That It Processes Water Rights Promptly

Audit Highlights: Our review of the operations of the State Water Resources Control Board's Division of Water Rights (division) revealed the following:

- Because the division's database does not always contain the correct amount of annual diversion authorized, some of the annual fees the division charged over the past two fiscal years were wrong.
- The division's method of charging annual fees may disproportionately affect holders of multiple water rights that authorize them to divert small amounts of water.
- Because the division does not factor in certain limitations on permits and licenses, it charges some fee payers based on more water than they are authorized to divert.

- The number of permits and licenses the division has issued over the past five fiscal years has significantly decreased.
- Although the process of approving a water right is complex and can be legitimately time-consuming, the division may cause unnecessary delays because it has a poor process for tracking its pending workload and is sometimes slow to approve documents to be sent to applicants.
- The data in the division's electronic tracking systems related to applications and petitions are unreliable for the purpose of tracking the progress and status of those files.
- The electronic bar-code system the division uses to track the location of its files has limited usefulness as a management tool because more than 5,200 of its permit and license files are not present in the system.

DWP Buys Advice on Breast Feeding

(LA Daily News) The Department of Water and Power, proposing to hike water rates 18 percent in the next four years and impose surcharges for natural gas and renewable energy, faces increasingly intense scrutiny of how it spends ratepayers' money, down to more than \$1 million a year it pays for parenting and breast-feeding classes, a fitness center and a choir for its employees.

The spending is part of more than \$16 million in noncore activities the DWP paid for in fiscal 2006, according to an independent study of the utility's finances.

Spending includes \$1.1 million for family care and lactation programs, \$2.2 million for training and development, \$150,000 for a fitness center and \$28,000 for the DWP Choraliers, according to the study.

The study concludes that rate hikes would be needed even if the department axed all such extra spending, but the laundry list immediately heightened debate over DWP spending habits and rate-hike requests.

"What are they doing? Haven't they heard the city is in dire need of funds? It's kind of mind-boggling," said Michael N. Cohen, a Reseda Neighborhood Council board member.

"Is the rate increase to increase the perks for people who already get more than others workers (in similar classes in other city departments)?"

The \$360,000 study by Barrington-Wellesley Group Inc. was designed to give neighborhood councils more detailed information about revenue after the groups successfully blocked the utility's 2005 plan for a two-year, 7 percent water-rate hike.

The renewed pressure for more revenue comes after city officials approved a controversial contract last summer with the DWP's union, granting raises of up to 28 percent over five years, and Mayor Antonio Villaraigosa's appointees to the DWP board vowed to block new rate hikes.

Citing the lucrative deal for workers, Jim Alger, president of the Northridge West Neighborhood Council and a state Assembly candidate, said the public has a right to know more about the perks and expenses.

"I think it's ridiculous. ... It's beyond the pale of ridiculous," said Alger, who with other neighborhood councils' representatives was scheduled to meet with DWP General Manager Ron Deaton on Thursday to discuss the study.

"Their function is to provide safe power and water to the residents of Los Angeles, not other programs on the back of taxpayers."

Deaton on Thursday continued to defend the need for rate hikes, but said he agrees spending on noncore activities needs to be evaluated.

SOUTHERN CALIFORNIA

Runoff Crackdowns Prod Inland Homebuilders

(Riverside PE, 4/12) ["Regional water quality officials have fined developers of housing projects a record \\$1.5 million over the past year for failing to contain storm-driven pollution at 10 construction sites across the Inland region, according to water board records and officials."](#)

Oceanside Harbor Dredging Begins

(NC Times, 4/10) ["The dredging operation has two benefits, according to harbor maintenance manager Fran Quan: it regulates the depth of the harbor as a way to protect boaters from dangerous surf, and it deposits tons of sand from the harbor ---- sucked through pipes ---- onto local beaches as a way to replenish beaches just in time for summer."](#)

Former Resident Working to Stop Sewage Spills

(NC Times, 4/14) **Opinion:** ["North County's most effective environmental leader is not a member of the Surfrider Foundation or the Sierra Club."](#)

