

Moffatt Thomas

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

IDWR DIRECTOR DAVID TUTHILL ANNOUNCES RETIREMENT

After more than two years as Director of the Idaho Department of Water Resources, David Tuthill has announced plans to retire from public service on June 30, 2009. Director Tuthill spent 33 years with IDWR in a number of positions, including manager of the western regional office, adjudication bureau chief, and administrator of the water management division. While Mr. Tuthill was director, IDWR completed the Eastern Snake Plain Aquifer Comprehensive Management Plan and commenced the Northern Idaho Adjudication. Upon resignation as director, Mr. Tuthill plans to enter the private sector in the water engineering field. As of the date of this newsletter, Governor Otter has not yet named a new director.

FEDERAL APPEALS COURT HOLDS WATER TRANSFERS NOT SUBJECT TO CWA PERMITTING

On June 4, 2009, the federal appeals court for the Eleventh Circuit, which has appellate jurisdiction over federal court cases arising in Alabama, Florida, and Georgia, held that a water transfer from one jurisdictional body of water to another jurisdictional body of water does not require a discharge permit under the Clean Water Act (CWA). That particular case, *Friends of the Everglades Inc. v. South Florida Water Man. Dist.*, dealt with the pumping of water from agricultural canals into Lake Okeechobee. Previously, the trial court determined this activity required a CWA discharge permit, because the water from the canals contained pollutants.

The appeals court, however, reversed the trial court's decision. In particular, the Eleventh Circuit relied upon EPA's "water transfers" rule, which was finalized in June 2008 and after the trial court's decision. That rule adopts the "unitary waters" theory, essentially taking the position that the discharge of water from one jurisdictional body of water to another does not require a permit, because the pollutants were already in a jurisdictional body of water.

The Eleventh Circuit's holding is arguably at odds with a 2004 U.S. Supreme Court decision in South Florida

Water Man. Dist. v. Miccosukee Tribe, which dealt with similar facts. The Supreme Court remanded that case back to the trial court for a determination of whether the particular water transfer at issue really involved one body of water (in which case a permit would not have been required), or two distinct bodies of water (in which case a permit would have been required). The Eleventh Circuit addressed this issue by noting that EPA had not yet promulgated its water transfers rule at the time of the *Miccosukee Tribe* case, and that the rule is now entitled to substantial deference in interpreting the ambiguous terms of the CWA.

TETON DAM IN SOUTHEAST IDAHO MAY RISE AGAIN

Officials at the Idaho Department of Water Resources have announced that the state is close to signing an agreement with the Bureau of Reclamation to study additional water storage site opportunities in southeastern Idaho. The agreement would create a 50-50 cost sharing partnership between the state and the Bureau for purposes of underwriting the estimated \$800,000 study. Idaho would like to add upwards of an additional 100,000 acre-feet of storage in the region, particularly in the Teton River Basin, and the potential rebuilding of Teton Dam is one of the options being explored. The original Teton Dam failed shortly after the reservoir impounded behind it initially filled in 1976. The dam's failure killed 11 people and upwards of 13,000 head of livestock.

PRESIDENT OBAMA FAVORS PROPOSED LEGISLATION SEEKING TO FURTHER CLARIFY CLEAN WATER ACT JURISDICTION

The Obama administration is supporting legislative efforts to amend the federal Clean Water Act for purposes of clarifying the Act's jurisdictional reach. Several key officials within the administration co-signed a letter outlining various amendment guidance principles addressed to Representative James Oberstar (D-Minn.) and Senator Barbara Boxer (D-Calif.). Representative Oberstar is the chairman of the House Transportation and Infrastructure Committee, and Senator Boxer is chairman of the Senate Environment and Public Works Committee. Representative Oberstar, in conjunction with Senator Russ Feingold (D-Wis.), had already been

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pursuing similar legislation during the previous Bush administration.

Obama administration officials are urging congressional leaders to consider four general principles in an effort to define the scope of the Clean Water Act: (1) broad protection of the nation's waters; (2) amend the definition of covered waters so that covered waters are both predictable and manageable; (3) promote consistency between the Act and agricultural wetlands programs; and (4) recognize and maintain long-standing practices and prior determinations to the extent practicable.

The letter stated that "it is essential that the Clean Water Act provide broad protection of the nation's waters, consistent with full congressional authority under the Constitution." The letter also urged legislators to consider the formal codification of certain Clean Water Act exemptions currently in effect, but only as the result of regulations or guidance documents rather than formal legislation.

In the end, the Obama administration officials seek legislation that exhibits a clear statement of congressional intent with respect to the scope and reach of the Clean Water Act in order to support the "steady and predictable implementation of [the Act] in the years to come."

ENVIRONMENTAL GROUPS SEEK TO RETURN GRAY WOLF TO ENDANGERED SPECIES LIST

On June 2, 2009, a number of environmental groups, including Defenders of Wildlife, the Sierra Club, and the Natural Resources Defense Council, filed suit in the District Court of Montana, requesting that Judge Donald W. Molloy restore the gray wolf to the list of endangered species "until their long-term viability is assured." The lawsuit was filed in response to the delisting of the gray wolf in Idaho, Montana, and parts of Washington, Oregon, and Utah, which took effect on May 4, 2009. This is the second challenge to the delisting of the gray wolf in the Northern Rockies.

In February 2008, the Department of the Interior's Fish and Wildlife Service delisted the gray wolf. Environmentalists successfully blocked the delisting when Judge Molloy granted their request for preliminary injunction and subsequently vacated the delisting rule.

The Department of the Interior's Fish and Wildlife Service has estimated that, as of late 2008, the gray wolf

population in the Northern Rockies exceeded 1,600. It has also asserted that gray wolf populations in certain areas have reached the saturation point and that the management plan currently in place will allow the gray wolf population to average more than 1,100. In the complaint, the environmentalists disagree, suggesting that the long-term success of the gray wolf in the Northern Rockies will require a base population of between 2,000 and 5,000 prior to delisting.

WATER QUALITY MONITORING CUT FOR FY2010

The Idaho Department of Environmental Quality (IDEQ) has announced the elimination of water quality monitoring at 47 monitoring sites statewide for the fiscal year 2010, effective October 1, 2009. The move is a cost cutting measure in response to the current budget crunch.

The monitoring stations are used to measure levels of various pollutants in Idaho's streams and lakes. Data from the monitoring stations are used in a variety of contexts, including the determination of whether Idaho waterbodies satisfy designated uses and water quality standards, the calculation of acceptable pollutant load levels, and the assessment of the effects of additional discharges on those waterbodies.

Flow measurements at the 47 sites will be unaffected, and the public will still have full access to that data. The U.S. Geological Survey coordinates the measurement of flow and lake levels at those and many other monitoring sites around the state.

Currently, the cuts only affect the 2010 fiscal year. If the state government's finances improve, the water quality monitoring could resume in 2011.

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.