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CLEAN WATER ACT IN THE COURTS

by Richard M. Glick, Davis Wright Tremaine LLP (Portland)

The Clean Water Act is the focal point of four cases now pending in the courts. Three of the cases are on the United States Supreme Court's current docket, and the fourth was recently filed in the United States District Court for Oregon. All four hold the potential for significantly altering our understanding of the Act and bear watching.

Two of the Supreme Court cases, *Rapanos v. United States.* (No. 04-1034) and *Carabell v. United States Army Corps of Engineers* (No. 04-1384) arise out of Michigan and are on writ of certiorari to the Sixth Circuit Court of Appeals. Both deal with Section 404 [see 33 USC § 1344] of the Clean Water Act (CWA); the cases have been consolidated. The issues presented concern the Corps of Engineers' authority to regulate wetlands that are hydrologically remote from navigable waterways. The cases also raise important principles of federalism in that they question whether a broad interpretation of the CWA conflicts with the power of Congress to regulate interstate commerce.

The third case, *S. D. Warren v. Maine Dept. of Environmental Protection* (No. 04-1527), is on review of the Maine Supreme Judicial Court's interpretation of CWA Section 401 [see 33 USC § 1341]. In that case, the issue is whether water passing through a dam that itself adds no pollutants constitutes a "discharge" so that state certification of compliance with water quality standards is required under section 401.

The Oregon case, *Northwest Environmental Advocates v. United States Environmental Protection Agency* (Civil No. 01876-HA), challenges the US Environmental Protection Agency's (EPA) approval of Oregon's water quality standards. The case also attacks the no-jeopardy opinions issued by the National Marine Fisheries Service and the US Fish and Wildlife Service, following consultation with EPA pursuant to the federal Endangered Species Act.

RAPANOS v. UNITED STATES and *CARABELL v. UNITED STATES*

The *Rapanos* and *Carabell* petitioners seek clarification of a split among the Circuit Courts over interpretation of two seminal Supreme Court precedents. In *United States v. Riverside Bayview Homes, Inc.*, 474 US 121 (1985), the Court upheld the Corps' jurisdiction over adjacent wetlands. The Court noted that Congress chose to broadly define "waters" subject to federal authority and so approved the Corps' extension to all adjacent wetlands, even if the lands in question serve no significant ecological benefit:

> If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment . . . the Corps may always allow development of the wetland for other uses simply by issuing a permit. *Id.* at 135.

In *Solid Waste Agency of Northern Cook County v. United States Corps of Engineers*, 531 US 159 (2001) (*"SWANCC"*), the Court narrowed the scope of the Corps' jurisdiction. It struck down the Corps' "Migratory Bird Rule" that asserted § 404 authority over isolated intrastate wetlands that provide habitat for migrating birds. The Court recognized Congress' "unequivocal acquiescence" to the Corps' interpretation of the CWA to include adjacent wetlands and noted a "significant nexus" between the wetlands and the affected navigable water. *Id.* at 167.

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It is the extent of that "significant nexus" between "adjacent" wetlands and navigable waters that animates the *Rapanos* and *Carabell* appeals.

Criminal Charges

Rapanos was charged criminally, and a civil enforcement action was brought against him, for filling 54 acres of jurisdictional wetlands at three Michigan sites without a permit. The case before the Supreme Court concerns the civil case. The Corps of Engineers asserted jurisdiction over Rapanos' lands as adjacent to navigable waters, even though the wetlands are some distance from a navigable waterway, because the wetlands are "hydrologically connected" and drain into undisputed navigable waters.

Hydrology

Rapanos countered that his wetlands are connected to navigable water by means of intermittent tributaries and manmade ditches, and are too far away to be considered "adjacent" to navigable waters. The trial court upheld the Corps' enforcement action and the Sixth Circuit affirmed.

Carabell owns 19.6 acres of land about a mile from Lake St. Clair, a navigable water body. About 15 acres are forested wetlands. The State of Michigan issued a permit authorizing Carabell's development, but EPA objected on the ground that the property contained jurisdictional wetlands and referred the matter to the Corps for decision. The Corps denied the application for a § 404 fill permit, finding that the wetland is part of the Lake St. Clair watershed and thus adjacent to navigable waters. The Corps asserted that a drainage ditch on a neighboring property provided the nexus between Carabell's land and the lake. Carabell argued that a berm separating his land from the ditch prevented his land from draining to the ditch and therefore there is no hydrologic connection. The Corps and the District Court found to the contrary that there is hydrologic connection, which the Sixth Circuit affirmed.