Oceanside Expands Local Water Supplies

(SD Union Tribune, 4/14) ["Years before a company proposed purifying ocean water to make drinking water at a beachfront desalination plant, Oceanside embarked on a smaller project that does something similar with groundwater."](#)

Developer Can Tap into Vista's Sewer System

(NC Times, 4/13) ["A proposed 55-unit residential development in an unincorporated area east of the city limits has been granted future access to the city's sewer system, even though the closest sewer lines are deteriorating and running at capacity, city officials said Wednesday."](#)

La Jolla Seals Win Key Vote for Wildlife Protection: City Council to Vote on April 18

On April 5, the City of San Diego's Natural Resources & Culture Committee unanimously approved a proposal to put up a guideline rope to protect mother and baby seals at La Jolla's Children's Pool Beach during the annual pupping season (January 1 - May 1). Coastkeeper's Law & Policy Clinic worked with many other environmental organizations, community members, elected officials and city staff to ensure a positive outcome for the seals. **The issue now goes to the full City Council for a vote on April 18th.** If you would like more information about our efforts to protect coastal habitats and wildlife, please contact Gabriel Solmer at gabe@sdcoastkeeper.org.

Monitoring Wells Installed Near Poway Landfill

(NC Times, 4/13) "[Workers have begun installing 22 wells that officials will use to help determine whether an old landfill off Poway Road is leaking benzene and other contaminants.](#)"

Scientists Question Test of Beach Water

(Orange County Register, 4/08) "[Somewhere on the Southern California coast, almost every day, signs go up warning swimmers of possible sewage in those rolling, beckoning waves.](#)"

Rainbow Water District Gets \$48K Bill From State

(NC Times, 4/06) "[The Rainbow Municipal Water District, which recently finished paying \\$15,000 in fines issued by the California Department of Health, now faces a \\$47,821.91 bill from the same agency, district General Manager Chris Trees said Wednesday.](#)"

Golf-Club Buy Plays Into O.C. Flood Control

As part of flood-control efforts, Orange County supervisors agreed Tuesday to buy the Green River Golf Club, with its two championship golf courses hugging the Santa Ana River. <http://www.calcoast.org/news/waterq.htm>

Group Meets on Trash

LONG BEACH — A coalition representing businesses, government and the environment Friday discussed alternatives to meeting a controversial federal mandate to reduce pollution going into the Los Angeles River.

<http://www.calcoast.org/news/coast.htm>

ANNOUNCEMENTS

CASQA

California Stormwater Quality Association Meeting; **May 12**; San Jose; *topic*: monitoring; \$50 payable at the door or online, includes lunch; <http://www.casqa.org/>



Foley & Lardner LLP's Environmental Regulation Practice Group recently hosted the first session in the 2006 Environmental Law Update Web Conference Series. Topics covered in this session included:

- "TOP TEN" Environmental Issues to Watch in 2006
- Stormwater Permits: The Next Big Stick in the Spokes of Progress?
- Once and for All: Is a Material a RCRA "Waste" or Not?
- Status of Significant Clean Air Act Reforms [Please note this Web Conference was held one day before the D.C. Circuit's new decision vacating EPA's "equipment replacement rule" for determining which modifications trigger NSR. We will be covering that decision, its implications, and related NSR developments in our June 15 Web Conference.]

If you missed the Web Conference and are interested in viewing, the recorded session can be found on [Foley's website](#) and clicking on "Recorded WebEx" located in the right column under Event Materials.

Also, below is a link to a very short overview of Foley's Environmental Regulation Practice Group that displays each attorney's photo, along with his/her location and years of experience in environmental law.

[Environmental Regulation Practice Group Overview](#)

For more information on the group and each attorney's specific areas of practice please visit Foley.com/environmental.

Upcoming 2006 Schedule

As a reminder, the upcoming sessions in the 2006 Environmental Law Update Web Conference Series are scheduled:

- Thursday, June 15, 2006
- Thursday, September 21, 2006
- Thursday, December 14, 2006

Please mark your calendars and plan to join us. All sessions are scheduled to begin at 11:30 a.m. Central time and last approximately one hour. If you would like to pre-register for any of the sessions to ensure your participation, please email your registration information, including your name, company name, job title, company address, phone number, email address, and dates you would like to participate to jtank@foley.com.

