

# Moffatt Thomas

## WATER, ENVIRONMENTAL, AND NATURAL RESOURCES LAW NEWSLETTER (August - December 2010)

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### IDAHO IRRIGATORS BRACE FOR EPA'S PESTICIDES GENERAL PERMIT

Barring Congressional action, or the EPA seeking and receiving a court-ordered extension from the Sixth Circuit, the EPA's Pesticides General Permit ("PGP") will go into effect in April 2011. Though EPA has yet to release the final PGP, all indications are that the PGP program will move forward as scheduled, much to the dismay of Idaho irrigators.

The PGP is a Clean Water Act ("CWA")-based National Pollutant Discharge Elimination System ("NPDES") permit covering the application of aquatic pesticides in non-delegated states (such as Idaho) where EPA, rather than a state agency (like IDEQ), is the CWA permitting authority. EPA issued its draft PGP for public comment in June 2010 in response to the Sixth Circuit Court of Appeals decision in *National Cotton Council v. EPA*, 553 F.3d 927 (6th Cir. 2009) which struck down the EPA's prior Aquatic Pesticide Rule on the grounds that the rule was not based upon a reasonable interpretation of the CWA. In short, the Sixth Circuit decided that certain pesticides (chemical pesticides that leave residues, those where excess chemical is applied, and those that are "biological material"-based) are "pollutants" under the terms of the CWA. Thus, the "point source" application/"discharge" (through nozzles, sprayers, hoses, etc.) of such pesticides requires coverage under a viable NPDES permit. The public comment period closed on July 19, 2010, and resulted in approximately 750 sets of comments.

By its terms, the PGP covers four pesticide use/application patterns: (1) mosquito and other flying insect pest control (which can result in the indirect drift deposition of pesticide into jurisdictional waters); (2) aquatic weed and algae control (direct application of pesticide into jurisdictional waters as well as ditch bank/ditch road applications that could result in indirect drift deposition); (3) aquatic nuisance animal control (direct application of pesticide into jurisdictional waters); and (4) forest canopy pest control (which, like flying insect control applications, can lead to indirect drift deposition of pesticide into jurisdictional waters). PGP coverage for some will be automatic, while others

who expect to, or do, exceed permit-based annual treatment area thresholds will be required to file separate notices of intent ("NOI"s) with EPA to receive coverage under the PGP. Pesticide applications/uses falling outside the above-referenced application patterns will not be covered by the PGP. Instead, such non-conforming applications/uses will require one to apply for a separately authored permit specifically tailored to cover that non-conforming application/use. Further, regardless of PGP coverage, all pesticide applications are still required to conform to FIFRA labeling requirements (*i.e.*, coverage under the PGP does not exempt applicators from having to follow FIFRA label requirements/application directions).

Idaho irrigators are concerned because the NOI process essentially requires irrigation entities to concede that manmade irrigation facilities are jurisdictional (qualify as "waters of the U.S." under the CWA), and because the PGP imposes new record keeping and reporting requirements that will require additional time, effort, and financial resources to create and maintain. The irrigation community also fears that the current incarnation of the PGP is just the beginning. For example, while the PGP program does not presently require ambient water quality monitoring (requiring even more time and significantly more money to perform), EPA has expressly reserved the right to require such monitoring in the future depending upon how effective the initial PGP program proves to be.

### LEGISLATIVE EFFORTS TO CLARIFY CLEAN WATER ACT JURISDICTION ON HOLD

Based upon the results of the mid-term elections this past November, it appears that efforts in Congress to clarify and expand the jurisdiction of the federal Clean Water Act ("CWA") will not be moving forward. This is because the primary proponents of such legislation, Representative James Oberstar (D-MN) and Senator Russ Feingold (D-WI) both lost their re-election bids. Oberstar had been the sponsor of the "America's Commitment to Clean Water Act," (H.R. 5088), while Feingold had been the sponsor of the "Clean Water Restoration Act," (S. 787). To differing degrees, both of those bills, had they been enacted, would have expanded

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the jurisdiction of the CWA beyond limitations adopted by the U.S. Supreme Court over the past decade.

The extent of CWA jurisdiction became a controversial issue in 2001, with the U.S. Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159. In that case, the Court limited the CWA's jurisdiction over isolated bodies of water and wetlands and, in so doing, adopted confusing standards for determining jurisdiction. The regulated community was hopeful the Court would clarify the extent of CWA jurisdiction in its 2006 *Rapanos v. U.S.* decision, 126 S.Ct. 2208. In that case, not only were there two competing tests adopted by different Supreme Court justices, but the tests again turned out to be difficult to apply in practice.

Identifying the extent of CWA jurisdiction is a critical issue, in part because there are so many regulatory programs under the CWA. This includes the regulation of discharges of process wastewaters from industrial and agricultural facilities, and storm water runoff from industrial facilities, municipalities, and construction sites. The regulatory program that has perhaps been in the greatest state of flux with the uncertainty over CWA jurisdiction, however, is the Section 404 wetlands permitting program, administered jointly by EPA and the Army Corps of Engineers. Under all of these programs, whether a particular activity or discharge requires a permit (and all of the associated costs and responsibilities) depends to a large extent upon whether nearby water bodies are within the jurisdiction of the CWA.

Prior to the mid-term elections, President Obama had called on Congress to finally and definitively define the jurisdiction of the CWA. Now that such legislation appears unlikely anytime soon, it appears that the principles for determining jurisdiction will continue to be developed through a mixture of agency guidance and federal appellate court decisions.