Hydrologic Nexus

In both cases, the Sixth Circuit was willing to grant substantial deference to the government in finding the significant nexus to navigable waterways, despite the somewhat attenuated link to the wetlands, citing *Chevron, U. S. A. v. Natural Resources Defense Council*, 467 US 837 (1984). In both cases the record included evidence that the wetlands drained, at least sometimes, to the navigable water. Some courts have interpreted *SWANCC* narrowly to require that the wetlands abut the navigable water. *In re Needham*, 354 F3d 340 (5th Cir. 2003). However, the Sixth Circuit joins others in interpreting *SWANCC* narrowly to prohibit regulation only of wetlands that are isolated in fact and have no interplay with navigable waterways whatever. *Carabell v. U. S.*, 391 F3d 704, 709 (6th Cir. 2004); *U. S. v. Rapanos*, 339 F3d 447, 452-53 (6th Cir. 2003); *U. S. v. Deaton*, 332 F3d 698, 702 (4th Cir. 2003).

Authority Exceeded?

Petitioners Rapanos and Carabell also argue that if the CWA extends to non-abutting "adjacent" waterways, then the Act exceeds the authority of Congress under the Commerce Clause (Art. I, § 8, cl. 3) of the Constitution.

As framed by Carabell:

> Because Congress enacted the Clean Water Act pursuant to its Commerce Clause authority, the scope of jurisdiction under the Clean Water Act is limited to waters that have some substantial connection to interstate commerce. In other words, the Clean Water Act regulates aquatic ecosystems that have an effect on interstate waters. Petition for Writ of Certiorari at 25.

Authority Limits

Petitioners rely on a line of cases beginning with *United States v. Lopez*, 514 US 549 (1995). *Lopez* holds that the authority of Congress to regulate interstate commerce is limited to those matters having a "substantial economic effect." *Id.* at 556-57, citation omitted. Both petitioners argue that extending Corps jurisdiction to remote wetlands lacks a substantial economic effect to interstate commerce. Moreover, so extending the reach of the CWA would "intrude upon the states' primary power to regulate land and water use . . ." Carabell Petition at 27. Citing *Lopez*, Rapanos argues for "a determination as to whether the regulated activity is so removed from any substantial impact on interstate commerce that to allow such regulation would obliterate the distinction between what is national and what is local." Rapanos Petition for Writ of Certiorari at 25.

Some States Support

Several western states have joined to file an *amici curiae* brief in support of Rapanos and Carabell. As presented by the states:

> Therefore, the CWA does not authorize federal regulation of non-navigable waters, like the wetland here, that do not significantly affect navigation or interstate commerce in, or the flows or conditions of, navigable waters. The CWA, like the navigation power itself, protects the national interest in navigable waterways while otherwise recognizing the primacy of state and local laws to regulate water and land use. *Amici Curiae* Brief of the States of Alaska and Utah, *et al.* at 6.

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CWA Cases

401 Certification

Hydro-Licensing

Expanded Scope

Dams

Dam "Discharge"

S. D. WARREN v. MAINE DEPT. OF ENVIRONMENTAL PROTECTION

CWA § 401(a)(1) provides that any applicant for a federal permit to conduct any activity that "may result in any discharge into the navigable waters" must obtain certification from the state in which the discharge originates that the discharge will not violate water quality standards [see 33 USC § 1341(a)(1)]. Through this provision, the states are infused with federal authority. The extent of this authority, and the inherent conflict between state and federal power, has many times been tested in the context of hydroelectric power project licensing under the Federal Power Act. In *First Iowa Hydro-Electric Cooperative v. Federal Power Com'n.*, 328 US 152 (1946), the Supreme Court held that the Federal Power Act confers upon the Federal Energy Regulatory Commission ("FERC"—formerly the Federal Power Commission) paramount authority over hydroelectric licensing, with narrow exceptions, such as regulation of state water rights. States are pre-empted from imposing duplicative regulatory burdens on FERC applicants and licensees, which are subject to a comprehensive environmental regulatory scheme under the Federal Power Act.

However, citing CWA § 401, the Court significantly expanded the range of water quality related matters subject to state regulation. In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 US 700 (1994), the Court allowed imposition by the state of flow requirements that the Department of Ecology deemed integral to water quality. The question of what constitutes a "discharge" for purposes of § 401 jurisdiction was not addressed, as the fact of a discharge was not at issue in that case.

