WESTERN STATES WATER

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THE WEEKLY NEWSLETTER OF THE WESTERN STATES WATER COUNCIL

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LITIGATION/WATER QUALITY

Northern California River Watch/Clean Water Act

On August 6, the Ninth Circuit Court of Appeals upheld a district court decision in *Northern California River Watch v. City of Healdsburg* finding the city in violation of the Clean Water Act (CWA) for discharging wastewater without a National Pollutant Discharge Elimination System (NPDES) permit into a former gravel pit adjacent to the Russian River. The Court's opinion, by Chief Judge Mary Schroeder, referred to *Rapanos* and the narrowing of the CWA's scope, while finding "...the controlling opinion is that of Justice Kennedy who said that to qualify as a regulable water under the CWA the body of water itself need not be continuously flowing, but that there must be a 'significant nexus' to a waterway that is in fact navigable."

Since 1978, Healdsburg's secondary wastewater treatment plant has discharged into Basalt Pond, an old sand and gravel pit, separated from the Russian River by a levee. The pond covers some 58 surface acres. Discharged wastewater amounts to 420-455 million gallons per year, nearly the volume of the pond itself, which would overflow but for the unconfined nature of the alluvial aquifer. The pond serves to "polish" effluent by means of percolation and filtration, as well as the wetlands in and around the pond, effectively reducing "biochemical oxygen demand and removing some pollutants, but the filtration is not perfect." Chloride concentrations in the ground water between the Pond and the Russian River are "substantially higher" than surrounding areas, and upstream concentrations in the river are only 5.9 parts per million (ppm), while seepage from Basalt Pond measures 36 ppm.

The Pond itself is privately owned, and while all excavation operations have ceased, discharges of slurry and sediments from surface mining operations at other locations to the Pond continue.

The plaintiffs filed suit on December 4, 2001 alleging Healdsburg was violating the CWA, and the district court agreed based on its findings of fact, and the legal conclusion that Basalt Pond is a "water of the United States." The city appealed, claiming Basalt Pond is exempt, as the CWA excludes "waste treatment systems" from "waters of the United States," and that there is an exception for active excavation operations. The district court found no merit to the latter, nor did the Ninth Circuit, which also stated, "Basalt Pond may be part of a waste treatment system, but it does not fall under the exemption because it is neither a self-contained pond nor is it incorporated in an NPDES permit as part of a treatment system." Further, the court found no evidence of active excavation operations.

Regarding "waters of the United States," the court found: "It is undisputed that the Russian River is a navigable water of the United States.... The horizontal distance between the edge of the River and the edge of the Pond varies between 50 and several hundred feet.... Usually, there is no surface connection, because the levee blocks it and prevents the Pond from being inundated by high river waters.... Pond water in the aquifer finds its way to the River over a period of a few months...." The court noted the U.S. Army Corps of Engineers issued regulations, in 1978, which included adjacent wetlands, including "[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.... The Supreme Court has since confirmed that regulable waters of the United States include tributaries of traditionally navigable waters and wetlands adjacent to navigable waters and their tributaries. Riverside Bayview Homes, 474 U.S. 121; 33 C.F.R. 328.3(a)(1),(4),(7)."

The court also stated, "The applicable regulations define wetlands as 'those areas that are inundated or saturated by surface or groundwater.' See 33 C.F.R. 328.3(b). The record here reflects that the Russian River and surrounding area, including the Pond itself, rest on top of a vast gravel bed extending as much as sixty feet into the earth. The gravel bed is a porous medium, saturated with water. Through it flows an equally vast under ground aquifer. This aquifer supplies the principal pathway for a continuous passage of water between Basalt Pond and the Russian River.... Indeed, the parties have [so] stipulated...." The court held, "The Basalt Pond and its surrounding area are therefore regulable under the CWA, because they qualify as wetlands under the regulatory definition...because here, the Pond is not isolated; it contains and is surrounded by wetlands.... The remaining question is whether Basalt Pond is a 'water of the United States' because it is sufficiently adjacent to the navigable Russian River to confer jurisdiction or alternatively because it has a substantial nexus to the River." The court affirmed the district court's determination saying, "In sum...Basalt Pond has a significant nexus to the Russian River."

