

A COMPILATION OF STORMWATER AND OTHER RELATED WATER NEWS

By S. Wayne Rosenbaum & Aiko Osugi, Foley & Lardner LLP

NATIONAL NEWS

District Court Rejects *Tulloch II*

(Lands Alert, February 1, 2007) On January 30, 2007, the U.S. District Court in D.C. handed NAHB a solid victory in its challenge to the Corps's and EPA's so-called "*Tulloch II*" rule. [NAHB v. U.S. Army Corps of Eng'rs](#), Civ. Action No. 01-0274. Litigation over the *Tulloch* rules regarding the "discharge of dredged or fill" material has been going on for 14 years, and this decision is the latest ruling from D.C. federal courts admonishing the Corps and EPA for their illegal interpretive rules.

U.S. District Judge Robertson found the *Tulloch II* rule illegal because the agencies required a permit even in the absence of a "discharge" or "addition" of pollutants. Several aspects of yesterday's decision are significant. First, the court recognized that the existence of a discharge does not depend on the volume or amount of dirt that might be moved. Second, Judge Robertson found the *Tulloch II* rule defective because it improperly shifted the burden to the landowner to disprove the need for regulation-as opposed to requiring the agencies to prove the need for regulation. According to the court, the text of *Tulloch II* impermissibly "regards the use of mechanized earth-moving equipment as resulting in a discharge of dredged materials unless project-specific evidence shows otherwise. *That statement, followed by the coy explanation that it 'is not intended to shift any burden,' ... essentially reflects a degree of official recalcitrance that is unworthy of the Corps.*" Slip Op. at 8-9 (emphasis added).

For those reasons, Judge Robertson issued an injunction against the Corps and EPA from enforcing and applying the *Tulloch II* rule. For more information, please contact Duane Desiderio (ddesiderio@nahb.com) or Tom Ward (tward@nahb.com).

Supreme Court to Decide Whether ESA Has Supremacy Over Other Environmental Laws

Last Friday, the U.S. Supreme Court granted petitions filed by the National Association of Home Builders ("NAHB") and the U.S. Environmental Protection Agency ("EPA") for review of a Ninth Circuit decision that requires federal regulators to

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formally consider impacts on endangered species and their habitats before transferring water pollution permitting authority to states. The Supreme Court granted review and consolidated the appeals in *EPA v. Defenders of Wildlife* (No. 06-549) and *National Association of Homebuilders v. Defenders of Wildlife* (No. 06-340)(collectively, "Defenders").

[Full Article »](#)

Building a Green Revolution

Green building -- the practice of increasing the energy, water and materials efficiency of buildings and building sites to reduce the impact on human health and environment -- is no longer a fringe concept. Mounting evidence of global warming and increasing awareness of indoor air pollution have pushed green building into the mainstream with both the National Home Builders Association and the American Institute of Architects, which have identified it as a top priority in recent years.

<http://www.sanluisobispo.com/mld/sanluisobispo/business/16403028.htm>

CALIFORNIA NEWS

NPDES Permit Ruled Not Defective Due To Failure To Analyze Or Impose Numeric Limits On Stormwater Discharges: Divers' Environmental Conservation Organization v. State Water Resources Control Board (November 29, 2006)145 Cal.App. 4th 246.

(Environmental Law Section Update, February 2007) The Fourth District Court of Appeal has upheld a National Pollutant Discharge Elimination System ("NPDES") permit issued by a regional water quality control board which, instead of imposing numeric limits on chemicals in stormwater discharges, required the permittee to limit its stormwater discharges by employing best management practices.

In November 2002, the Regional Water Quality Control Board, San Diego Region ("Regional Board") issued a NPDES permit to the Navy governing discharges from the Naval Base San Diego Complex San Diego Bay. The permit included regulations governing stormwater discharges from the base complex to the bay and, in particular, required the Navy to develop and adopt a "StormWater Pollution Prevention Plan" ("SWPPP") that employed best management practices ("BMPs") to reduce or prevent pollutants in the base complex's stormwater discharges. In addition to the SWPPP, the permit contained a numeric limit on the amount of toxicity in the Navy's total effluent.

