

Moffatt Thomas

WATER, ENVIRONMENTAL, AND NATURAL RESOURCES LAW NEWSLETTER
(Dec. 2008)

Welcome!

Hello, and welcome to the inaugural issue of Moffatt Thomas's Water, Environmental, and Natural Resources Newsletter! As you are well aware, legal and regulatory developments in these areas of the law are frequent. So, we thought some of our clients and colleagues may appreciate periodic updates on newsworthy recent developments and issues. Our current plan is to issue these newsletters monthly, and to adjust the frequency as warranted. If you ever have any questions or want us to cover something in particular, please let us know. In the meantime, enjoy.

Sincerely,

Scott Campbell, Dylan Lawrence, Matt McGee, and
Andy Waldera

IDWR Transfer/Mitigation Workshop

On November 13, 2008, the Idaho Department of Water Resources (IDWR) hosted a workshop in Jerome regarding recent updates on IDWR's policies and procedures for processing water right transfers, and the use of mitigation water to prevent injury to other water users in transfers and new water rights applications.

Of particular interest is the fact that IDWR is in the process of revising both its standard transfer application form and its "Transfer Processing Policies & Procedures" memorandum. These are both significant developments, as water right transfers are becoming more important as Idaho's water sources become fully allocated.

On a related note, IDWR indicated that it received a record number of transfer applications last year, which is increasing the agency's application "backlog." The underlying message is to submit your transfer applications early if you are contemplating any changes to your water rights, to help minimize delay.

During the workshop, IDWR also walked through various scenarios in which mitigation water can be used to avoid injury to other water users, thereby allowing

IDWR to approve a transfer or new water right application that it would otherwise deny. Again, as Idaho's sources of water become more and more tightly appropriated, mitigation will also become an increasingly important component of transfer and new water right applications.

Ninth Circuit Decision Limits Judicial Review Of CWA Wetlands Determinations

In *Fairbanks N. Star Borough v. U.S. Army Corps of Eng'rs*, No. 07-35545 (9th Cir. 2008), the Ninth Circuit Court of Appeals held that while an approved jurisdictional determination from the Corps is the ultimate and final agency determination of CWA jurisdiction, the decision still does not qualify as a final agency action for judicial review purposes under the Administrative Procedure Act. The result is that the regulated community can either expend time and resources securing a CWA Section 404 permit that might not be necessary, or it can proceed with a development, cross its fingers, and hope for the best that an enforcement action is not waiting for them on the other side.

Generally speaking, judicial review of an agency action under the Administrative Procedure Act (5 U.S.C. § 704) requires two things: (1) a final agency action—the consummation of the agency's decision making process, and (2) the action must be one that is determinative of legal rights or obligations, or amount to an action from which legal consequences will flow. While the Court agreed that an "approved" jurisdictional determination from the Corps (the Corps' decision that wetlands are present on a particular piece of land) is a final agency action, the Court disagreed that such a determination, in and of itself, affects legal relations or subjects one to any imminent legal liability. Instead, the Court reasoned that Fairbanks North Star Borough simply asked the Corps for its opinion as to the existence of wetlands on its property, and the Corps' obliged in offering its opinion. The Court stated that the Corps' opinion (wetlands determination) merely expresses the Corps' view of the law, and does not compel or forbear Fairbanks to/from doing anything. Therefore the Corps' jurisdictional

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determination, in and of itself, does nothing to fix or alter Fairbanks' legal obligations under the CWA.

For the regulated community, the Court's decision that a Corps' wetlands determination amounts to nothing more than the agency's factual opinion regarding the existence of jurisdictional wetlands and nothing more is a distinction without a difference. This is because one should heed the Corps' "opinion" as determinative of CWA jurisdiction over a particular parcel. To do otherwise, and to plow ahead with a development or other improvement without a valid Section 404 permit, would prove extremely risky. Attacking the propriety of a Corps' wetlands determination after the fact, and during a civil and criminal enforcement proceeding while thousands of dollars (if not hundreds of thousands of dollars) and potential imprisonment hang in the balance, is gutsy to say the least.

Ranchers Associate In Response To Aggressive Wind Development In Several Western States

Wind blowing across the West is a valuable commodity. As developers and utilities seek to harness the energy that wind can provide, they also seek a path for transmission of generated power to market. Therefore, the easements and rights of way necessary to build such a path have also become very valuable.

In light of the effects wind power development may have on an entire community and in order to ensure that everyone gets a fair deal, landowners in Wyoming, Montana, New Mexico, and Colorado are forming collective bargaining cooperatives as they are approached by developers seeking easements for transmission lines. The purpose of the cooperative is to share information and leverage that shared knowledge against wind developers who often know more about the real market value of a transmission easement than does the local rancher.

New Reporting Rule For Extremely Hazardous Substances

The Environmental Protection Agency has promulgated a new rule under the Emergency Planning and Community Right-to-Know Act (EPCRA). The rule requires that facilities report changes in the status of extremely hazardous substances to local authorities within 30 days if the change affects emergency planning. Among the status changes that may trigger the reporting requirement are moving substances to a different location at the facility, removing substances from a

facility, closing a facility, and bringing substances to a site.

The rule was published in the Federal Register and took effect on December 3, 2008, which means reporting should begin in January 2009. A failure to notify local authorities as required by the new rule could result in fines as high as \$75,000 per violation per day.

EPA Audit Disclosure Policy Updates

In 2000, EPA issued a written policy which provided regulated entities with immunity from enforcement under federal environmental quality laws if the entity timely discloses and remedies the violation. One gray area under that policy was the ability of purchasers of facilities with previous or ongoing violations to utilize the audit disclosure policy.

Recently, EPA published an interim approach that clarifies this issue, and provides greater flexibility for purchasers to utilize the audit disclosure policy. This provides incentives for purchasers to conduct environmental audits and to start with a "clean slate" if they report and remedy environmental violations that they discover.

Second Circuit Holds That RCRA Does Not Apply To Actions Already Governed By The CWA

In *Coon v. Willet Dairy*, 536 F.3d 171 (2nd Cir. 2008), the Second Circuit Court of Appeals dismissed RCRA-based citizen suit claims filed against a dairy alleging that the dairy improperly managed its herd waste and silage leachate. The Court held that the dairy was shielded from RCRA-based liability because the dairy was operating under a valid Clean Water Act NPDES permit. Consequently, the Court held and affirmed that under 42 U.S.C. § 6905(a), RCRA does not apply to activities already subject to regulation under the Clean Water Act.