WATER RESOURCES/ADMINISTRATION UPDATE

Water 2025 - System Optimization Reviews

On August 30, Secretary of the Interior Dirk Kempthorne announced that a new System Optimization Reviews grant program under the Water 2025 initiative will enable water users to perform broad studies of the efficiency of their water delivery systems. "This program will assist water users in evaluating the most efficient ways to manage their irrigation systems and thus further the goals of Water 2025 to increase water conservation and ensure adequate water supplies for future needs," Secretary Kempthorne said.

He added, "The Bureau of Reclamation will award the funds for [reviews], each of which will result in a plan of action that will focus on improving efficiency and operations on a regional or basin perspective. Most improvements identified in the reviews will be eligible to apply to the Water 2025 Challenge Grant Program for additional funding."

Water 2025 encourages voluntary water banks and other market-based measures as authorized under state law, promotes the use of new technology for water conservation and efficiency and removes institutional barriers to increase cooperation and collaboration among federal, state, tribal and private organizations. System Optimization Reviews will involve a multi-step process that will gather information; identify issues and priorities; establish water conservation goals; examine water management, water marketing and ways to prevent conflicts over water; identify and evaluate potential improvements; define a plan of action; and prepare a final report.

To be eligible for the new grants, applicants must represent an irrigation or water district, tribal water authority, state governmental entity with water management authority, or organizations created under state law with water delivery authority. They must also be located in the seventeen western states; provide a 50/50 non-federal cost-share; request no more than a $300,000 federal cost-share; and reviews must be scheduled for completion in 24 months. Grant proposals must be submitted by December 4. For more information visit www.doi.gov/water2025.

The press release notes that since 2004, Interior has awarded more than $25M in Challenge grants for more than 120 projects, which with matching contributions from non-federal partners, represent a combined investment of more than $105M in water management improvements.

WATER QUALITY

Clean Water Act - NPDES Guidance/Watersheds

The Environmental Protection Agency (EPA) has published new technical guidance that will help integrate National Pollutant Discharge Elimination System (NPDES) permits into watershed management plans. The guidance is a follow up to the 2003 implementation guidance, and leads interested permitting parties through the analysis of watershed data and developing a framework for implementing an NPDES program. "This guidance helps citizens and regulators accelerate watershed protection through more innovative and holistic permits and programs under the Clean Water Act," said Assistant Administrator for Water Benjamin H. Grumbles. "The detailed information and case studies provide a road map to cleaner and healthier watersheds."

The guidance supports approaches to permitting that may help target the watershed's most pressing environ-mental needs, which will help achieve water quality-based effluent limitations based on water quality standards while providing opportunities for cost reductions and improved efficiencies such as water quality trading. The guidance includes case studies describing how watershed approaches involving NPDES permitting have been implemented across the country. The agency is accepting comments on the guidance on a continuing basis. For an electronic copy of the guidance go to: www.epa.gov/npdes/watersheds.

Drinking Water State Revolving Fund

EPA has released its 2006 Drinking Water State Revolving Fund (DWSRF) program annual report, which highlights the infrastructure assistance achievements in 2006 and over the nine-year history of the program. Almost $13B in assistance has been made available to communities to finance important infrastructure needs and an additional $1.2B to support state and local drinking water programs through training, capacity development, and source water protection. The program has funded close to 5,000 projects needed to help public water systems achieve and maintain compliance with drinking water standards, including almost 500 projects for disadvantaged communities. Ensuring the long-term sustainability of our drinking water infrastructure is a key challenge facing the Nation. The report and additional information about the DWSRF program is available at www.epa.gov/safewater/dwsrf.html.

PEOPLE

Glenn Patterson has retired from active service with the U.S. Geological Survey after over 30 years. He began as a part-time field assistant in Menlo Park, CA and worked as a hydrologist and in water quality posts in Oregon, South Carolina (as District Chief), and with many states as the Cooperative Water Program (CWP) Coordinator. He moved to Colorado in 2006, where he served as USGS liaison with the National Park Service's Water Resources Division in Ft. Collins (a role he will continue to play). We appreciate his work with the CWP stakeholders in raising support and visibility for the program.