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**CLEAN WATER ACT PESTICIDES GENERAL PERMIT (“PGP”) MOVES FORWARD**

EPA expects the Clean Water Act PGP to be in full force and effect by early January 2012. If all goes according to schedule the federal Office of Management and Budget is expected to issue its final clearance of the PGP on October 31, 2011.

Upon receiving final clearance, EPA will issue a press release and post the final permit with appendices and the corresponding permit fact sheet on the agency’s website. EPA plans to issue a 120-day enforcement delay. This means EPA will not start enforcing the permit until on or about January 9, 2012, and also that prospective permittees will not have to submit Notices of Intent securing permit coverage until that date.

EPA is creating and scheduling webinars to educate the regulated community regarding the enactment and implementation of the PGP. The EPA may also schedule in-person permit workshops in addition to the webinars in Idaho in an effort to smooth permit implementation.

**IDAHO CONGRESSMEN SPONSOR AND SUPPORT LEGISLATION SEEKING TO REIGN IN EPA PROPOSALS**

Senator Mike Crapo, in conjunction with the rest of Idaho’s Congressional delegation, are co-sponsoring and supporting legislation aimed at curtailing EPA efforts to regulate cow manure as a “hazardous substance” under the CERCLA, and to regulate farm field and road dust under the Clean Air Act. Environmentalists contend that the Congressmen are trying to interfere with the EPA’s ability to do its job, while Senator Crapo calls the EPA proposals “overboard” regulation that will hurt Idaho’s agricultural community.

Specifically, Senators Crapo and Risch are co-sponsors of the Farm Dust Regulation Prevention Act, and Representative Simpson is a co-sponsor of the

Superfund Common Sense Act. EPA supporters argue that farm dust is a major nuisance capable of negatively affecting local and regional air quality, and that cow manure containing E. coli is a serious threat to groundwater drinking supplies. However, Crapo, in particular, counters that Congress never intended such micro-level agricultural regulation when it enacted either the Clean Water Act or the Clean Air Act. Instead, the Acts were enacted to regulate large institutional polluters rather than small family farmers in rural areas.

At last check, both the Farm Dust Regulation Act (Senate Bill No. 1528) and the Superfund Common Sense Act (Senate Bill No. 2997) are still in committee.

**IDAHO MAN SENTENCED TO PROBATION FOR ENDANGERED SPECIES ACT VIOLATION**

Thomas Demorest, a 73-year old rancher at the Diamond D Ranch located north of Stanley, received two years probation and a \$625 fine for taking threatened species without a permit under the Endangered Species Act. Demorest’s sentence also requires that he no longer hold any management positions at the Diamond D Ranch, and that he perform 50 hours of community service at a local fish hatchery.

The violations stemmed from Demorest’s operation of irrigation diversions from Mayfield Creek and Trail Creek located within the Frank Church River of No Return Wilderness Area without fish screens. In October 2009, a U.S. Forest Service biologist found 35 Chinook salmon and five bull trout—both listed as “threatened” or “endangered” under the Endangered Species Act—trapped on the downstream side of the closed Mayfield Creek diversion.

After further investigation by both the EPA and NOAA Fisheries, Demorest was charged on September 20, 2011. Rather than face trial, Demorest pleaded guilty to misdemeanor charges of violating Section 9 of the Endangered Species Act (taking listed species without a permit) in federal district court in Pocatello.

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## **IDAHO COUPLE TAKES CLEAN WATER ACT PRE-ENFORCEMENT REVIEW CASE TO THE UNITED STATES SUPREME COURT**

Michael and Chantell Sackett have asked the United States Supreme Court to decide whether the federal Clean Water Act bars pre-enforcement review of agency decisions (particularly Army Corps and EPA jurisdictional determinations). The Sackett's appeal stems from the Ninth Circuit's decision that the Clean Water Act does bar pre-enforcement review. *Sackett v. EPA*, 622 F.3d 1139 (9th Cir. 2010).

The Sacketts filed what the EPA contends were jurisdictional wetlands while grading a home site near Priest Lake, Idaho. The EPA issued an administrative compliance order ordering the Sacketts to cease their development activities and to restore the wetlands that they had already allegedly filled. The Sacketts disagreed with the EPA's determination that the wetlands on their property were jurisdictional and, therefore, regulated under the Clean Water Act. Consequently, the Sacketts sought judicial review to the EPA's wetlands determination in U.S. District Court for the District of Idaho.

Both the federal district court, and then the Court of Appeals for the Ninth Circuit ruled against the Sacketts. The courts did not reach the merits of the EPA's wetlands determination (*i.e.*, whether the agency's decision was legitimate, proper, and supported by sufficient evidence), rather the courts ruled against the Sacketts by deciding that the Sacketts' challenge to the EPA's determination was premature because the Clean Water Act precludes "pre-enforcement review."

Pre-enforcement review is the judicial review of the legitimacy/propriety of an agency determination before the agency actually initiates an enforcement action based upon its underlying determination. The courts basically held that because the Sacketts were not yet facing liability exposure under an EPA enforcement action at the time they brought their challenge, their challenge was not yet ripe for review. The Sacketts argued in response that the EPA's compliance order had the practical effect of an enforcement action because it ordered them to cease and desist their development activities. If the Sacketts failed to abide by the order, chances were good that EPA would initiate an enforcement action against them.