Before the permit was adopted by the Regional Board, the petitioners, Divers, challenged the permit administratively, arguing that the applicable federal regulations required that instead of regulating the Navy's industrial stormwater discharges by way of BMP's-based prevention plan, the Regional Board was required to set numeric "water quality based effluent limitations" ("WQBELs") on the Navy's stormwater discharges, and that before setting those numeric WQBELs, the Navy was required to conduct an analysis of particular pollutants for which there was a reasonable potential the stormwater discharges would cause or contribute to a violation of any state water quality standard. The Regional Board rejected Divers' arguments, and

adopted the permit without WQBELs, and without performing any analysis of particular pollutants in the Navy's stormwater discharges. Divers' then filed a petition for writ of mandate against the Regional Board and State Water Resources Control Board. The trial court denied the petition and Divers appealed.

Divers raised two arguments on appeal. First, because the Regional Board did not identify and analyze the numeric level of particular pollutants in the Navy's stormwater discharges, it did not perform the reasonable potential analysis required by 40 Code of Federal Regulations part 122.44(d)(1) (2005). The Court of Appeal disagreed. "Contrary to Divers's argument, 40 Code of Federal Regulations does not require that in all cases a permitting authority analyze the particular pollutants in an applicant's stormwater discharges." That portion of the regulation, the Court held, only requires that the permitting authority use procedures that account for existing controls, the variability of the pollutants in the effluent, the sensitivity of species to toxicity, and the dilution of effluent in receiving waters. Thus, a numeric analysis is not the only means of achieving the requirements of the regulation.

Second, Divers argued that in the case of industrial permits, BMPs are permissible only upon a finding by the permitting authority that numeric WQBELs are not feasible. The Court, however, did not read 40 Code of Federal Regulations part 122.44(k)(2) (2005) so narrowly, explaining that "In sum, there is nothing on the face of the statute which suggests that in making express reference to BMPs in particular instances Congress intended to limit use of BMPs in controlling stormwater discharges in general." Thus, the Regional Board could reasonably conclude that Congress intended to grant it wide discretion in regulating stormwater runoff, including the use of BMPs where the agencies believed they were appropriate.

Data and Information for 2008 Integrated Report – List of Impaired Waters and Surface Water Quality Assessment [303(d)/305(b)]

The intent of this letter is to clarify the Notice dated December 4, 2006 regarding the 2008 integrated report described above. There are no limits on the data and information that the public can provide to the Regional Water Quality Control Boards (Regional Water Boards) for their assessment as part of the development of the 2008 integrated report. Federal regulation [(40 CFR § 130.7(b)(5)] states that "Each State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the list required by §§ 130.7(b)(1) and 130.7(b)(2)." The Regional Water Boards will accept any and all data and information. As stated in the Notice dated December 4, 2006, all data previously submitted to the State Water Resources Control Board (State Water Board) for consideration during the 2006 listing cycle need not be re-submitted, as the State Water Board will make the data available to the Regional Water Boards for consideration for the 2008 integrated report. However, even though it is not necessary, the public may also re-submit such data.

Furthermore, Enclosure 3 of the Notice dated December 4, 2006 contained suggestions and staff preferences for format of data submittals. It was not then, and is not now, the intent of the State Water Board to limit submittals to these format

suggestions. The Regional Water Boards will also accept Web addresses that link to actual data. As stated above and in the Notice dated December 4, 2006, all data will be considered.

Governor Schwarzenegger Announces Appointments

Cheryl Maki, 58, of Auburn, has been appointed to the Central Valley Regional Water Quality Control Board. Since 1983, she has served as the chief executive officer and general manager of Maki Heating and Air Conditioning. Maki previously served two terms on the Auburn City Council, including two years as the mayor of Auburn in 1997 and 2004. She is a member of the Sierra Business Council and the Auburn Area Chamber of Commerce. This position requires Senate confirmation and the compensation is \$100 per diem. Maki is a Republican.

