A Foley & Lardner Information Bulletin

May 16, 2006

A COMPILATION OF STORMWATER AND OTHER RELATED WATER NEWS

By S. Wayne Rosenbaum Foley & Lardner LLP

NATIONAL NEWS

SEC Eyes Rare Enforcement Step Over Cleanup Reserves Accounting

The Securities & Exchange Commission (SEC) is proposing a rare enforcement action against a public corporation for allegedly illegally reporting reserves needed for possible cleanup efforts, a development that observers say could show new SEC interest in ensuring that corporations accurately report their environmental risks under strict new financial accounting standards.

SEC staff April 25 notified Kentucky-based Ashland Inc., a major manufacturer and distributor of chemicals and plastics, of their intent to seek authorization from the commission to pursue civil action against Ashland over "adjustments" to the company's environmental remediation reserves, which are required to fund cleanup cost overruns.

The SEC staff, which must first receive approval to seek action by the five-member commission appointed by the president, says it intends to seek injunctive or administrative relief against the company, which sources say could include not allowing Ashland accountants to sign-off on filings sent to the SEC. Such action would require more oversight of the company's accounting practices by SEC staff

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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and damage the reputation of the company's accountants and the public perception of the company, one environmentalist says.

TMDLs - Federal Appeals Court Says "Daily" Means "Every Day" (Who Would Have Guessed?)

(Water Quality News Flash, May 8, 2006) Total maximum daily loads (TMDLs) is the rather awkward name for the process prescribed by the Clean Water Act for allocating a "safe" loading of pollutants going into a waterway. A recent U.S. Court of Appeals decision for the District of Columbia Circuit reversed a lower court decision and ruled that "daily" means "every day" for TMDLs rather than annually or some other interval (Friends of the Earth Inc. v. EPA, D.C. Cir., No. 05-5015, 4/25/06). The court pointed out that, "Doctors making daily rounds would be of little use to their patients if they appeared seasonally or annually." Although this Court of Appeals decision does not directly affect California it may have national implications if other Courts of Appeal rule in a similar manner or if the U.S. Supreme Court concurs. EPA has indicated that it will attempt to change the TMDL regulations in order to address the ruling. Earlier attempts to amend the TMDL provisions have proven controversial and subsequently failed.





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Assigning allocations to the various sources on a daily basis is often not practical so allocations are currently generally assigned for a longer time interval. For example, the proposed SF Bay Mercury TMDL allocates an annual loading to urban runoff of 82 kg. In addition the TMDL allows urban agencies the option of showing progress by means of a rolling five-year annual average. A *daily* loading allocation for an intermittent discharge such as storm water would be very difficult to formulate and implement. http://pacer.cadc.uscourts.gov/docs/common/opinions/200604/05-5015a.pdf.

EPA: Drinking Water Regulations to be Finalized

(WaterWeek, 5/1) "USEPA plans to finalize several drinking water regulations this year, including the Ground Water Rule (GWR) in August and the second Unregulated Contaminant Monitoring Rule (UCMR2) in November, according to the agency's newest regulatory agenda."

Common Soap Antiseptic Found in U.S. Crop Fields

(Reuters, 5/3) "A chemical widely used to make soap 'antiseptic' survives sewage treatment and is being spread onto farmland and released into water, with unknown effects, researchers reported Tuesday."

EPA Unveils Assessment of U.S. Wadeable Streams

(EPA News Release, 5/5) "What's the state of the union's streams? EPA set out to answer that question in a just-completed, multiyear study of wadeable streams across the country."

EPA: Only Third of U.S. Streams in Good Shape

(Reuters, 5/8) "More than half of U.S. streams are polluted, with the worst conditions found in the eastern third of the country, according to a study by the Environmental Protection Agency."

Legislation Seeks Abandoned Mines Cleanup

(EPA, 5/10) **NEW RELEASE.** "The Good Samaritan Clean Watershed Act aims to lower legal roadblocks to cleaning up more than half a million abandoned hardrock mines that litter the American landscape. The legislation, introduced on behalf of the Bush Administration, would remove the potential liability for volunteer organizations willing to restore watersheds affected by acid drainage from the mines."

