

# Legal News<sup>SM</sup>

**FOLEY**

FOLEY & LARDNER LLP

■ FEBRUARY 15, 2008

Legal News is part of our ongoing commitment to providing legal insight to our environmental stormwater clients and colleagues.

If you have any questions about this alert or would like to discuss these topics further, please contact your Foley attorney or:

**S. Wayne Rosenbaum**  
San Diego, California  
619.685.6413  
srosenbaum@foley.com

**Elizabeth A. Cason**  
San Diego, California  
619.685.4634  
ecason@foley.com

**Heidi K. Vonblum, Law Clerk**  
San Diego, California  
619.685.4637  
hvonblum@foley.com

## A Compilation of Stormwater and Other Related Water News

### National News

#### **Federal Judge Rejects Bush Administration's Attempt to Exempt Navy Sonar Training From Environmental Laws**

(*Los Angeles Times*, February 5, 2008) On January 3, 2008, United States District Judge Cooper ordered tough restrictions on the United States Navy's use of mid-frequency sonar off the Southern California coast to protect whales and other marine mammals from underwater sonar blasts. Two weeks after the injunction was issued, President Bush moved to exempt the Navy sonar training missions from complying with the Coastal Zone Management Act (CZMA), and in response, Judge Cooper temporarily set aside some of the court-ordered restrictions on upcoming naval exercises. In President Bush's memo justifying his action, he stated that his decision would "enable the Navy to train effectively" for activities "which are essential to national security" and "in the paramount interest of the United States." Then on February 4, 2008, on remand from the Ninth Circuit Court of Appeals, in considering the Bush administration's executive actions, Federal District Court Judge Cooper rejected the Bush administration's attempt to exempt Navy sonar training from complying with the CZMA and the National Environmental Policy Act (NEPA). Judge Cooper found that there is no real emergency to justify overruling court-ordered protections for the whales and dolphins. Judge Cooper's latest order means that the Navy will now have to follow her previous injunction that forbids the Navy from using submarine-detecting sonar in areas where whales are abundant such as within 12 nautical miles of the coast and in the waters between Santa Catalina and San Clemente islands. The Navy also will be required to shut down sonar when whales or other marine mammals are spotted within 2,200 yards of vessels or under certain sea conditions that allow powerful sonic blasts to travel farther than usual. Judge Cooper's order is available online at <http://www.calendarlive.com/media/acrobat/2008-02/35262081.pdf>. The presidential memorandum

**FOLEY**

FOLEY & LARDNER LLP

regarding the CZMA exemption also is available online at <http://www.whitehouse.gov/news/releases/2008/01/20080116.html>.

Posted (free registration required): <http://www.latimes.com/news/local/la-me-sonar5feb05,1,5010590.story?ctrack=1&cset=true>

## California News

### Department of Water Resources Increases State Water Project Allocation for Long-Term Contractors

(California Department of Water Resources, February 5, 2008) The California Department of Water Resources (DWR) has announced that it has increased its allocation of 2008 State Water Project water for long-term contractors from 25 percent to 35 percent of requests. DWR credited January's wet weather for increases in the state's water supplies and snowpack, but warned that tighter pumping restrictions in the delta will limit how much of that water can actually be provided to Southern California, the Central Valley, and the Bay Area. Referring to the recent federal court ruling that has curtailed delta pumping by state and federal water project to protect the threatened delta smelt, DWR estimates that the 35 percent allocation would have been 50 percent with the court decision in place. The allocation increase will nonetheless boost State Water Project water for long-term contractors from approximately one million acre-feet to 1.5 million acre-feet. The 29 long-term State Water Project contractors distribute water to over 25 million Californians and approximately 750,000 acres of irrigated agricultural land.

Posted: <http://www.water.ca.gov/news/newsreleases/2008/020408swpallocation.pdf>

### Southern Marin Sewage Spill Closes Recreation Areas and Raises Reporting Concerns

(*Marin Independent Journal*, February 7, 2008) On January 25, 2008, Sewerage Agency of Southern Marin plant operators

released 2.45 million gallons of nearly raw sewage, and then again, on January 31, 2008, an additional 2.7 million gallons of partially treated sewage was released through storm drains when too few pumps were left on overnight. In both incidents, the sewage drained into Arroyo Corte Madera del Presidio Creek, which empties into the Richardson Bay, causing closure of recreational areas along its shores. In response to the two spills, the California Environmental Protection Agency has called for an investigation of state regulators and the Sewerage Agency of Marin after the two spills, totaling 5.2 million gallons, were not timely reported. The agency failed to report the January 25, 2008 incident to the state Office of Emergency Services, but did report it to the San Francisco Bay Regional Water Quality Control Board, who in turn delayed in making that information public. Assemblyman Jared Huffman (D-San Rafael) said the spills highlight local sewage agencies' failure to maintain their pipes and plants.

