

A COMPILATION OF STORMWATER AND OTHER RELATED WATER NEWS

By S. Wayne Rosenbaum Foley & Lardner LLP

NATIONAL NEWS

(Lands Alert, May 16, 2006) Today, the Supreme Court delivered a unanimous opinion in a Clean Water Act case, *S.D. Warren Co. v. Maine Bd. of Env'tl. Prot.*, 547 U.S. ___ (2006), No. 04-1527. The opinion interprets the term "discharge," in the context of releases of water from a dam, and whether a state water quality certification is required under Section 401 for a license issued by the Federal Energy Regulatory Commission (FERC) for dam operation. In this context, the Court held "that a dam does raise a potential for a discharge, and state approval is needed" under Section 401. Slip op. at 1.

Significantly for the home building industry, the Court draws the distinction between Section 401 and Section 402. Section 401 provides that state certification is needed when the project of a federal permit applicant "may result in any discharge into the navigable water[s]..." In contrast, Section 402 does not use the phrase "may result," or the bare term "discharge." Rather, Section 402 imposes permit requirements for a "'discharge of any pollutant' into the navigable waters of the United States, 33 U.S.C. 1342(a)." Slip op. at 9 (emphasis supplied). The Court continued: "The triggering statutory term here is not the word 'discharge' alone, but 'discharge of a pollutant,' a phrase made narrower by its specific definition requiring an 'addition' of a pollutant to the water. Sec. 1362." *Id.*

In short, today's opinion confirms that home builders — and other members of the regulated community — do not have an obligation to obtain coverage under a Section 402 permit unless they add pollutants to navigable water, such as sediment in stormwater. Without an addition of pollutants, there is no obligation to obtain a permit under Section 402. In short, while state water quality certification must be obtained for a "potential" discharge under Section 401, today's opinion makes clear that, under Section 402, EPA and other federal agencies cannot require a permits simply upon a potential addition of pollutants to navigable waters.

New and Revised National Menu of BMPs

EPA has completed a significant revision of the National Menu of Best Management Practices (BMPs). The new menu has been redesigned to make it easier to browse and search. It also cross references many new resources from other

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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organizations involved in stormwater management. The new Menu now includes a comment feature so that stormwater practitioners and experts can provide suggestions, new data, and additional references.

To keep pace with the rapidly developing field of stormwater management, we have developed approximately 20 new fact sheets to highlight innovative practices. Look for new fact sheets on outreach and education, illicit discharge detection and elimination, concrete washout, post-construction, smart growth, low impact development, green roofs, municipal operations, and many others. You can find the new Menu of BMPs at www.epa.gov/npdes/menuofbmps

EPA Urges Caution When Working in Areas Exposed to Contaminated Flood Water

(EPA, 5/17) **NEWS RELEASE.** "[The U.S. Environmental Protection Agency is cautioning the public and all responders about the potential hazards associated with flood waters. Every effort should be made to limit contact with flood water due to potentially elevated levels of contamination associated with raw sewage and other hazardous substances.](#)"

Even When Located Over Water, Stormwater Can Be a Problem

Dealing with rainfall on bridges is another category of stormwater challenges. [Full story](#)

Cheaper Desalination Method Found in Nanotubes

(Science, 5/22) "[A nanotube membrane created on a silicon chip the size of a quarter may offer a cheaper way to remove salt from water, said the researchers who created it at Lawrence Livermore National Laboratory \(LLNL\).](#)"

CALIFORNIA NEWS

New Mexico Groups to Sue Over Clean Water Act

(Los Alamos Monitor, 5/23) "[A coalition of New Mexico environmental groups announced in Albuquerque this morning that they intend to sue the Department of Energy and the Regents of the University of California for violations of the Clean Water Act at Los Alamos National Laboratory.](#)"

Mercury – OEHHA Issues More Warnings –

(Water Quality News Flash, May 15, 2006) The Office of Environmental Health Hazard Assessment (OEHHA) is proposing to issue advisories concerning elevated levels of mercury in some fish in the lower Cosumnes River (Sacramento County) and lower Mokelumne River (San Joaquin County). The OEHHA Director said, "Women of childbearing age and children should sharply restrict the number and types of fish they eat from those rivers, as well as nearby creeks and sloughs." See: http://www.oehha.ca.gov/public_info/press/cosmokepress0406.html Interestingly, neither waterway appears on the current (2002) 303(d) list or on the proposed 2006 list as impaired by mercury. Mercury pollution of waterways and bioaccumulation

in fish is ubiquitous in U.S. waterways and is the major cause of fish consumption advisories. California fish consumption advisories, mostly mercury-related, are posted at: http://www.oehha.ca.gov/fish/so_cal/index.html