CALIFORNIA NEWS

Historic Bond Deal Approved: State Voters Will Have to Give Final Okay in November to Billions in Funding for Roads, Schools, Levees and Affordable Housing

(CBIA Monday Morning Report, May 8, 2006) Surprising critics and other Capitol observers, the Legislature passed an infrastructure spending package which will direct \$37 billion to, among other things, make critical transportation





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improvements, build and modernize public schools, complete repairs of the state's 1,600-mile levee system and finance the construction of housing for low and moderate-income households. The landmark infrastructure funding package came just seven weeks after lawmakers failed to reach agreement on a similar package in time to make the June, 2006 ballot. It appeared then that the Legislature would have a difficult time overcoming the bitter politics that immediately ensued that defeat but, in the weeks that followed, legislative leaders resumed discussions on a funding package. Senate President pro tem Don Perata (D·Oakland) had announced that he was setting a new deadline – May 6 – which coincided with the day that sponsors of an initiative to constitutionally fence off Proposition 42 (transportation) funds would have to turn in signatures necessary to qualify for the November ballot. (Senator Perata was attempting to head off a fight over the initiative between teachers, who feared it would limit funds to schools, and business and transportation interests trying to stop the Legislature from raiding Proposition 42 funds.) Talks intensified after Republicans agreed to drop demands for water storage funding and prison construction. CBIA, which supported the package in concept, risked having to oppose it due to offensive provisions that would have included funding for regional planning. CBIA argued that the bond package should be limited to "bricks and mortar" activities, leading to the provision's elimination. A summary of the package will be posted today at www.cbia.org.

Statewide General National Pollutant Discharge Elimination System (NPDES) Permit for Discharges from Utility Vaults and Underground Structures To Surface Waters (Utility Vault Permit)

Wednesday, July 5, 2006 Coastal Hearing Room – Second Floor Joe Serna, Jr. Cal/EPA Building 1001 | Street, Sacramento, CA 95814

Background: On September 22, 1989, the U.S. Environmental Protection Agency (USEPA) Region 9 approved California's program to issue general NPDES permits for discharges of waste to surface waters. On July 19, 2001, the State Water Resources Control Board (State Water Board) adopted Water Quality Order No. 2001·11·DWQ for the re-issuance of a general NPDES permit (CAG990002). This general permit covers short-term and intermittent discharges from the de-watering of utility vaults and underground structures to surface waters. The State Water Board is proposing to re-issue the Utility Vault Permit for discharges from utility vaults and underground structures. Staff has prepared a draft Utility Vault Permit, which has been circulated for comments to USEPA Region 9, potential enrollees, current enrollees under Water Quality Order No. 2001·11·DWQ, and interested parties. The State Water Board will conduct a public hearing during a regularly scheduled Board meeting to receive testimony on the draft Utility Vault Permit. At the conclusion of the hearing, the State Water Board will consider adopting the permit. This board meeting is scheduled for 10 a.m. on July 5, 2006 at the Joe Serna/CalEPA Building located at 1001 | Street in Sacramento, California.

Submission of Contents: Comments regarding the draft Utility Vault Permit must be addressed to Song Her, Clerk to the Board, Executive Office, State Water Resources Control Board, P.O. Box 100, Sacramento, CA 95812-0100. (Fax: 916-341-5620 or email: commentletters@waterboards.ca.gov).





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SF Regional Board - Stormwater Workshop -

(Water Quality News Flash, May 8, 2006) On May 10, following the regular Board meeting, the Board's Stormwater Subcommittee will hold a workshop to address stormwater management, including the pending Municipal Regional Permit for storm water (See *NewsFlash 06-17*). Agenda: http://www.waterboards.ca.gov/sanfranciscobay/agenda_may_06.htm

State Water Resources Control Board Adopts a General Waste Discharge Requirement

(CWEA, 5/4) "On May 2, 2006, the State Water Resources Control Board (SWRCB) adopted a General Waste Discharge Requirement (WDR) for all publicly owned sanitary sewer collection systems in California with more than one mile of sewer pipe. The goal of the WDR is to provide a consistent statewide approach for reducing Sanitary Sewer Overflows (SSOs)."

Balance Needed on Water-Protection Board

(Mercury News, 4/29) **OPINION.** "Clean water is the currency of California's environment and economy, and we are running increasingly short. Water made toxic by contaminated runoff helped trigger the crash of the vast delta ecosystem, which provides drinking water for two-thirds of Californians. Water."