Posted: [http://origin.marini.com/marin/ci\\_8191631](http://origin.marini.com/marin/ci_8191631)

### Farm Group Coalition Files Suit to Stop Protection of Predatory, Nonnative Striped Bass in the Delta

(*Sacramento Bee*, January 31, 2008) After a federal court decision limiting the amount of water that can be pumped to farms from the Sacramento-San Joaquin Delta, a coalition of farm groups, including four large agricultural water districts in Kern County, has filed suit against the California Fish and Game Commission and the Department of Fish and Game in federal court blaming state agencies for endangering native fish in the delta. The farm groups are seeking to halt California's practice of maintaining predatory, nonnative striped bass in the delta for the benefit of fisherman, claiming that that practice violates the Endangered Species Act (ESA). The complaint alleges that the bass feed on Chinook salmon, steelhead, and delta smelt (all protected by the ESA) and that their dwindling populations ultimately reduce water deliveries to farmers.

Sport fishermen responded by saying that the real threat to the delta is the water that is channeled to farms through the State Water Project and the Central Valley Project.

Posted: <http://www.sacbee.com/101/story/675668.html>

## **California Cities Warned to Plan for Stormwater Impacts Caused by Global Warming**

(*San Francisco Chronicle*, February 1, 2008) A U.S. Geological Survey (USGS) team warns that because of climate change, planners who design dams and flood control projects in California can no longer rely on records of orderly variations in recent past climate conditions, and must instead look ahead to an era when variations in the pace of the warming will be rapid and unpredictable. The team warned that California is very vulnerable to the impact of global warming such as more rain in the coming years, a diminishing snowpack, and increased flooding dangers. A \$5.4 billion bond issue for dams and water conservation passed by California voters in 1986 includes \$1 billion for integrated water management infrastructure to cope with problems associated with a warming climate. An engineer with the Department of Water Resources has said that the state will have to deal with planning future work on California dams with the best models they have available on ongoing climate change.

Posted: <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/02/01/MNC9UOA3M.DTL>

## **California Coastal Commission Rejects Controversial Toll Road Proposal**

(*Los Angeles Times*, February 7, 2008) After 12 hours of hearing public testimony and in front of a crowd of over 3,500 people, the California Coastal Commission voted eight to two against a proposed six-lane toll road that would run through San Onofre State Beach. Toll road opponents said the highway would ruin the environment;

supporters argued that it was critical to relieve the overburdened Interstate 5 through southern Orange County. Transportation Corridor Agencies, the toll road's proponent, stated that it will likely appeal the commission's decision to the federal government. The commission's decision can be appealed to the U.S. Secretary of Commerce because San Onofre State Beach sits on leased federal land within Camp Pendleton Marine Corps base. According to commission officials, there have been 13 such appeals to the Secretary of Commerce, about half of which have resulted in the commission's decision being overturned.

Posted (free registration required): <http://www.latimes.com/news/local/la-me-tollroad7feb07,0,3701099.story?page=1>

## **Southern California**

### **U.S. Geological Survey Hydrologists Find Aquifer Beneath Balboa Park**

(*San Diego Union Tribune*, February 2, 2008) USGS hydrologists have announced their discovery of a 600-foot-thick aquifer beneath Balboa Park in San Diego. USGS hydrologists recently spent weeks drilling a monitoring well at Balboa Park near the golf course. Although water officials do not expect the aquifer to substantially reduce the region's reliance on the Colorado or Sacramento river systems, they are hopeful that this small water source could be used to irrigate nearby landscaping. The City of San Diego, which has agreed to pay for most of the \$300,000 monitoring well project, said that it is encouraged by the existence of the water, even though tests must still be done to determine the salinity of the newly discovered water. USGS hydrologists also are working to complete a comprehensive study of San Diego County's groundwater resources in an attempt to increase local groundwater supplies.

