

Moffatt Thomas

WATER, ENVIRONMENTAL, AND NATURAL RESOURCES LAW NEWSLETTER (August 2009)

Scott L. Campbell ♦ Dylan B. Lawrence ♦ Matthew J. McGee ♦ Andrew J. Waldera

SRBA PRESIDING JUDGE APPOINTED TO IDAHO COURT OF APPEALS

On August 20, 2009, Governor Otter announced the appointment of District Judge John M. Melanson to the Idaho Court of Appeals. In addition to being the current district judge for the Fifth Judicial District, Minidoka County, Judge Melanson has also been the presiding judge of the Snake River Basin Adjudication District Court since 2003.

In related news, Governor Otter still has not named a new director of IDWR, to replace retired former director David Tuthill, Jr. Gary Spackman has been acting as the interim director since Tuthill's retirement on June 30, 2009.

INTERIM DIRECTOR OF IDWR AMENDS MAGIC VALLEY CURTAILMENT ORDER

On August 7, 2009, IDWR Interim Director Gary Spackman amended a curtailment order previously issued on July 22, 2009. The amendment reduced the number of groundwater rights that need to be curtailed in order to satisfy a water delivery call initiated by Clear Springs Foods in 2005.

The July 22 curtailment order affected groundwater users in Blaine, Cassia, Gooding, Jerome, Lincoln, Minidoka, and Twin Falls Counties with priority dates junior to January 8, 1981. However, in response to proposals by the North Snake Ground Water District and the Magic Valley Ground Water District to convert more acreages from ground water to surface water irrigation, the Interim Director was able to amend the order to curtail fewer ground water rights. The more recent order affects ground water users in portions of Cassia, Gooding, Jerome, and Lincoln Counties, with priority dates junior to April 12, 1990.

In other news related to Idaho's Eastern Snake Plain Aquifer, the Surface Water Coalition recently announced that it is donating approximately 6,300 acre-feet of water

for ESPA recharge efforts. The water is being directed to Jensen's Grove Lake in Blackfoot, which has been used in previous aquifer recharge projects due to its strong hydrological connection to the ESPA. The SWC, which is a coalition of southern Idaho irrigation districts and canal companies, had water available for the project due to above-average water storage levels in the upper Snake River reservoirs.

FEDERAL COURT APPROVES SMOKY CANYON MINE EXPANSION

On August 4, 2009, Judge Mikel Williams, district judge for the federal district of Idaho, granted summary judgment in favor of the J.R. Simplot Co. for its proposed expansion of the Smoky Canyon phosphate mine in Caribou County. According to Simplot, phosphate ore at the existing mine is running out, and an expansion is necessary to keep the mine operating. Four environmental groups (the Greater Yellowstone Coalition, the Natural Resources Defense Council, the Sierra Club, and Defenders of Wildlife) had filed suit in federal court to challenge the approval of the mine expansion by the U.S. Forest Service and Bureau of Land Management.

The plaintiffs filed suit under the National Environmental Policy Act and the Clean Water Act, based upon concerns over selenium contamination in the region. According to the plaintiffs, the federal government failed to obtain the required "Section 401" certification from the Idaho Department of Environmental Quality that new discharges would not adversely affect area waterways. According to the U.S. Environmental Protection Agency, such certification was not required, because the mine is not hydrologically connected to the contaminated waterways, and because there were to be no discharges from the mine. The court, recognizing a difference in opinion between the parties on these technical issues, deferred to the determination of the federal agencies, and granted summary judgment.

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Representatives of at least one of the plaintiffs have indicated that an appeal is likely.

ENVIRONMENTALISTS SEEK REVIEW OF APPELLATE DECISION UPHOLDING EPA'S 2008 WATER TRANSFERS RULE

In follow-up to an article we first reported in the June 2009 Newsletter (*Federal Appeals Court Holds Water Transfers Not Subject to CWA Permitting*), environmental activists and the Miccosukee Tribe of Florida are seeking *en banc* review of the Eleventh Circuit's decision in *Friends of the Everglades, et al. v. South Florida Water Management District, et al.*, No. 07-13829, 2009 WL 1545551 (11th Cir. June 4, 2009). The environmentalists and Indian Tribe filed petitions on July 20, 2009 requesting a full panel rehearing of the case.

The Eleventh Circuit's decision was the first in which a federal appeals court had ruled upon the EPA's 2008 regulation exempting water transfers from the permitting requirements of the CWA's NPDES program. The current *en banc* rehearing request is likely a prelude to an eventual petition for review of the issue by the United States Supreme Court. Among other things, the petitioner environmental groups argue that the Eleventh Circuit decision is at odds with prior decisions of the First and Second Circuits. For example, the Second Circuit's decision in *Catskills Mountains Chapter of Trout Unlimited, Inc. v. New York*, previously (in 2006) struck down a prior EPA-promulgated administrative water transfer exemption on the grounds that the plain meaning of the CWA requires an NPDES program permit whenever there is any point source discharge of a pollutant. The environmentalists argue that such a "plain meaning" holding by the Second Circuit precludes any subsequent and contrary agency interpretation according to the United States Supreme Court's decision in *National Cable & Telecommunications Ass'n v. Brand X Internet Services*.

While the Eleventh Circuit agreed that the South Florida Water Management District's pump stations, which move water back and forth between an elaborate system of canals and waterways and the Florida Everglades, are "point sources" for purposes of the CWA, the question is whether the pump stations need be regulated by NPDES permits if they, in and of themselves, do not add pollutants to the water that they transfer back and forth. In sum, the Eleventh Circuit reasoned that for purposes of CWA regulation, point sources need to not only be truly discrete point sources, but they also need to contribute pollution, as opposed to merely passing

preexisting pollution with no pollutant addition in their own right. The Eleventh Circuit's June 2009 decision further argues that to the extent that its decision is seemingly at odds with other prior decisions of other courts, it is because the other courts did not have to consider and apply the EPA's recent 2008 water transfer rule. Instead, the Eleventh Circuit held that the EPA's 2008 rule was a reasonable interpretation of ambiguities contained within the CWA (a statute that the EPA administers), and that as a consequence, EPA's 2008 rule was entitled to significant deference under the United States Supreme Court's 1984 decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*

SIXTH CIRCUIT STAYS CWA PESTICIDES DECISION

As we have previously reported, on January 7, 2009, in consolidated proceedings from eleven circuit courts around the United States, the Sixth Circuit Court of Appeals found that an EPA rule exempting certain pesticide applications from NPDES permitting requirements was not a reasonable interpretation of the Clean Water Act. That decision, *National Cotton Council of America v. EPA*, 553 F.3d 927 (6th Cir. 2009), would require anyone who applies a pesticide in, over, or near waters of the United States to obtain an NPDES permit. On April 9, 2009, the EPA requested a stay of the decision due to the practical burdens of the immediate administration of a compliant permitting program for hundreds of thousands of regulated entities in the United States.

Recently, the Sixth Circuit agreed with EPA on this issue. On June 8, 2009, the court held that regulated entities will not immediately need a permit for pesticide applications covered by the *National Cotton Council* case. Instead, EPA and the states administering their NPDES programs now have until April 9, 2011 to develop general NPDES permits for the newly regulated entities, which will include farmers, foresters, and municipalities.

If you would like additional information regarding the topics covered, or if there are additional topics that you would like us to cover in upcoming newsletters, please contact Lela Wood at (208) 345-2000 or llw@moffatt.com, and she will connect you with the appropriate contact. In addition, please contact Ms. Wood if you would prefer to receive the newsletter electronically, or if you would like to be removed from our mailing list altogether.