SF Bay Mercury TMDL - Regional Board Makes Second Attempt -

(Water Quality News Flash, May 1, 2006) In September 2004, the San Francisco Regional Water Quality Control Board adopted a total maximum daily load (TMDL) for mercury in the Bay. A year later, the State Water Resources Control Board rejected the TMDL and remanded it back to the Regional Board to make specific revisions (see *NewsFlash 05-37*). The Regional Board has now addressed the State Board concerns and is again proposing the TMDL for adoption. The revision:

- Decreases the total allowed annual loading of mercury from 706 kg to 700 kg. Current (2003) loading is about 1220 kg/yr. The largest sources of mercury in San Francisco Bay are bed erosion (i.e., resuspended Bay muds and the Central Valley watershed which contribute about 460 kg/yr and 440 kg/yr respectively). Both of these sources are the legacy of past gold and mercury mining.
- Assigns more stringent individual and aggregate mass limits for sewage treatment facilities (publicly owned treatment works POTWs). Compared with the original TMDL, allocation 17 kg/yr, this version decreases the aggregate allocation of mercury loadings assigned to the POTWs to 14 (interim) then 11 kg/yr (final). In addition, POTWs must implement aggressive pollution prevention measures and monitor for methyl mercury. The Board will issue a watershed NPDES permit to the POTWs for mercury.
- Eliminates the Basin Plan's existing total mercury water quality objective (0.025 ug/l 4-day) but adopts new fish tissue objectives for mercury in large fish to protect human health (0.2 mg/kg) and in small fish to protect wildlife (0.03 mg/kg). (See NewsFlash 06-04.)



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- Includes a provision that NPDES permits for POTWs and industry will include a re-opener to allow for future incorporation of a pollutant offset (trading) policy to be developed by the State Board.
- Adds a requirement for storm water dischargers to monitor for methylmercury to determine whether it is a general environmental concern and also to identify any local effects at discharge locations. As in the original draft TMDL, this revision includes reductions approaching 50% for the mercury carried in stormwater runoff a very difficult challenge. Urban runoff would be allocated a mercury loading of 82 kg/yr, down from an estimated current loading of 160 kg/yr. This loading estimate is based on very little data. The 2004 TMDL Report stated: "The specific means by which urban storm water runoff management agencies will achieve their proposed wasteload allocations are unknown."

The Board will hold two public hearings on the proposed amendments: June 14 and August 9. Comments are due June 5 and are limited to the issues identified in the remand and the revisions being proposed. Posted: http://www.waterboards.ca.gov/sanfranciscobay/sfbaymercurytmdl.htm

New Septic Regs Costly to Lassen County Residents

(Lassen County News, 5/2) "<u>Users of septic systems in Lassen County face considerable expense due to proposed statewide sewage disposal regulations.</u>"

Palco Gets Permits

(Eureka Times-Standard, 5/9) "Water quality officials cut a compromise over the number of acres the Pacific Lumber Co. will be allowed to log in Freshwater Creek and Elk River at a hearing in Santa Rosa on Monday, though all parties were still combing through the order late in the day digesting the details."

Farmers Charged in Pollutant-Monitoring Program?

(Stockton Record, 5/12) "Farmers charged with monitoring pollutants that spill off their crops so they can avoid hefty wastedischarge fees may have to pay more anyway."

SOUTHERN CALIFORNIA

California Regional Water Quality Control Board San Diego Region to Hold Second Workshop on New Municipal Stormwater Permit

California Regional Water Quality Control Board, San Diego Region (Regional Board) staff will conduct a second public workshop concerning Tentative Order No. R9-2006-0011, the San Diego County Municipal Storm Water Permit. Upon adoption, Tentative Order No. R9-2006-0011 will replace the current San Diego County Municipal Storm Water Permit, Order No. 2001-01. This new Municipal Storm Water Permit is likely to be the most import piece of land use regulation in the next five years, effecting all segments of society including businesses, residences, development and redevelopment.





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The Regional Board has made available Tentative Order No. R9-2006-0011 and its corresponding Fact Sheet/Technical Report for public review and comment. The documents are available by request from the Regional Board or at: http://www.waterboards.ca.gov/sandiego/programs/sd_stormwater.html.