The question of whether dams are point sources that "discharge" pollutants by passing upstream polluted water that flows through the dam was answered in the negative in *National Wildlife Federation v. Gorsuch*, 693 F2d 156 (DC Cir. 1982) and *National Wildlife Federation v. Consumers Power Co.*, 862 F2d 580 (6th Cir. 1988). The courts noted that dams may alter the condition of a waterway, but absent the addition of a pollutant by dam operations, were not subject to regulation:

> . . . generally water quality changes caused by the existence of dams and other similar structures were intended by Congress to be regulated under the "nonpoint source" category of pollution. *Consumers Power* at 588.

The Supreme Court had the opportunity to clarify whether water transfers through man-made obstructions result in a "discharge" subject to CWA regulation in *South Florida Water Management Dist. v. Miccosukee Tribe of Indians*, 541 US 95 (2004), but stopped short of a definitive ruling (see Glick/Molina, ***Insider*** #341). The Court did note, however, that polluted waters flowing from a canal into a wetlands would constitute a discharge of pollutants only if the two water bodies are meaningfully distinct. The Court quoted approvingly from a lower court ruling that "if one takes a ladle of soup from a pot, lifts it above the pot, and pours it back into the pot, one has not 'added' soup or anything else to the pot." *Id.* at 110, citation omitted. The Court remanded the case for further evidence on the question of the distinctness of the water bodies.

The *S. D. Warren* case follows on this history and the petitioner there seeks a ruling that the mere passage of already polluted water that enters the petitioner's dam and is passed unchanged back to the stream below the dam, is not a "discharge" that triggers CWA § 401 jurisdiction. Warren owns and operates five hydroelectric dams on the Presumpscot River in Maine, constructed in the early 1900s. The dams operate as run-of-river impoundments and have no meaningful storage capacity. It is undisputed that the dams do not add pollutants, though they do alter river flows, which affects aquatic habitat.

While reserving the question of the Maine DEP's jurisdiction because the dams do not result in a discharge, Warren applied for § 401 certification. Certification was granted, but the DEP imposed "extensive restrictions on the operation of the facilities, resulting in a projected loss of energy equivalent to roughly one-seventh of the dams' electric generation (10,000 barrels of oil per year." Warren Petition for Writ of Certiorari at 9. These restrictions related to flows, fish passage, mitigation for loss of dissolved oxygen and recreational facilities. Warren appealed to the state's highest court and lost. *S. D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27.

The Maine Supreme Judicial Court acknowledged that operation of the Warren dams does not add pollutants to the river, and that an addition of pollutants is necessary for there to be a discharge. This notwithstanding, the court advanced a novel theory for finding that a "discharge" had occurred. The court reasoned that water passing through a dam is subject to private control and thus temporarily loses its status as waters of the United States. Therefore, when the impounded water is returned to the stream through the tail race, an "addition" of waters that are not waters of the United States results.

Petitioner counters that such a tortured interpretation is contrary to EPA policy, Supreme Court precedent and the legislative history of the CWA. Following the *Miccosukee* case, EPA issued a guidance memo to its regional administrators that the permit requirements of CWA § 402 generally do not apply to water transfers or dams that do not add pollutants [see Memorandum from Ann R. Klee and

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Benjamin H. Grumbles to Regional Administrators regarding Agency Interpretation on Applicability of Section 402 of the Clean Water Act to Water Transfers, Aug. 5, 2005—at: www.epa.gov/ogc/documents/water_transfers.pdf.] The term "discharge" is used differently in sections 401 and 402, but Warren argues that the two provisions are functionally the same. In § 401, any activity that could result in a "discharge" is covered, while § 402 requires a "discharge of pollutants." The Maine court reasoned that, through its temporary change of ownership theory, the "addition" of non-US waters to the river below the tail race is a discharge for 401 purposes, notwithstanding there is no discharge of pollutants. Warren, after a lengthy review of the legislative history, argues that Congress did not intend a significant broadening of the scope of section 401 over 402, but regardless:

"Addition"

> For present purposes, though, the point is not that section 401 should be limited to discharges of pollutants in order to comport with this drafting history. Rather, the simpler point is that, however one parses this history, one certainly finds no support for reading the term "discharge into" so broadly so as to include an activity that adds nothing at all to the waters. Petition at 33.

Amici Edison Electric Institute, *et al.*, in their brief do not attempt to equate the scope of sections 401 and 402, acknowledging that § 402 applies only when there is a discharge of a pollutant:

Addition Required

> Section 401, properly construed, may still apply in instances when section 402 does not—namely, when a water project adds a substance to the water that is not a pollutant. But both statutory sections require as a precondition that *something* be added. The mere flow of water through a hydropower project simply does not cause any discharge to begin with. Petition at 5, emphasis original.