As more waterways are sampled, more mercury contamination is likely to become apparent, resulting in advisories from OEHHA. The State Board's *Water Quality Control Policy For Developing California's Clean Water Act Section 303(d) List* includes fish advisories as one of the criteria for identifying and listing impaired waterways. Consequently, we can expect that over time more waterways will be placed on the section 303(d) list because of health advisories. The total maximum daily loads (TMDLs) made necessary by these listings will potentially require reductions in mercury loadings from urban runoff. Listing policy: http://www.swrcb.ca.gov/tmdl/docs/ffed_303d_listingpolicy093004.pdf

Ocean Plan – State Posts Revised Version

(Water Quality News Flash, May 15, 2006) The California Ocean Plan (OP) establishes water quality standards (WQS) for the ocean in the same way that the Regional Board Basin Plans, along with the *California Toxics Rule*, establish WQS for bays and inland waters. The latest set of OP revisions was approved by U.S. EPA in February. The changes: (1) introduce a procedure for determining when pollutants in a discharge have “reasonable potential” to exceed WQS and therefore must have effluent limitations (not currently applicable to storm water); (2) change the name of some of the Areas of Special Biological Significance; and, (3) add water contact bacterial standards.

<http://www.waterboards.ca.gov/plnspols/docs/oplans/oceanplan2005.pdf>

California Water and Land Use Partnership – Land Use and Water Quality Education –

(Water Quality News Flash, May 15, 2006) CA WALUP (formerly the CA NEMO Partnership) is a collaboration of various local, state, and federal agencies in California that provides assistance to local governments to improve land use planning with the goal of protecting and improving water quality. Partners include the California Coastal Commission, State Water Resources Control Board, OEHHA, the California Association of Resource Conservation Districts, and others. The group has produced a series of fact sheets including one on low impact development: <http://ca-walup.usc.edu/> OEHHA has also been working on a related project to help communities determine impervious surface coefficients for various types of development: <http://www.oehha.ca.gov/ecotox/isc031006.html>

Caltrans Annual Report – 2006 Report Summarizes Activities

(Water Quality News Flash, May 22, 2006) The Division of Environmental Analysis Storm Water Program recently posted its Annual Report summarizing the 2004-2005 fiscal year. The report is required by the Caltrans Statewide NPDES Storm Water Permit (Order No. 99-06-DWQ). Some highlights:

- **SWATs** – Storm Water Advisory Teams continued their role as a major component of the storm water management program. SWATs are internal teams composed of District and Headquarter representatives from one or more Department functional units (Water Quality, Project Design, Maintenance, Construction, and Encroachment Permit) that work together to gather and disseminate new program information, review Best Management Practices (BMPs), track progress, and improve communication and coordination.
- **Treatment controls** – During the fiscal year, Caltrans constructed 462 permanent treatment BMPs, most of which were vegetated strips and swales. To comply with the Trash Total Maximum Daily Loads for the LA River and Ballona Creek, District 7 constructed 51 Gross Solids Removal Devices, which are litter-control devices developed by Caltrans (see *NewsFlash 05-43*). The Department also completed 43 detention basins throughout the state.
- **Construction BMPs** – The Department added nine new BMPs to its “tool chest” of controls available for construction projects, ranging from stream bank stabilization to controls for concrete curing and finishing. See: <http://www.dot.ca.gov/hq/construc/stormwater/stormwater1>.
- **Maintenance program** – Maintenance staff inspected over 32,000 drain inlets and cleaned those with accumulated sediment. The maintenance program also developed guidance and maintenance protocols for the new treatment BMPs.
- **Inspections and compliance assessments** – The Department’s compliance efforts included inspection of 131 maintenance facilities. The construction program completed 484 non-rainy season and 523 rainy season inspections by outside contractors. Facilities and construction sites are graded and re-inspected as necessary to bring them into compliance.
- **Training** – Department participants in training classes included 389 in Planning & Design, 1,003 in Construction, and 3100+ in Maintenance.
- **Public outreach** – The “Don’t Trash California” campaign included signs, highway billboards, gas station toppers, cinema notices, and public service announcements on TV and radio. Other efforts include storm water-related websites, local municipality partnerships, the Adopt-a-Highway program, and public education events. The Department also held informational outreach sessions for construction contractors.
- **Monitoring and research** – The Department continued its research and monitoring efforts. Previous and recent reports are posted at: <http://www.dot.ca.gov/hq/env/stormwater>