Sandra Meraz, 65, of Alpaugh, has been appointed to the Central Valley Regional Water Quality Control Board. She has served as the vice president of the Tulare County Water Works District since 2006, where she previously served as president from 1998 to 2006. Meraz also founded the Committee for a Better Alpaugh in 2000, where she successfully lobbied for government funding to bring clean water to Alpaugh's public water system. Previously, she served on the Alpaugh Unified School District Board from 1997 to 1998. This position requires Senate confirmation and the compensation is \$100 per diem. Meraz is a Democrat.

David Hodgin, 74, of Scotts Valley, has been appointed to the Central Coast Regional Water Quality Control Board. Since 1984, he has served as chair of Pathfinder Companies, a management consultant business. Previously, Hodgin served as president of Pathfinder Companies from 1979 to 1984. Prior to that, he was president of the small business development center, Daire Associates, from 1968 to 1979. Hodgin currently serves as president of the Scotts Valley Water District and is past president of the California Small Business Association. This position requires Senate confirmation and the compensation is \$100 per diem. Hodgin is a Republican.

Susan Ritschel, 45, of San Clemente, has been appointed to the San Diego Regional Water Quality Control Board. She was first appointed to the Board in 2005. Ritschel most recently served as a council member on the San Clemente City Council, where she was first elected in 1998. She served as the mayor of the City of San Clemente in 2002 and 2004. Previously, Ritschel was a regional portfolio manager for Lincoln Property and Legacy Partners from 1995 to 1998. This position requires Senate confirmation and the compensation is \$100 per diem. Ritschel is a Republican.

Drainage Dilemma: Experts Cast Doubt on Toxic Water Plan

(San Francisco Chronicle) [An internal government memo obtained by *The Chronicle* shows that the federal government wants to spend billions of dollars on a plan to fix one of the San Joaquin Valley's most intractable pollution problems.](#)

On Target: Navy's Solid Waste Program Makes an Impact

(Navy Compass) [The Naval Base San Diego Recycling Center is one of the first and largest in the Navy and continues to make a significant impact for the Southwest Region as well as the city of San Diego.](#)

Don't Blame Cows: Water Trouble May Not be From Cattle

(Modesto Bee) [A study commissioned by a farmers group suggests that humans, not livestock, are the main source of certain bacteria entering waterways in the Northern San Joaquin Valley.](#)

Construction Storm Water Bulletin - Caltrans Periodical Resumes Publication

(Water Quality Newsflash, January 9,2007) Caltrans' Construction Storm Water Management unit is resuming publication of the *Construction Storm Water Bulletin*. These monthly bulletins will target Resident Engineers as well as Caltrans and contractor construction storm water staff. Each issue will discuss one of the more frequently observed deficiencies at construction sites and will offer practical ways to eliminate them or reduce their frequency.

The current issue discusses Sediment Control Tracking which has been identified as the most common storm water control deficiency at construction sites. Mud and dirt carried from construction sites onto roadways can enter the storm drain system or create a hazard to the public. Caltrans has several BMPs to address this problem including the placement of corrugated ("ribbed") steel panels at exit points to remove sediment from tires. The Bulletins will be posted at:

<http://www.dot.ca.gov/hq/env/stormwater/publicat/const/index.htm>

Mercury – Scoping Meetings to Address Possible Methylmercury Standard and Offset Policy

(Water Quality Newsflash, January 9,2007) The metal mercury occurs naturally in rocks and soils and is also released into the environment by human activities. In waterways, mercury typically settles to the bottom where it may be converted by bacteria into the organic form methylmercury (MeHg). Methylmercury is one of the chemicals in fish that most often creates a health concern. Elevated levels in fish can present a health risk especially to young children and women of childbearing age. The State Water Resources Control Board is considering adopting a statewide policy for methylmercury that would apply to inland waters, enclosed bays, and estuaries. The policy may include a methylmercury fish tissue objective, a total mercury water quality objective, a methylmercury water quality objective, or some combination of these objectives. The policy may also include implementation procedures utilizing the NPDES permitting process.