To facilitate public comment, a second public workshop will be conducted concerning the Tentative Order. The first public workshop was held on April 26, 2006 with only one Regional Board member observing in the audience. Regional Board Staff has yet to respond to written questions and comments from the public.

The second public workshop will consist of a roundtable discussion between Regional Board staff and representatives of the municipalities regulated by the Tentative Order. The roundtable discussion will focus on principal issues regarding the Tentative Order that have been raised by the municipalities. Other interested parties will be provided with the opportunity to comment on the roundtable discussion. It is not clear whether Regioal Board Members will attend this workshop or whether staff will provide responses to questions or comments from the public.

The public workshop will be held at the following time and location:

Public Workshop

- May 24, 2006, 9:00-12:00 AM
- Regional Water Quality Control Board
- Regional Board Meeting Room 9174 Sky Park Court San Diego, California

In addition, the Regional Board has rescheduled the public hearing on the Tentative Order. The public hearing was originally scheduled for June 14, 2006. The public hearing has been rescheduled to be held on:

Public Hearing

- June 21, 2006, 9:00 AM
- Regional Water Quality Control Board
- Regional Board Meeting Room 9174 Sky Park Court San Diego, California

The official public review and comment period for the Tentative Order began March 14, 2006 and will close on June 21, 2006. The official public review and comment period is the opportunity for interested parties to provide comment on the Tentative Order to the Regional Board; public comments will not be accepted following close of the official review and comment period. Written comments or testimony should be submitted to the Regional Board as soon as possible, but no





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later than June 21, 2006. Only written comments or testimony received by 5:00 PM on June 7, 2006 will be provided to the Regional Board members for their consideration prior to the June 21, 2006 public hearing. The Regional Board will receive and consider oral statements at the June 21, 2006 public hearing. Please contact Phil Hammer at phammer@waterboards.ca.gov or 858-627-3988 if you have any questions.

LA River Trash TMDL: California Supreme Court Rejects Appeal

(Water Quality News Flash, May 8, 2006) As discussed in *NewsFlash 06-06*, the 4th Appellate District Court upheld a lower court's invalidation of the TMDL and agreed that the Regional Board will need to complete an Environmental Impact Report (EIR) for the TMDL to proceed. The Appeals Court, however, rejected arguments by the cities challenging the TMDL that the TMDL lacked a study of the assimilative capacity of the river (i.e., an evaluation as to whether some trash would be acceptable). The Appeals Court also rejected arguments that the TMDL required a cost/benefit analysis or the consideration of economic factors. These issues were appealed to the Supreme Court by the cities. The Supreme Court has refused to hear the appeal which means that the TMDL may proceed once the Regional Board completes the required environmental impact documentation. Appeals Court decision: http://www.courtinfo.ca.gov/opinions/documents/D043877.PDF

Encinitas to See Increased Clean Water Costs

(NC Times, 4/30) "The city can pay its bills in fiscal 2006-07 with money to spare, but is far short of the savings it needs for capital projects, according to a budget made public last week."

"Grand jury: Charges by City Really a Hidden Tax": Levies on Water, Sewer Funds Cited in Report

San Diego's long-standing practice of charging water and sewer funds for services is a hidden tax on ratepayers to finance cash-starved departments, such as fire, police and trash collection, the county grand jury concluded in a report released yesterday. http://www.signonsandiego.com/uniontrib/20060426/news 1n26jury.html

Source of Pollution by San Marcos Park in Dispute

(SD Union Tribune, 5/11) "Contaminated water and trash have been reported in a storm-water channel next to Bradley Park, which was built on top of an old landfill."

Plating Company Guilty in Water Pollution Case

(SD Union Tribune, 5/11) "A Santee plating company and its owner were convicted yesterday of illegally letting heavy metals and acids flow into the municipal sewer system."





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Carlsbad Moves Forward with Its Desalination Plans

Carlsbad Water Supply Gets a Boost

(North County Times, 5/6) **Editorial.** "On Wednesday night, Carlsbad's planning commissioners voted unanimously to approve the Poseidon project, which could someday pump 50 million gallons of drinking water a day ---- or 8 percent of the county's water demand ---- out of the Pacific Ocean."