Dams , Heat & DO

Even if the Supreme Court overturns the Maine court's ruling, we can expect that western state water quality agencies will continue to assert § 401 jurisdiction over hydroelectric projects undergoing FERC relicensing. Their argument is that most dam operations involve an "addition" of heated water stored in the reservoirs, as well as supersaturated dissolved gases below spillways and reduce dissolved oxygen below the dam. In Oregon, since most of the streams on the Department of Environmental Quality's (DEQ) water quality limited list under CWA § 303(d) [see 33 USC § 1313(d)] are there for temperature problems, the state will likely continue to aggressively seek mitigation of dam effects on waterways. The *S. D. Warren* decision, should however, provide some guidance on how to distinguish between true additions of pollutants and mere changes to the condition of the river for § 401 purposes.

Oregon Concerns

NORTHWEST ENVIRONMENTAL ADVOCATES v. ENVIRONMENTAL PROTECTION AGENCY

On December 13, 2005, Northwest Environmental Advocates (NEA) filed a complaint for injunctive and declaratory relief against EPA, the National Marine Fisheries Service (NMFS or NOAA Fisheries) and the US Fish & Wildlife Service (FWS) (collectively "the Services"), alleging violations of the CWA and federal Endangered Species Act (ESA). The case seeks to invalidate EPA's approval of Oregon's water quality standards, require EPA to promulgate its own water quality standards in lieu of the existing ones and to vacate the biological opinions issued by the two fishery services. The premise is that the existing standards are not adequately protective of salmonids at all life stages, all the time.

ESA/CWA Law Suit

This case is a continuation of a constant flow of litigation brought by NEA against federal environmental protection and resource agencies. The litigation history over Oregon's water quality standards is well summarized in the 71-page complaint, which will be more briefly summarized here. In 1996, the DEQ submitted its revised standards for EPA review and approval, as required by CWA § 303(c) [see 33 USC § 1313(c)]. Because Oregon has several populations of salmon, steelhead and bull trout listed as threatened or endangered under the ESA, EPA initiated formal consultation with the Services under ESA § 7 [see 16 USC § 1536]. In 1999, NMFS issued its Biological Opinion (1999 BiOp), which agreed with EPA's assessment that the Oregon standards were "likely to adversely affect," but concluded that the standards would not pose jeopardy if certain conservation measures were implemented. EPA then approved the Oregon standards with the exception of the temperature criterion of 20°C for the lower Willamette River.

Litigation History

NEA then filed suit, and on cross motions for summary judgment, the court ruled that EPA, NMFS and FWS had violated the CWA and ESA. *Northwest Environmental Advocates v. United States Environmental Protection Agency*, 268 F Supp 2d 1255 (D. Or.2003). First, the court found that EPA had failed to perform a non-discretionary duty by not promulgating replacement temperature criteria for the lower Willamette. Second, EPA failed to replace an inadequate Oregon antidegradation policy implementation plan. Third, EPA had failed to require "time and place" use designations for temperature criteria. Fourth, EPA erred in approving Oregon's 6.0 mg/L **i**nter**g**ravel **d**issolved **o**xygen (IGDO) criterion as being unprotective of salmon. Fifth, Oregon's "alternate mixing zone" rule had not been properly submitted to the EPA for review and approval. Finally, the court rejected NMFS' acceptance of "unenforceable" conservation measures as a basis for the no-jeopardy 1999 BiOp.

Prior Decision

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EPA and DEQ then separately began developing revised Oregon water quality standards. EPA abandoned its efforts in favor of Oregon. DEQ's revisions were released for public review in August 2003. The instant complaint alleges that DEQ did not follow proper rulemaking procedures, which hindered the public's ability to meaningfully comment. The revised standards were submitted to EPA in December 2003, which EPA approved the following March.