The purpose of the scoping meeting is to seek input on the scope and content of the environmental information to be considered during development of the policy. The meeting will be held in the afternoon in Sacramento on February 7.

Comments are due Feb. 15. Meeting information including informational document:

<http://www.swrcb.ca.gov/plnspols/index.html#policies> (page down). The policy will reference the U.S. EPA's methylmercury fish tissue-based criteria guidance: <http://www.epa.gov/waterscience/criteria/methylmercury/>

The morning meeting at the same location on February 7 will address a proposed mercury offset policy for the San Francisco Bay, Sacramento-San Joaquin River Delta and tributaries (Bay-Delta mercury offset policy). The State Board requested that staff develop this policy when the Board remanded the SF Bay Mercury TMDL back to the Regional Board. (See *NewsFlash 05-37*.) “The policy shall allow dischargers to perform other activities aside from eliminating more mercury from their discharges than they would be required to remove by applicable technology-based effluent limitations.” The policy will not address pollutant trading due to the complexity of establishing a market. (Same meeting link as above) (OEHHA site with mercury and fish information: <http://www.oehha.ca.gov/fish/hg/index.html>)

California Steamin': Forecasters Predict Hellacious Summer, World's Hottest Year on Record

(Los Angeles Daily News) [The hottest prediction for '07: the hottest world temperature on record. Stubborn greenhouse gases and the return of El Niño will likely turn 2007 into the world's hottest year on record, climate researchers predicted Thursday. That's bad news for California, singed last year during its hottest-ever summer.](#)

Delicate Balance: A New Year's Resolution: Keep the Creek Clean

(The Acorn) [The Las Virgenes Municipal Water District and Triunfo Sanitation District have launched a study that will look at ways the two agencies can limit the amount of reclaimed sewer water that is released into Malibu Creek.](#)

California Changin': 2007 Brings a Slew of New Environmental Laws

(Sierra Sun) [A host of new state environmental laws will take effect this year, according to Cal-EPA. Residents will see changes ... from in-store plastic bag recycling programs to larger fines against illegal dumping on private property.](#)

Bioassessment – New methods Zero in on Toxic Mechanisms

(Water Quality News Flash, January 2, 2007) Researchers at U.C. Berkeley have developed new methods of assessing pollution which in the future could potentially be used to determine compliance. Wastewater discharges are required to comply with water quality standards and most standards are specified as a numeric objective for a specific chemical such as cadmium or trichloroethylene. In addition, waterways often have objectives based on numeric or narrative toxicity standards. Toxicity testing is useful since it can identify potential harm from unregulated pollutants or from combinations of pollutants. The *acute* (short term) toxicity standards are typically defined as a per cent survival of a specific organism and use what has been described as a ‘kill ‘em and count ‘em’ approach that does not provide information on the nature of the toxicity. Similarly, a *chronic* (long term) toxicity test looks at reproductive success but does not identify the mechanism of the toxicity.

The new assessment methods identify the genes turned on and off in response to toxicants. Called genomics, this approach can assess more subtle impacts on waterway organisms such as the ability to ward off infections. The approach could also be useful in screening chemicals for potential impacts. The researchers focused on three contaminants typically present in urban runoff – copper, zinc, and cadmium. <http://pubs.acs.org/cgi-bin/abstract.cgi/esthag/asap/abs/es0615573.html>

SOUTHERN CALIFORNIA

Runoff Rules: Water Cops Approve New Stormwater Permit

(North County Times) [San Diego County's water cops, in a six-hour meeting Wednesday before a packed house, approved a new permit aimed at cutting the pollution that runs down storm drains to local bays, creeks and beaches.](#)

Big Brother is a Water Cop

(North County Times, January 23, 2007) – OPINION – **One emergency down. One to go.**

Our governor declared a state of emergency last week after cold weather decimated most of California's citrus crops. We were lucky: That emergency cost us only about \$1 billion.

Wednesday, San Diego County faces another emergency even more ruinous -- this one self-inflicted. Not from harsh weather, but from harsh regulators at the San Diego Regional Water Quality Control Board.