Carlsbad Loves Desalination

(Voice of San Diego, 5/5) "Talk about a love fest. Carlsbad's planning commission couldn't say enough nice things about the proposed desalination plant they approved unanimously Wednesday night -- the first formal approval of using ocean the a source of drinking water source in San Diego County."

Planners Approve Carlsbad Desal Project

(North County Times, 5/4) "Calling it a brilliant and long-sought proposal, Carlsbad's planning commissioners put their stamp of approval Wednesday on plans to build a seaside desalination facility capable of producing 50 million gallons of drinking water a day."

Carlsbad Told Desal Could Supply All Water by '20

(SD Union Tribune, 5/4) "The city could be self-sufficient in water by 2020 if it approves construction of an ocean-water desalination plant, the Planning Commission was told during a hearing on the proposal last night."

Desal Project Goes before Planning Commission

(NC Times, 4/30) "After years of delays, a proposal for a seaside desalination plant capable of producing 50 million gallons of drinking water a day will go before Carlsbad's Planning Commission this week."

Desalination Debate

(SD Union Tribune, 4/29) "The city's Planning Commission will weigh in next week on one of the major environmental challenges facing the state: turning ocean water into drinking water."

LEGISLATION

CA SB 1733

Author: Aanestad (R)

Title: Water Quality: Civil Penalties

Introduced: 02/24/2006





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Last Amend: 05/02/2006

Location: Senate Appropriations Committee

Summary: Amends the Porter-Cologne Water Quality Control Act. Modifies repeated violation provisions to apply to a period of 6 calendar months. Modifies effluent limitation provisions to include only violations of an effluent limitation for the same pollutant parameter. Requires mandatory minimum penalties to be assessed within 1 year of the date of the violation. Authorizes a state or regional board to waive the imposition of, or reduce the amount of, the mandatory minimum penalty for certain violations.

CA AB 2901

Author: Wolk (D)

Title: Mercury Monitoring and Remediation

Introduced: 02/24/2006

Last Amend: 05/03/2006

Location: Assembly Appropriations Committee

Summary: Enacts the Mercury Monitoring and Remediation Act. Authorizes the State Water Resources Control Board to expend money for grants for mercury monitoring, projects that reduce mercury levels, certain cost-sharing incentive payments, public education and outreach, and assistance to local public entities and nonprofit organizations for the development and implementation of mercury monitoring and remediation plans. Requires the state and regional boards to prioritize remediation actions in the plan.

Status: 5/03/2006 In ASSEMBLY. Read second time and amended. Re-referred to Committee on APPROPRIATIONS.

CA SB 1795

Author: Machado (D)

Title: Groundwater Recharge

Introduced: 02/24/2006

Last Amend: 04/18/2006

Location: Senate Appropriations Committee

Summary: Declares that the recharging of a groundwater basin by a local agency for the purpose of repelling saline intrusion and recovering basin groundwater levels constitutes a beneficial use of water if the recharge is consistence with





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management objectives set forth in the agency's groundwater management plan. Requires that every application for a permit to appropriate water for groundwater discharge purpose set for specified information.

Status: 05/08/2006 In SENATE Committee on APPROPRIATIONS: To Suspense File.

AB 2838

(Pavley) - (sponsored by CalCoast) - would give 20 coastal and Bay Area counties the option of increasing vehicle registration fees by up to \$6 per vehicle to fund clean water and other environmental programs countywide. The bill is the same as last year's SB 658 (Kuehl), which was co-sponsored by CalCoast and the Bay Area Open Space Council. SB 658 was vetoed by the governor, but indications are that the bill may be treated differently this time around. AB 2838 passed in Assembly Transportation last Monday and it will be heard next in Appropriations, although a hearing date has not yet been scheduled.

Dream Killer to Set 200-Year Flood Standard Rolls On

AB 1899 (Wolk), a bill that would prohibit development in Central Valley areas where 200-year flood protection is not provided, passed the Assembly Committee on Natural Resources last week on a straight party-line vote. The bill was making its second appearance in a policy committee and is certain to reach the Assembly floor after its next stop, the Committee on Appropriations. Besides being impractical – since no maps exist to support 200-year protection – the measure barely disguises its intentions: to shut down suburban housing development in the Sacramento and San Joaquin valleys. For example, the bill exempts infill and affordable housing from its restrictions, raising doubts that the bill is intended to produce greater flood safety. The bill is backed by several environmental groups and East Bay MUD.