Complaint Specifics

The NEA complaint takes the standards to task on several grounds:

- Although Oregon proposed time and place use designations for temperature criteria, it removed certain designated uses without benefit of Use Attainability Analysis.
- Temperature criteria were established "at or above the upper temperature limits" and provided no margin of error. EPA's approval of these criteria was based on "faulty assumptions," for example, that upstream temperatures would be cool enough to help lower reaches achieve attainment. Complaint at 28.
- Using the seven-day average of the daily maximum (7DADM) metric is inadequate: "However, a seven-day average, rather than an instantaneous maximum, allows temperatures to exceed lethal levels without triggering a regulatory response." *Id*. at 29.
- EPA improperly relies on undefined cold water refugia in approving the 20°C salmon and steelhead migration criterion.
- EPA accepted the 18°C salmon and steelhead juvenile rearing and migration criterion, although it would be protective only at the "high end of a range of optimum temperatures." *Id*. at 29.
- Similarly, the 13°C criterion for salmon and steelhead spawning through emergence was set at the upper limit of recommended temperatures.
- Oregon made minimal use of the 16°C core cold water habitat criterion, though it was intended to have broad application.
- EPA improperly approved a single 12°C criterion for bull trout spawning and rearing, though both EPA and FWS recognize that figure is too high.
- Narrative temperature criteria and exemptions would have the effect of negating the standards.
- The spatial median IDGO criterion of 8.0 mg/L will allow IGDO levels below what is needed.

Anitdegradation Policy

NEA also attacks Oregon's antidegradation policy as wholly inadequate. NEA states the policy does not provide protection for "existing" uses and allows exemptions for previously established mixing zones and other established sources of degradation that have not been subjected previously to antidegradation review.

Finally, NEA argues that Oregon's antidegradation implementation plan is merely an:

> unenforceable, non-binding policy statement by DEQ that attempts to explain how DEQ will implement antidegradation review when it issues Section 401 water quality certifications and NPDES permits. The Antidegradation [implementation plan] does not apply to nonpoint sources. *Id.* at 37.

Implementation Inadequate

NMFS is equally lacking in its implementation efforts, according to NEA:

> By purposefully assuming in its analysis that listed fish are exposed to waters achieving water quality standards, NMFS disregarded the environmental baseline and failed to account for the degraded state of salmon and steelhead habitat in Oregon. Thus, the 2004 NMFS BiOp's conclusion that EPA's approval of Oregon's water quality standards would not cause jeopardy to listed species or result in adverse modification of critical habitat is legally and factually unsupportable. *Id.* at 47.

A similar conclusion is reached as to FWS' performance in its 2004 BiOp on bull trout effects. *Id*. at 51.

The NEA pleading is broad and comprehensive brief. Without assessing the merits of the case, even if it is successful, a few observations are in order.

Remedy?

First, NEA's remedy would be to force EPA to promulgate replacement standards, thus removing state discretion from the picture. This is contrary to Congress' intent that those states willing to develop standards be given the lead role, with EPA oversight to be sure. There is no particular reason to believe that EPA will more zealously or rigorously attempt new standards. There is a lot of criticism in the complaint about DEQ's inadequate procedures and EPA's acquiescence. If that is the driving factor, then filing a state Administrative Procedures Act case in state court would have been the preferred approach.

DEQ Authority Limits

Second, underlying NEA's allegations is the apparent belief that if DEQ only sets the correct criteria, then water quality will improve. In other words, there is the assumption that DEQ has it within in its power to restore watersheds everywhere. That is simply not the case. As NEA reports, "In 2000, Oregon identified 12,102 river and stream miles as impaired due to 'thermal modifications.'" *Id.* at 17. Most of those thermal modifications are caused by non-point sources over which DEQ has no authority, regardless of standards. DEQ's antidegration policies are a recognition of that.

Litigation Barrage

Third, there is the apparent belief that micromanaging the agencies, or worse having the federal courts do it, will bring about better results for aquatic resources. It is a fact that the constant barrage of

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litigation against environmental and fishery agencies has become a major distraction and a drain of agency resources. Having to play defense against unrelenting attack is a poor way to make public policy.

Conclusion

In conclusion, we may soon see whether the addition of Justices Roberts and Alito to the Supreme Court will, as some suspect, lead to a narrowing of the Clean Water Act's reach under the Commerce Clause. If the Court concludes that the records below are adequate that there is a hydrologic connection to navigable waterways—i.e., that the wetlands in question are ecologically related to the navigable waterway—then the *SWANCC* precedent should be distinguished and federal jurisdiction affirmed. The question is whether the hydrologic link is too attenuated to implicate interstate commerce or navigability. In *S. D. Warren* the Court has squarely before it the question of whether dams will be treated as dischargers subject to CWA §§ 401 and 402 regulation simply by passing polluted water through the impoundment without independently adding pollutants. Finally, the *NEA* case may finally undo Oregon's water quality standards and shift the heart of the CWA regulatory program from the state to the EPA.

New Court New Rulings?

CWA Rewrite?

These cases may provide the best impetus yet for a major rewrite of the Clean Water Act.