Unless, of course, they hear from us.

Wednesday, they intend to pass a new program that could cost local governments, business owners and home buyers billions of dollars -- with negligible improvements to the environment.

State officials say the problem is something called hydro-modification: Sand-tinged water running off into storm drains. Government officials want home builders to stop it by building mini water treatment plants in each yard in each new home.

The price tag: \$30,000 apiece, according to the Building Industry Association. This is on top of the \$10,000 already being spent to stop sand-rinsed waters from running off our sites and mingling with the sewage-infested surf.

Nor does that count the hundreds of millions this measure will add to the cost of building new schools, parks and roads. Or the cost to inspect every restaurant, grocery store, gas station, hotel, golf course and cemetery for compliance with the new rules.

That is 8,000 inspections annually. So much for unreasonable search and seizure. Who knew Big Brother would be a water inspector?

Local surfers may be surprised to hear about this measure. They have been getting sick from effluent -- not sand -- for years. Hundreds of millions of gallons of the stuff that annually flows north from Tijuana.

Just a few days ago, a surfer sued several North County government agencies alleging he suffered a brain-damaging illness acquired from sewage -- not sand -- in local waters.

And if the Tijuana sewage was not bad enough, what about the black water spilling from leaky pipes throughout our region? San Diego Mayor Jerry Sanders -- whose government treats most of our region's waste -- admits our area's sewer pipes are more than 100 years old.

This is what we need to fix.

If this new regulation could improve local waters, it might be worth it. But even in the best-case scenario it won't.

Despite the junk science, local water officials are determined to go ahead.

Among them is North County's own Eric Anderson, of Elfin Forest, an executive at La Costa Flower Shop and Nursery. Perhaps we can count on him to inject some sanity into this lunatic proposal.

Meanwhile, it is worth wondering how an unelected, unknown, unaccountable kangaroo court can inflict a death sentence on our economy with less scrutiny than Britney Spear's latest pub crawl.

That's quite a responsibility for people whose main qualification is knowing someone who knows someone who knows someone who knows a politician.

The water quality board's Web site does not even mention the \$30,000 this new regulation will inflict on new home buyers -- other than to say it does not really matter because they have the authority to do it.

Wednesday, unless our local nursery executive and others hear from us, that is exactly what they will do.

Somebody dial 911.

Michael D. Pattinson, a freelance columnist for the North County Times, is president of Barratt American, a builder based in Carlsbad, and past president of the California Building Industry Association. <http://www.nctimes.com/opinion/pattinson>

County's Urban-Runoff Rules Getting Tougher

(Calcoast News, January 23, 2007) Analysts say the revised storm-water discharge permit could force the region's 18 cities, county, port district and airport authority to collectively spend more than \$250 million in the next five years.

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

State Water Resources Control Board: Addition of Unidentified Water Bodies to BU Tables

This regulatory action includes both regulatory and non-regulatory changes. The regulatory changes consist of updating the beneficial use (BU) tables in one chapter of the San Diego Basin Plan. This includes naming and assigning BUs to water bodies that were left off the BU tables when the 1975 Basin Plan was revised in 1995 and to make corrections to the water quality objective tables. The non-regulatory changes consist of updating definitions and program descriptions to make them consistent with statutes and regulations adopted since 1994.

Citizen Monitoring Data is Now Available On-line

(San Diego Coastkeeper News, January 22, 2007) Click [here](#) to access the maps, data reports and charts. The data portal contains field screening data collected throughout 2006 by volunteers that were trained in accordance with State Water Resource Control Board and Environmental Protection Agency field methods.

Please note that the maps are working prototypes (last updated in December 2006), and we are currently soliciting feedback from the public in order to improve these maps. If you have specific feedback, please click [here](#) to send an e-mail to Karen Franz, Coastkeeper's Watershed Monitoring Program Director.