Flood Control Dream Killer Held in Assembly Committee

(CBIA Monday Morning Report, May 15, 2006) AB 1899 (Wolk), a bill that would prohibit building in areas of the Central Valley that would flood more than three feet and do not have 200-year level of flood protection, was placed last week on the

“suspense” file in the Assembly Committee on Appropriations – where bills having significant fiscal impacts on the state go and are held until a decision is made about their being worthy. Indeed, the estimate for the bill’s cost to the state was somewhere between \$120 million and \$150 million to comply with its provisions. If the bill makes it off the suspense file it will then be considered by the Committee. CBIA remains opposed to AB 1899 and believe it will result in a building moratorium if enacted.

UCLA Study: Beach Sand Can Be Polluted Even When Water is Clean

(Associated Press, 5/23) "[Beach sand can be teeming with bacteria even when the ocean water is clean, according to a study to be released on Tuesday.](#)"

Fish Farm Regulations Await Signature

(San Francisco Chronicle, 5/18) "[California will become the first state in the nation to adopt comprehensive controls on future fish farming in its coastal waters, if Gov. Arnold Schwarzenegger signs a tough set of environmental standards that state legislators have approved.](#)"

Paperwork Logjam

(Eureka Times-Standard, 5/18) "[The Pacific Lumber Co. and its logging and trucking contractors pleaded Wednesday with the North Coast Regional Water Quality Control Board to issue the permits it's approved for harvest plans in Elk River and Freshwater Creek.](#)"

Hilmar Cheese Pays Massive Pollution Fine

(LA Times, 5/13) "[One of the world's largest cheese companies paid California water regulators a \\$3-million fine for polluting water for years by illegally flushing wastewater from its plant.](#)"

Stormwater Pipes for Decoto Under Study

(Inside Bay Area, 5/15) "[In the old Decoto district, excess rainwater is whisked away in much as it was when railroad workers populated the neighborhood well more than a century ago: by gravity and evaporation](#)"

Set Aside Land Along Rivers to Prevent Flooding

(Modesto Bee, 5/15) **OPINION.** "[About once or twice every decade, California receives abundant rain and snow, which then runs off the Sierra into Central Valley rivers and streams, where high flows threaten lives and property.](#)"

SOUTHERN CALIFORNIA

Solana Beach Voters to Decide Proposed Room Tax Hike

SOLANA BEACH ---- The present 10 percent tax provides revenue for the city's general fund, which pays for such expenses as law enforcement, fire protection and street maintenance. The additional 3 percent would be earmarked for sand replenishment and other coastal-related projects in the city, according to the city attorney's written analysis.

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

Carlsbad to Seek More Beach Sand

CARLSBAD ---- It will require more than a dozen permits and months of work, but Carlsbad has decided to pursue a program to add extra sand to the beach. <http://www.calcoast.org/news/beachrest.htm>

High Water Marks for San Diego County Region

(San Diego Union Tribune, 5/25) "[San Diego County's beaches were mostly pollution-free in the 12 months ending March 31, except for several located at the mouths of creeks, rivers or lagoons.](#)"

State's Most Polluted Beaches in L.A.

(Associated Press, 5/25) "[Almost all of the state's most polluted beaches are in Los Angeles County, where officials aren't doing enough to notify the public of water contamination at problem locations, the environmental group Heal the Bay charged Wednesday.](#)"

Ratings Show O.C. Beaches Less Polluted

(OC Register, 5/25) "[Orange County got better grades this time around on the yearly beach report card by Heal the Bay, a Santa Monica environmental group.](#)"

More Bad Tidings; Polluted Sand

(LA Times, 5/23) "[Polluted water isn't the only health threat for Southern California beachgoers: The sand at some of the region's most popular beaches can be laced with bacteria even when the water is clean.](#)"