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Editor's Note: At the recent "13th Annual Endangered Species Act Conference" presented in Seattle, January 19-20, by The Seminar Group, two lead attorneys (including your next author) representing opposing interests in *Defenders of Wildlife v. EPA* provided comprehensive overviews of the case. This federal Ninth Circuit decision resulted in the State of Arizona losing its authority to issue NPDES permits. The case is being closely watched by all state agencies administering programs under delegated federal authority. While currently the case is being petitioned for rehearing in the Ninth Circuit Court of Appeals, Seminar Co-Chair Melanie Rowlands (NOAA Office of General Counsel) remarked, "I assume this is going to end up in the [US] Supreme Court."

THE ESA & FEDERAL PROGRAM DELEGATION

Defenders of Wildlife v. EPA — Arizona Loses NPDES Authority
by Norman D. James, Fennemore Craig Law Firm (Phoenix, AZ)

ESA & Delegated Programs

ESA Obligation

In an important recent decision, the Ninth Circuit Court of Appeals has expanded the obligations of federal agencies under section 7(a)(2) of the federal Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2), holding that section 7(a)(2) independently grants agencies authority to act for the benefit of listed species and that any "authorizing action" creates an obligation to exercise that authority. *Defenders of Wildlife v. EPA*, 420 F.3d 946 (9th Cir. 2005).

CWA Obligations

This litigation arose from US Environmental Protection Agency's (EPA's) approval of Arizona's application to administer the National Pollutant Discharge Elimination System (NPDES) program under section 402(b) of the Clean Water Act (CWA). [see 33 U.S.C. § 1342(b)] Section 402(b) states that EPA "*shall* approve each submitted program unless" EPA determines that one or more of nine specified criteria are not satisfied. *See, e.g., EPA v. California ex rel. State Water Resources Control Bd.,* 426 U.S. 200, 208 (1976); *American Forest and Paper Ass'n v. EPA*, 137 F.3d 291, 297 (5th Cir. 1998). In addition, under Section 402(c), EPA must act on a state's application within 90 days and suspend the issuance of federal permits "unless the [EPA] determines that the State permit program does not meet the requirements of subsection (b)." Prior to Arizona's application, 44 states had been authorized to administer the NPDES program.

Consultation & BiOp Inadequate

In this case, there was no dispute that Arizona's program satisfied the criteria in CWA section 402(b). The petitioners, Defenders of Wildlife and Center for Biological Diversity, instead contended that EPA violated section 7(a)(2) of the ESA by failing to properly consult with the US Fish and Wildlife Service (Service) and by relying on an inadequate biological opinion. The Ninth Circuit panel, by a 2-1 vote, vacated EPA's approval of Arizona's application based on adverse impacts to listed species. Petitions for rehearing are presently pending.

ESA & Delegated Programs

Section 7(a)(2) of the ESA applies to actions undertaken by federal agencies, and prohibits actions that are likely to jeopardize the continued existence of ESA-listed species or adversely modify their critical habitat. If a proposed federal action is likely to affect listed species or their critical habitat, then the agency must consult with the Service (or, in the case of marine species, the NOAA Fisheries), following the procedures in ESA section 7(a)(2) and its implementing regulations, codified at 50 C.F.R. part 402. *See, e.g., Defenders of Wildlife v. Flowers,* 414 F.3d 1066 (9th Cir. 2005) (affirming "no effect" determinations made by the Corps of Engineers in issuing CWA section 404 permits to developers).

Conservation Concerns

In this case, the petitioners' primary argument was that the transfer of NPDES permitting authority to Arizona would result in a significant loss of "conservation benefits" produced by the section 7(a)(2) consultation process. This argument was supported by various documents in the administrative record prepared by Service employees in the Arizona field office, who objected to the impact Arizona's program would have on their ability to use the section 7 consultation process to regulate real estate development. For example, in briefing their Region 2 director, Service employees argued that approval of Arizona's program would allow "unchecked" development to occur, reducing the conservation status of the cactus ferruginous pygmy-owl, Pima pineapple cactus and Huachuca water umbel. EPA, in contrast, contended approval of Arizona's program constituted an administrative shift in authority and future real estate development was not an effect of the action. *See* 50 C.F.R § 402.02 (definition of "effects of the action").