Posted: <http://www.signonsandiego.com/news/metro/20080202-9999-1m2water.html>

## **Proposed Settlement Reached for Vista and Carlsbad Sewage Spill**

(*North County Times*, February 5, 2008) Following a 7.3 million gallon sewage spill that occurred during late-March and early-April 2007, the cities of Carlsbad and Vista have reached a tentative settlement agreement with the San Diego Regional Water Quality Control Board (RWQCB). Under the proposed settlement, the cities would pay \$200,000 to the RWQCB and \$500,000 to federal and state wildlife agencies to address local environmental impacts that resulted from the sewage spill. The sewage spill was a result of a sewer main break and caused the death of about 1,700 fish in the freshwater Buena Vista lagoon. RWQCB originally proposed \$1.1 million in penalties but under the proposed settlement agreement, that liability would be reduced by \$395,000 on the condition that the cities upgrade the sewer main that suffered the leak. The proposed settlement must be approved at the RWQCB's March 12, 2008 meeting before it can become final. Public comment on the proposed settlement may be sent to [EBecker@waterboards.ca.gov](mailto:EBecker@waterboards.ca.gov).

Posted: [http://www.nctimes.com/articles/2008/02/05/news/inland/vista/2\\_04\\_092\\_4\\_08.txt](http://www.nctimes.com/articles/2008/02/05/news/inland/vista/2_04_092_4_08.txt)

## **Regional Board Unable to Impose Fines for Navy Sewage Spill**

(*San Diego Union Tribune*, January 31, 2008) A report prepared by the San Diego RWQCB has found that United States Navy inaction allowed at least 14 million gallons of sewage to discharge from the San Diego Naval Base to Chollas Creek over two years ending in November 2006. RWQCB often imposes penalties for sewage overflows, but the Navy is immune to fines assessed for Clean Water Act violations. Based on other big sewage spills in San Diego, the one from the San Diego Naval Base could have generated a penalty of around \$1 million. The Navy sewage spill, the largest in recent county history, is just one of the many sewage

overflows that have occurred in San Diego in recent years. Despite some improvements in reducing sewage overflows however, there were still six discharges of more than 100,000 gallons last year. The number of sewage overflows in the region has dropped from 427 in 2002 – 2003 to 214 in 2006 – 2007. However, the City of San Diego's volume of spilled wastewater in 2007 quadrupled from the previous year due to a 391,000-gallon August overflow near Lake Hodges. That spill was blamed on grease and other items that clogged a pipe.

Posted: <http://www.signonsandiego.com/news/military/20080131-9999-1m31sewage.html>

## **Cross-Border Team Seeks to Address Stormwater Runoff Problems in Tijuana and the United States**

(*Christian Science Monitor*, February 6, 2008) A cross-border team hopes to turn a Tijuana slum into an example of environmental activism, resulting in better living conditions and environmental conditions. When it rains in Tijuana, that stormwater runoff crosses the international border resulting in flooding. The cross-border team aims to convince the community to devote its own time and effort to pave the roads in the community of San Bernardo, a neighborhood that becomes a bleak, muddy lake during heavy rain periods. The plan is to cover dirt roads with concrete blocks that are designed to hold water and allow it to seep back into the earth. Residents, mainly women, are making the 70,000 "permeable pavers" needed for the first half-mile of road. Students from the University of California, San Diego also are making visits to San Bernardo to help residents make the hexagonal pavers out of gravel, cement, and water. Team members hope that communities in the United States also will see the value of the pavers and start requiring them for areas like parking lots.

Posted: <http://www.csmonitor.com/2008/0206/p13s01-sten.html>

## **Coachella Valley Water Officials Look to Move Toward Desert Landscaping**

(*The Desert Sun*, January 28, 2008) In the current environment of uncertain water supplies, Coachella Valley Water District's new landscape rules are part of an ongoing effort to reduce outdoor water use, which can account for up to 70 percent of total home water consumption. The new rules require new developments to use "smart" controllers that self-adjust lawn sprinklers based on climate, 24-inch sidewalk setbacks for sprinkler heads, a maximum water allowance that will hold grass to 25 percent of laws, and golf course restrictions that limit grass to four acres per hole and 10 acres per driving ranges. The Mission Springs Water District similarly restricts water use in new developments to encourage more drought-tolerant landscaping.