These data were collected as a part of a Prop. 13 grant, in partnership with the Regional Water Quality Control Board, San Diego State University and San Diego Stream Team. Additional partners to this effort include The San Diego County Airport Authority, San Diego Surfrider and the Golden State Flycasters.

Please e-mail karenjm@sdcoastkeeper.org for details. [Click for details on the water monitoring program.](#)

What Lies Above: Water Contamination from Tijuana Poses Threats

(Daily Aztec) [Watersport lovers are used to seeing debris and seaweed wash to and from the ocean shore with the tides. But what they can't see floating around them is the Hepatitis A virus, E. coli, or enteroviruses.](#)

\$2B Makeover: Costly L.A. River Plan Contains a Raft of New Ideas

(Los Angeles Times) [After decades of enduring jokes about the city's concrete-lined waterway, officials today will release an ambitious master plan for restoring the Los Angeles River, a project that reflects lofty dreams and carries a big price tag.](#)

'Risk Too Great': Del Mar Pursues Grants to Replace Aging Sewage Pumps

(San Diego Union-Tribune) [At peak times, the 21st Street Lift Station handles more than 1 million gallons of sewage. The facility was state of the art when it was built in 1973, but despite upgrades and constant maintenance, it has had four "significant" failures since 2000. So, the city is looking to federal and state grants to provide \\$5.2 million for a new pump station.](#)

Sea-Friendly SMURRF: Santa Monica Aims to Stop Pollution from Reaching Ocean; Facility Cleans 300,000 to 400,000 Gallons of Runoff Daily

(The Log) [Most of us know Smurfs as cute and cuddly cartoon creatures. They're lovable, but they don't do much to improve our local water. SMURRF, on the other hand, is a revolutionary water treatment facility in Santa Monica that is capable of cleaning 500,000 gallons of urban runoff every day.](#)

That's the Ticket: Newport Beach May Fight Over-Watering with Citations

(Daily Pilot) [Sprinkler systems that rely on satellites to tell them the weather before watering lawns could be the key to reducing urban runoff in Newport Beach, but the systems only work if homeowners use them.](#)

Sewage Agency to Pay Millions for Spill

The Sanitation Districts of Los Angeles County has agreed to pay more than \$2.5 million to settle a dispute over a massive spill earlier this year that sent more than 800,000 gallons of sewage into the Pacific Ocean and coastal groundwater supplies.

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

Sherman Property Fundraising Campaign Reached Its Goal

Carlsbad ---- A campaign to buy and protect land in the Buena Vista Creek Valley on Carlsbad's northern edge now has the final \$100,000 it needs to make its plans a reality, campaign leaders reported this week. <http://www.calcoast.org/news/coast.htm>

ANNOUNCEMENTS

25th Annual Water Law Conference: Changing Values, Changing Conflicts

February 22-23, 2007 San Diego, CA

[Hotel del Coronado](#)

The 25th Anniversary Water Law Conference will focus on the changing values for water use and the resulting changes in legal conflicts over water. The conference includes speakers and panels reflecting the broad diversity of issues and perspectives on the most challenging issues now facing the water law community. Speakers will discuss past, present and anticipated future changes and trends in water law, and how those changes will affect your practice.

The conference will open with perspectives on the changing nature of water conflicts and the most significant trends over the last 25 years, from water law luminaries of the last quarter century. After a rousing debate about changes in how courts defer to agency determinations, particularly in light of the 2006 *Rapanos* decision, panels will examine more closely certain critical issues now facing the water law community – from instream use and conflicting sovereigns to international conflicts and conservation. Friday morning will address emerging issues that will change the nature of water law practice in the next quarter century, including water quality issues arising out of inter-basin transfers, resolution of water rights conflicts, and the dynamic relationship between water law and science. The conference will close with a special “Hot Topics” lunch on climate change and how it may affect water law practice, including a presentation on California’s recent efforts to assess how its water policy may need to change to address global warming.

This year's conference also offers two early morning panels – one on water law fundamentals to help those new to the water law field, and one on the ethics of ex parte contacts in a world where water conflicts are now often resolved outside formal adjudications.

[Click here to Register](#)

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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