Interagency MOA

This disagreement was elevated under the 2001 Memorandum of Agreement on coordination between the CWA and ESA, 66 Fed Reg. 11202 (Feb. 22, 2001). In the interagency elevation document the agencies' positions were summarized as follows:

> FWS is concerned that, following EPA Region 9's approval action, endangered species, in particular, the cactus ferruginous pygmy-owl, the Pima pineapple cactus, and perhaps other species, will be adversely impacted in the future by projects that will require State NPDES permits issued by the State of Arizona. The FWS's concerns involve the indirect effects of permit issuance from non-water-quality-related impacts from these projects, such as construction, water usage, and similar activities that affect individuals of the species either directly or through disturbance of their habitat. . . .
>
> EPA Region 9 believes that it does not have legal authority to regulate the non-water-quality-related impacts associated with State NPDES-permitted projects that are of concern to FWS. . . .
>
> EPA Region 9 also believes that its approval action, which is an administrative transfer of authority, is not the cause of future non-discharge-related impacts on endangered species from projects requiring State NPDES permits.

BiOp

Ultimately, the Service issued a biological opinion concluding that approval of Arizona's program was not likely to jeopardize listed species on several different grounds, including EPA's arguments that its CWA authority is limited and future real estate development in Arizona was not an indirect effect of the action (the Service's biological opinion, issued on December 3, 2002, is available at www.fws.gov/arizonaes/Documents/Biol_Opin/020268_EPA_approval_of_AZ_AZPDES.pdf).

BiOp Deficient

The majority of the panel agreed with the petitioners and held that the biological opinion is "fatally deficient." *Defenders of Wildlife*, 420 F.3d at 971. The majority acknowledged that "the Clean Water Act does not grant the EPA authority to make pollution permitting transfer decisions for the benefit of all endangered species; the EPA has that authority only when one also considers the Endangered Species Act." *Id.*, 420 F.3d at 974. The majority concluded instead that the obligation imposed on federal agencies under ESA section 7(a)(2) to avoid jeopardy and adverse modification of critical habitat "is an obligation in addition to those created by the agencies' own governing statute." *Id.*, 420 F.3d at 967. This holding expands the scope of section 7(a)(2) by treating the statute as providing independent authority, as well as creating an affirmative obligation, to regulate non-federal activities for the benefit of listed species.

Additional ESA Obligation

Avoiding Jeopardy

The majority focused on the phrase "insure that any action . . . is not likely to jeopardize" in section 7(a)(2), concluding Congress intended this phrase to grant authority to act, rather than prohibiting actions that jeopardize species. *Id.*, 420 F.3d at 963-67. It found support for this reading of the statute in *TVA v. Hill*, 437 U.S. 153 (1978), and in the distinction between sections 7(a)(2) and 7(a)(1), which directs agencies to "utilize their authorities" to carry out programs for the conservation of species. The majority also discussed the exemption process enacted in the 1978 ESA amendments, codified at 16 U.S.C. § 1536(g) and (h), concluding that Congress elected to maintain the section 7(a)(2) limitations on agency actions discussed in *Hill* in subsequent amendments of the ESA.

ESA & Delegated Programs

Dissenting Opinion

Senior Circuit Judge Thompson dissented, stating that the Ninth Circuit has "consistently recognized that an agency may have decisionmaking authority and yet not be empowered, either as an initial matter or in conjunction with some continuing authority, to act to protect endangered and threatened species." *Defenders of Wildlife*, 420 F.3d at 979. For example, in *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995), the court held section 7(a)(2) did not apply to US Bureau of Land Management's approval to construct a logging road because a reciprocal right-of-way agreement limited the agency's approval rights. [*See also Ground Zero Center v. Dep't of the Navy*, 383 F.3d 1082 (9th Cir. 2004) (the Navy lacked sufficient discretion to trigger consultation in connection with expanding and operating a submarine base)] In other cases, such as *Wash. Toxics Coalition v. EPA*, 413 F.3d 1024 (9th Cir. 2005), the court determined that section 7(a)(2) applied to a federal action. [*See also Turtle Island Restoration Network v. NMFS*, 340 F.3d 969 (9th Cir. 2003) (NMFS was required to consult when issuing permits to fishing vessels under the High Seas Fishing Compliance Act because the agency was granted sufficient discretion to condition permits to benefit listed species)] However, in each case, the Ninth Circuit analyzed the agency's enabling statutes to determine whether sufficient discretionary authority existed, an approach consistent with 50 C.F.R. § 402.03.