Posted: <http://www.mydesert.com/apps/pbcs.dll/article?AID=/20080128/NEWS07/801280332/1006/news01>

## **California Green Builder Program Model Homes Revealed**

(*The Desert Sun*, February 3, 2008) Model homes at an Indio residential development are the first homes built under the California Green Builder program, which means the homes exceed the California Energy Efficiency Standards by at least 15 percent and use about 20,000 fewer gallons of water per year than similar conventional homes. The homes include features such as the use of scrap wood material, which saves at least one tree per home; installation of irrigation timers that adjust water volume based on climate conditions; use of paints, lacquers, and carpets that have low or no volatile organic compounds; use of pumps that circulate hot water allowing it to come out of the faucet immediately; installation of ultra low-flush toilets; installation of high-performance windows with special glazing to reduce energy expenses; and higher performance furnace and air conditioning systems to use less energy.

Posted: <http://www.mydesert.com/apps/pbcs.dll/article?AID=/20080203/NEWS07/802030302/1006/news01>

## **Announcements**

### **Draft Environmental Impact Report for North Delta Flood Control and Ecosystem Restoration Project Released for Public Review**

The Department of Water Resources released its Draft Environmental Impact Report (Draft EIR) for the North Delta Flood Control and Ecosystem Restoration Project. The project would implement flood control improvements primarily on and around Staten Island, Dead Horse Island, and the McCormack-Williamson Tract. Copies of the Draft EIR may be viewed online at <http://www.dfm.water.ca.gov/dsmo/northdelta/documents.htm>. A public hearing is scheduled for February 21, 2008 from, 10:00 a.m. to 12:00 p.m. at the Jean Harvey Community Center, 4273 River Road, Walnut Grove, California. Comments on the Draft EIR may be submitted through March 28, 2008.

Posted: [http://www.businesswire.com/portal/site/google/index.jsp?ndmViewId=news\\_view&newsId=20080129006336&newsLang=en](http://www.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20080129006336&newsLang=en)

### **March 14, 2008 California Stormwater Quality Association General Membership Meeting**

The next California Stormwater Quality Association (CASQA) General Membership meeting will be held on March 14, 2008, from 9:00 a.m. to 3:00 p.m. at the Doubletree Hotel San Francisco Airport, in Burlingame, California. The meeting will focus on the latest findings of Caltrans' Stormwater Research Program and will feature federal and state updates from the State Water Board and the U.S. Environmental Protection Agency, Region IX. For more information, go to <http://casqa.org/meetings/locations.php>.

### **Delta Vision Workshop to be Held on March 7, 2008**

The Water Education Foundation, co-sponsored by the California Resources Agency, will be holding the sixth of its series of Delta

## ABOUT FOLEY

Foley & Lardner LLP continually evolves to meet the changing legal needs of our clients. Our team-based approach, proprietary client service technology, and practice depth enhance client relationships while seeing clients through their most complex legal challenges. The BTI Consulting Group (Wellesley, Massachusetts) recently recognized Foley as one of the top four law firms shaping the U.S. legal market, while *CIO* magazine has named Foley to its CIO 100 list six times for our client-focused technology. Whether in the United States or around the world, count on Foley for high-caliber business and legal insight.

## Foley.com

*Foley & Lardner LLP Legal News is intended to provide information (not advice) about important new legislation or legal developments. 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.*

*If you do not want to receive further Legal News issues, please e-mail [info@foley.com](mailto:info@foley.com) or contact Marketing at Foley & Lardner LLP, 321 N. Clark Street, Suite 2800, Chicago, IL 60610 or 312.832.4500.*

Vision Workshops on March 7, 2008, from 8:00 a.m. to 5:00 p.m. at the Joseph A. Nelson Community Center, 611 Village Drive, Suisun City, California. The workshop will outline the Delta Vision Blue Ribbon Task Force recommendations to protect the Delta ecosystem and the state's water supply. Moderators will encourage panel debates among speakers, and self-facilitated breakout groups will allow participants to discuss the issues and provide feedback. Attendance is free and a complimentary box lunch will be served, but registration is required. For more information and to register online, please visit: <http://www.water-ed.org/secure/mar7deltaworkshop.asp>.