#### **ENDANGERED SPECIES ACT UPDATE: SAGE GROUSE AND BULL TROUT**

On October 18, 2010, the U.S. Fish and Wildlife Service ("USFWS") issued a final rule under the Endangered Species Act ("ESA") designating critical habitat for bull trout in Oregon, Washington, Idaho, Montana and Nevada. The rule covers 19,729 miles of streams, 488,252 acres of lakes and reservoirs, and 754 miles of marine shoreline. This represents approximately four times more habitat than was designated under the former rule and includes 800 miles of streams and 16,700 acres of lakes that are not actually occupied by bull trout. The

dramatic increase in critical habitat in the final rule is the result of a 2006 lawsuit by environmentalists that alleged the former designation of critical habitat was inadequate for protection of the bull trout, a protected species since 1999.

Designation of an area as critical habitat under the ESA subjects agencies to strict regulation of federal activities in the designated area. While the primary impact of designation is the limitation of federal activities, designation impacts private parties because the issuance of federal permits for, among other acts, storm water discharge, mining and cattle grazing on federal land is one of these federal activities. Thus, ranchers, loggers, municipalities, and mining or energy operations, as well as other persons or entities that require a federal permit for certain activities, are often subject to increased oversight as a result of critical habitat designation. While the impact of the final rule on water rights, water delivery from federal facilities, water storage and grazing remains to be seen, the final rule signals increased federal scrutiny of water use and treatment throughout the West.

In other ESA news, on June 28, 2010, conservation groups filed an amended lawsuit challenging USFWS's determination that listing of the sage grouse is "warranted but precluded." The lawsuit alleges that the "warranted but precluded" determination is arbitrary and capricious and increases the risk of extinction based solely upon a bureaucratic backlog. The lawsuit requests a quick review of USFWS's determination that listing is precluded and the prompt publication of a proposed listing rule.

As previously reported in this newsletter, the listing of the sage grouse—a species native to several Western states, including Idaho—under the ESA has become a topic of great interest. Scientists report that sage grouse populations have declined due to loss and fragmentation of the sagebrush-steppe habitat on which they depend, and USFWS's investigation and findings confirm such a decline. The legal and biological status of the sage grouse is especially important to Idaho, because much of southern Idaho is sage grouse habitat that will likely be designated as critical.

In March 2010, USFWS determined that listing the sage grouse as endangered is "warranted but precluded" because of other higher priority listing actions. In other words, the sage grouse is not currently protected under the ESA, but eventually it likely will be. To address this eventuality and the somewhat unique determination by USFWS, federal agencies are working cooperatively with state governments, and in some cases providing

incentives to farmers and ranchers to implement habitat improvement.

### **IWRB ADOPTS CHANGES TO STATE WATER SUPPLY BANK**

The Idaho Water Resource Board has adopted changes to the state Water Supply Bank program, which are primarily aimed at increasing the efficiency of the program and allowing Idaho Department of Water Resources staff to work through a backlog of Water Bank lease applications. The primary changes involve increasing the financing of the Water Bank program, allowing IDWR to dedicate more staff resources to the program.

First, the Board passed a resolution adopting a \$250 fee to lease a water right to the Water Bank. At the time the resolution was adopted, the fee was proposed to apply to each water right leased to the Water Bank. However, at its November 16, 2010 meeting, the Board discussed ways to decrease the overall fee when “stacked” water rights are proposed to be leased to the Water Bank.

Second, the Board passed a resolution increasing the administrative fee for renting or purchasing a water right from the Water Bank to 25%. Previously, IDWR reserved 10% of any proceeds from the rental or sale of a water right from the Water Bank. Both of these funding changes require the approval of the legislature before they take effect. If approved, they will likely take effect July 1, 2011.

By contrast, another change to the Water Bank program has already taken effect: IDWR will no longer accept indefinite leases of water rights to the Water Bank. Instead, leases will be capped at five years. Leases in excess of five years would therefore require submission of another lease application prior to the expiration of the initial five-year lease. Of course, water right owners are still free to lease their water rights to the Water Bank for periods of less than five years.

By way of background, the Water Bank is essentially a centralized marketplace allowing water right owners in Idaho who have extra water to sell or lease their water rights to those who need water. While a water right is leased to the Water Bank, it is protected from the doctrine of forfeiture, even if it has not been rented back out and used by another water user. In addition, the Water Bank can be used to temporarily transfer a water right to another location or change its authorized uses.

### **LARGE IDAHO AGRICULTURAL TRACTS ATTRACTING INTEREST FROM INSTITUTIONAL INVESTORS**

Not all real estate investments have gone “bust” during the so-called “Great Recession.” Large institutional investors, including pension funds, foundations, and endowment funds are investing in large parcels of agricultural ground in Idaho and many other agricultural states. In many respects, agriculture is largely counter cyclical, and tends to perform strongly when other sectors of the economy falter, or in the case of the “Great Recession,” outright tank. The stability and relative productivity of the agricultural sector is drawing investors who purchase ground and lease the same back to farmers.

Ever increasing investment in agricultural land since 2000 is concerning to some, including the FDIC which recently issued a statement warning that farmland investment could be the next asset bubble ripe to burst. According to the FDIC, farmland prices are up 58% in comparison to those in 2000. According to the USDA, average farm real estate value per acre as of January 1, 2010 was \$2,140, an increase of 17% compared to 2006. Conversely, residential and commercial real estate prices have declined as much as 40% over the same time period in some markets. In Idaho, the current average is \$2,100 per acre, which is below the 2006 average of \$2,200 per acre (a decline of roughly 4.5%, which is still weathering the storm remarkably well).

Large-scale, institutional investment activity in southwest Idaho agricultural parcels is practically non-existent because those investors seek large parcels typically measured in the many thousands of acres. Consequently, investment activity in Idaho farmland is concentrated in south-central and eastern Idaho.

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