Additional Questions

If you have questions on the content of the March 16 Web Conference or would like to suggest a topic to be covered in one of the next sessions, please feel free to contact any of the speakers.

Getting In Step with Phase II: A Workshop for Municipal Stormwater Program Managers.

Local, state and federal stormwater managers need innovative tools and real-world examples in order to reduce pollutants in urban runoff and comply with National Pollutant Discharge Elimination System (NPDES) Phase II stormwater requirements. These two-day workshops provide in-depth training on Illicit Discharge Detection and Elimination, Post-Construction Runoff Controls, Construction Management, and Public Education and Involvement.

Registration is open for:

- Fort Worth, Texas - May 3-4, 2006
- Albany, New York - May 31 - June 2, 2006

To register, download the workshop announcement and fill out the form (www.epa.gov/npdes/training). Space is limited, so register early. A small fee will be charged to help cover the cost of conference materials, breaks, and lunches.

Mark your calendar for:

- Phoenix, Arizona - August 14-15, 2006
- Lexington, Kentucky - September 21-22, 2006

Registration for these workshops will open soon. Check the NPDES Website for updates! www.epa.gov/npdes/training

Pretreatment Training: "Introduction and Intermediate Topics" and "Intermediate and Advanced Topics."

The Introduction and Intermediate Topics course provides an introduction to the pretreatment program and focuses on permit development and issuance. The Intermediate and Advanced Topics provides information on the control of industrial discharges and information on development and application of pretreatment standards with a focus on local limits.

In each location, the Introduction and Intermediate Topics will be covered on the first two days and the "Intermediate and Advanced Topics" on the second two days. Registration is open for April 25-28, 2006 in Pittsburgh, Pennsylvania and July 11-14, 2006 in Salt Lake City, Utah. Registration information is available on the NPDES Website at www.epa.gov/npdes/training.

To sign up for NPDES News, go to www.epa.gov/npdes and click on the NPDES News icon on the right side of the page.

Course

Stormwater Treatment: How It Works (Or Does It); **May 2-3**; San Clemente; more information:

http://www.stormwaterbook.com/short_course.html

National Conference

Monitoring Networks: Connecting for Clean Water" by National Water Quality Monitoring Council; **May 7 -11**; San Jose; co-sponsored by USGS, EPA, Water Boards; *focus*: large-scale collaborative monitoring networks such as the proposed National Water Quality Monitoring Network for U.S. Coastal Waters and their Tributaries;

http://water.usgs.gov/wicp/acwi/monitoring/conference/2006/06_NMC_conf_announcement.pdf

California and the World Ocean Conference - Call for Papers –

This State-sponsored will be held Sept. 17-20, 2006. Presentation abstracts due **April 14:**

<http://resources.ca.gov/ocean/cwo06/>

HEARINGS

CA SB 1617

TITLE: Streambed Alteration Agreements: Emergency Work

INTRODUCED: 02/24/2006

LOCATION: Senate Natural Resources and Water Committee

SUMMARY: Expands emergency work exemptions to include emergency work declared by the governing body of a local government agency to prevent or mitigate immediate future loss, or damage, to life, health, property, or essential public services is likely to occur as a result of fire, flood, storm, earthquake, land subsidence, gradual earth movement, or landslide.

STATUS:

04/04/2006 In SENATE Committee on NATURAL RESOURCES AND WATER: **Failed passage.**

04/04/2006 In SENATE Committee on NATURAL RESOURCES AND WATER: **Reconsideration granted.**

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.

Internal Revenue Service regulations generally require that, for purposes of avoiding United States federal tax penalties, a taxpayer may only rely on formal written opinions meeting specific requirements described in those regulations. This newsletter does not meet those requirements. To the extent this newsletter contains written information relating to United States federal tax issues, the written information is not intended or written to be used, and a taxpayer cannot use it, for the purpose of avoiding United States federal tax penalties, and it was not written to support the promotion or marketing of any transaction or matter discussed in the newsletter.