ANNOUNCEMENTS

Stormwater Webcasts

We are continuing our series of webcast training sessions for municipal stormwater managers. Designed for those unable to attend out-of-town or multi-day workshops, this series covers a mix of basic and advanced topics in two-hour blocks. These webcasts allow participants to listen to lectures and see presentations through their computers. Webcasts will be scheduled periodically from now until September.

Second Webcast

Construction 101. May 10, 2006, 1-3 pm EST. Barry Tonning, Tetra Tech, Instructor, Nikos Singelis, U.S. EPA Stormwater Program and Erik Nelson of Douglas County, Colorado will be guest speakers.

More than 5,000 municipalities are required to develop programs to address stormwater runoff from construction sites within their jurisdictions. Under the Phase II requirements, which became effective in March 2003, communities have five years to fully implement their programs. Many communities are encountering challenges as they design and implement this program.





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This webcast will provide an overview of the basic elements that make up a good municipal program for addressing construction site runoff. It will include a brief review the Phase II requirements, discussion of the key features of a successful program, and will explore options for developing inspection programs. In addition, Erik Nelson of Douglas County, CO will provide a case study overview of his county's successful program.

This session is targeted toward municipal stormwater managers, but will also be useful for others involved in managing construction site stormwater runoff.

To register for this webcast, please visit www.epa.gov/npdes/training

Future Topics and Tentative Dates (final dates and speakers will be announced later)

- Stormwater Utilities 201 -- 7/12/06
- Getting in Step Public Education and Involvement 101 8/9/06
- Illicit Discharge Detection and Elimination (IDDE) 101 Program Development (with the Center for Watershed Protection) - 9/13/06

Sarwa to Host "River of Life Conference"

The Santa Ana River Watershed Alliance is hosting the "River of Life Conference" on Friday, May 19th in Orange, CA. Gary Patton of the Planning and Conservation League will kick off the conference with a keynote address entitled "Two Worlds -- and the River!" In the afternoon, Former Assemblymember Fred Keeley will give a keynote address entitled "Rivers - Metaphors for Modern California."

Nine panels will discuss how to find balance along the Santa Ana River. Learn more about the panels and speakers online at http://www.santaanariverwatershed.org/speakers.html. To register, visit http://www.santaanariverwatershed.org/registration.html

<u>The American Membrane Technology Association</u> Biennial Conference "Desalination Comes of Age - The Answer for New Supplies" Anaheim, CA, USA.

The Impact of Climate Change and Weather Patterns on California's Water Resources - How Bad Will It Be, What Should Be Done, Who Should Do It, and Who Should Pay For It?

The Southern California Water Dialogue will meet on Wednesday, May 24th from noon - 2:30 pm at Metropolitan Water District of Southern California headquarters, 700 N. Alameda, Los Angeles, (213) 217-6000.

Lunch may be purchased "to go" from the MWD cafeteria and brought to the meeting, but is not provided. Coffee and soft drinks (and those yummy cookies) will be provided as refreshments.





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The Second Annual Smart Growth Awards

June 13, 2006 | 7:30 AM - 9:30 AM

Birch North Park Theater

The ULI San Diego/Tijuana's Smart Growth Awards Program recognizes distinguished planning and design achievement as well as visionaries helping to fulfill and advance the principles of smart growth in San Diego. ULI defines smart growth as development that is economically sound, environmentally friendly and supportive of community livability.

Award categories this year include Smart Growth Visionary, Smart Growth Project and Smart Growth Plan.

Sarah James, keynote speaker and author of "The natural step for communities: how cities and towns can change to sustainable practices" will share what communities throughout the world are doing to promote sustainable development. Sustainability may seem like one more buzzword and cities and towns like the last place to change, but James provides inspiring examples of communities that have made dramatic changes toward sustainability and explains how others can emulate their success.

SPONSORSHIP OPPORTUNITIES

Are you interested in gaining extensive visibility for your company at these events?

Click Here For Details on Smart Growth Awards Sponsorship

The Event Code is: 8132-0617

ONLINE Registration: click here

Parking Note: North Park has on-street/metered parking and a parking structure east of the North Park Theatre

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