The Clean Water Act does not expressly preclude pre-enforcement review. However, the Act does not expressly provide for pre-enforcement review either. The Ninth Circuit filled the regulatory gap (the Act's silence as to pre-enforcement review) by deciding that the legislative intent of the Clean Water Act barred pre-enforcement review. The Ninth Circuit reasoned that the Act's compliance order procedure was designed to remedy environmental issues quickly and administratively, and that pre-enforcement review litigation, if allowed, would frustrate that quick response remedy.

Unfortunately, the Ninth Circuit is not alone in holding that the Clean Water Act bars pre-enforcement review. Instead, that position is shared by the Fourth, Sixth, Seventh, and Tenth Circuits as well. The frustration for the regulated community is that the current pre-enforcement review bar requires the community to: (1) bear substantial time and expense obtaining a Section 404 dredge and fill permit that would otherwise not be needed if the agency's decision proved erroneous; or (2) ignore compliance orders and hope that a swift and expensive administrative enforcement proceeding is not waiting in the wings. Understandably, neither path is appealing.

## **SRBA MOVES CLOSER TO COMPLETION**

The Snake River Basin Adjudication (SRBA) District Court recently moved one step closer to completion of the massive water rights adjudication. On May 17, 2011, the SRBA Court held a hearing initiating the process for developing the final unified decree for the entire adjudication. As the SRBA has proceeded, parties successfully claiming their water rights have received "partial decrees" from the SRBA Court, which establish the terms and conditions of those particular rights. However, in order to conclude the SRBA, a final decree incorporating all of those individual partial decrees is required. In addition, there are a variety of legal and administrative issues that must be addressed in a final decree.

Any party to the SRBA desiring to participate in the development of the final unified decree was required to file a notice of intent to participate with the SRBA Court. In addition, the Court formed a steering committee to receive comments from the water user community and to assist with the development of the final unified decree.

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 Debby Long at (208) 345-2000 or [dll@moffatt.com](mailto:dll@moffatt.com), and she will connect you with the appropriate contact. In addition, please contact Ms. Long if you would prefer to receive the newsletter electronically, or if you would like to be removed from our mailing list altogether.

The Idaho Legislature initiated the SRBA in 1987 in order to catalog all of the water uses within Idaho's Snake River Basin. The Idaho Department of Water Resources has estimated that it has processed over 150,000 water right claims in the SRBA. At this time, most of the individual sub-basins within the SRBA have been completed.

### **CONGRESSMAN SIMPSON SPONSORS THE DAIRY SECURITY ACT OF 2011**

Congressman Mike Simpson, Co-Chair of the Congressional Dairy Caucus, is co-sponsoring legislation seeking to address dairy commodity price volatility, and to create financial safety nets to support dairy operators when they are operating at a loss. While 2007 yielded strong profit margins for dairy operators, 2009 brought "generational losses" leaving many on the brink of financial collapse even to date.

The dairy market crash in 2009 made lenders much less willing to extend operating lines of credit. Consequently, the Dairy Security Act proposes to allow producers to lock into guaranteed margins in order to protect against cash flow problems when milk prices drop well below break-even.

The proposed Act contains three main components:

(1) The creation of the Dairy Producer Margin Protection Program, a direct payment program administered by the United States Department of Agriculture. Producers would be able to enroll in up to two programs. The first "basic" program would be free to enrollees. The basic program would make direct payments to enrollees when the national margin between milk prices and feed costs drops below \$4 per

hundredweight based upon a program feed cost formula. The second "supplemental" program would allow operators to enroll at a cost. Operators could purchase additional levels of margin protection through the program, up to 90% of an operation's annual production.

(2) The creation of a corresponding Dairy Market Stabilization Program. Those who enroll in the free "basic" program would be automatically beholden to the stabilization program (*i.e.*, subject to calls to adjust milk production downward). When the margin price falls below \$6 per hundredweight for two consecutive months, basic program enrollees would only be paid for a maximum of 98% of their base production. This market stabilization prong of the Act is designed to systematically divert supply out of the market in order to buoy falling prices. Milk processors have voiced stern opposition to the market stabilization prong of the Act contending that supply management (*i.e.*, forced supply cuts) will undermine the processing industry by interfering with exports and raising end-consumer product prices.

(3) The implementation of Federal Milk Marketing Order reform. The Act mandates that the U.S. Department of Agriculture craft Federal Milk Marketing Order changes that would eliminate end-product pricing for milk sold to Class III (*i.e.*, cheese) manufacturers. The Act in its current form also requires the USDA to allow program enrollees the chance to vote upon the USDA-authored Marketing Order reforms prior to their final implementation—a "yes" vote would effectively implement the proposed reforms, while a "no" vote would maintain the current structure. Thus, while the Act would require the USDA to implement proposed reform, program enrollees (dairy producers) would have the final say as to whether the reforms are ultimately implemented.

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