Judge Won't Fine Agency for Delays

(San Diego Union Tribune, 5/25) "[A federal district judge yesterday refused to fine a federal agency for delays in improving the treatment of Tijuana wastewater that is released through a pipe 3.5 miles off Imperial Beach.](#)"

Tunnel's Turbines to Produce Hydroelectricity

(SD Union Tribune, 5/21) "[San Diego is not known as a hydroelectric hotbed. The image of large dams with gigawatt-churning turbines is more typical in the Pacific Northwest. But one component of the tunnel under construction between Lake Hodges and the Olivenhain Reservoir is a 40-megawatt power plant. One megawatt powers about 1,000 typical.](#)"

Pendleton Ending Bottled Water Distribution

(NC Times, 5/19) "[The Marine Corps is ending the distribution of bottled water to residents that began after tests last summer showed the presence of lead in the water serving some base homes.](#)"

San Bernardino County Direction Changed

(Inland Daily Bulletin, 5/16) "[County officials appeared to mislead the Colonies project developers and change direction midstream on flood control design plans for the Colonies Upland property, according to court documents and testimony Monday.](#)"

Water-Pollution Report on Bay Cleanup is Late

(SD Union Tribune, 5/15) "[More than a year after water-pollution regulators issued the largest bay sediment cleanup order in county history, they have yet to publish the scientific justification for their demands.](#)"

Santee Plunges into Creek Restoration

(SD Union Tribune, 5/18) "[The city will break ground today on a \\$35.9 million creek restoration project, believed to be the largest capital improvement project in the city's history.](#)"

ANNOUNCEMENTS



REMINDER

Foley & Lardner LLP will host the next session in its 2006 series of Environmental Law Update Web Conferences on Thursday, June 15 at 11:30 a.m. CENTRAL TIME (9:30 a.m. Pacific/10:30 a.m. Mountain/12:30 p.m. Eastern).

Foley's Web Conferences allow participants to stay up-to-date with timely information from the comfort of their own office. Mark your calendar and make plans to join us on the 15th. Specific topic information and access instructions will be sent closer to the date of the session.

If you would like to pre-register for the session to ensure your participation, please email your registration information, including your name, company name, job title, company address, phone number, and email address to Jennifer Tank at jtank@foley.com.

In Case You Missed It

Our first session in the 2006 Environmental Law Update Web Conference Series took place on Thursday, March 16. 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 next Web conference on June 15.)

If you missed the Web Conference and are interested in viewing, the recorded session can be found on [Foley's website](#). Once on the event site, click 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. It displays each attorney's photo, along with his/her location and years of experience in environmental law. [Environmental Regulation Practice Overview](#)

To learn more about the practice and more detailed profiles with specific areas of practice for each attorney, please visit Foley.com/environmental.

Stormwater Webcast Series

The Construction 101 webcast held on May 10, 2006 was attended by over 1000 people. If you missed this webcast, you can view the recorded and archived version anytime. These recorded webcasts make great training resources for new staff.

Our next webcast, "Financing a Municipal Stormwater Program" (July 12, 2006), will cover a variety of financing options, including creating a stormwater utility. Mark your calendars for this event. To view the archived webcasts or browse any of our

training opportunities, please visit www.epa.gov/npdes/training.

San Diego River Day to Include Craft Fair

(SD Union Tribune, 5/18) "[The third annual San Diego River Day will be celebrated Saturday with 20 events along the waterway, including beach and estuary cleanups, a craft fair and several nature walks.](#)"

Enroll Your Kids in SEACAMP and a Donation Will Go to Coastkeeper

Give your kids an exciting environmental education experience AND help out San Diego Coastkeeper at the same time! For 20 years SEACAMP San Diego has offered quality Marine Science Education Camps for students from around the world. This summer, for each student referred, SEACAMP San Diego will donate \$50 to San Diego Coastkeeper to help with their education and conservation efforts. To learn more about SEACAMP San Diego please go to www.seacamp.com and when you sign up, make sure to write Coastkeeper in the 'referred by' box.

Join Coastkeeper in a Beach Cleanup in Solana Beach

Saturday, June 10th, 2006

Beach Cleanup at the Pill Box, 9am-11am

Join San Diego Coastkeeper for a beach cleanup in Solana Beach. Meet in the parking lot near the lifeguard tower. [Click here for Details.](#)

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.