Federal Agency Obligations

In *Defenders of Wildlife*, in contrast, the majority concluded that whenever a federal agency authorizes, funds or carries out an action, Section 7(a)(2) applies: "the EPA had exclusive decisionmaking authority over Arizona's pollution permitting transfer application. The EPA's decision authorized the transfer, thus triggering section 7(a)(2)'s consultation and action requirements." 420 F.3d at 969. The majority marginalized 50 C.F.R. § 402.03, promulgated in 1986, which limits the application of section 7(a)(2) to actions in which there is "discretionary Federal involvement or control," characterizing the rule as a "gloss" on the statute. Under the majority's interpretation, the limitation on the obligation to consult codified in 50 C.F.R. § 402.03 will rarely apply because all federal agencies have an independent, affirmative obligation to act for the benefit of species under section 7(a)(2).

Conflicting Rulings

The majority's reading of section 7(a)(2) conflicts with *American Forest and Paper* and *Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 962 F.2d 27 (D.C. Cir. 1992), both of which held that ESA section 7 does not grant additional authority to federal agencies. In *American Forest and Paper*, for example, the Fifth Circuit held EPA lacked authority to impose conditions to protect listed species in approving Louisiana's NPDES program under CWA section 402(b). The majority rejected both decisions as unpersuasive, and instead followed decisions from two other circuits, *Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8th Cir. 1989), and *Conservation Law Found. v. Andrus*, 623 F.2d 712 (1st Cir. 1979), neither of which addressed the issue decided in this case. The former was an ESA section 9 case, while the latter involved the continued application of section 7(a)(2) to staged decision-making in the context of offshore oil and gas leases.

EPA Decision Vacated

As the remedy, the majority vacated EPA's decision to approve Arizona's program based on its concern with the possible risk of species' extinction (using the pygmy-owl as an example). The majority noted that normally when an agency action violates the Administrative Procedure Act and ESA, the action is vacated and remanded back to the agency "to act in compliance with its statutory obligations." The majority recognized that Arizona had "expended significant funds" and has issued a number of permits. It also recognized the "administrative difficulties" in transferring the program to EPA and, possibly, back to Arizona again. However, the majority concluded those factors were outweighed by the potential impacts on listed species caused by private real estate developments proceeding without consultation. The risk to species such as the pygmy-owl (which, the majority noted, "numbers less than 100") is simply too great.

Rehearing Sought

Petitions for rehearing have been filed by EPA and the Service, Arizona, and various trade associations that intervened in the proceeding. Amicus briefs supporting rehearing were filed by Alaska, which intends to implement its own NPDES program next year, and a coalition of western water users, including Metropolitan Water District, Southern Nevada Water Authority, and Central Arizona Water Conservation District. In November, the petitioners were ordered to answer the petitions, which they did in December.

For Additional Information, Contact: Norman James, Fennimore Craig law firm, 602/ 916-5346 or email: njames@fclaw.com

Norman James is a director of the Fennemore Craig law firm in Phoenix, Arizona. He specializes in natural resources law, including the Endangered Species Act. He is representing the National Association of Home Builders and state home builders' associations in connection with the litigation discussed in the above article.

ENVIRO BRIEFS

DEQ DECEMBER PENALTIES

2005 PENALTY TOTALS AND INDIVIDUAL PENALTY AMOUNTS TOP 2004

DEQ has announced six penalties totaling $68,500 in December 2005. For the year 2005, DEQ issued 169 penalties totaling $2,367,485. During 2004, DEQ issued a total of 148 penalties totaling $1,742,512.

The month's largest penalty, in the amount of $33,225, went to Luhr Jensen & Sons Inc., for a variety of hazardous waste storage, handling and labeling violations (see Brief, ***Insider*** #384).

The month's other significant penalty—totaling $24,254—went to Safeway Inc., for discharging partially treated effluent onto the store's property in Damascus. The effluent entered a nearby storm ditch that flows into a tributary of Richardson Creek, which eventually flows into the Clackamas River. Most of the penalty ($21,654) represents the economic benefit Safeway gained by failing to complete a required expansion and upgrade of its domestic sewage treatment and disposal facility.

As part of a modified discharge permit, DEQ required Safeway to upgrade and expand the store's septic system by Oct. 1, 2004. Safeway did not perform the work as required, even though average daily sewage flows at the facility exceeded the 3,000-gallon-a-day capacity of the existing system several times. On two occasions, the system couldn't handle overflows, resulting in partially treated effluent discharging to the ground surface and eventually into state waters.

Partially treated sewage, which may include human disease organisms, is a potential health threat to the public through direct contact, or through contact with pets or insects that have been in contact with the sewage. In addition, domestic wastewater often contains toxic levels of ammonia, which can harm aquatic life after being discharged to water bodies such as Richardson Creek.

Safeway Inc. has appealed the penalty.

Other DEQ December Penalties

Responsible Party & Location	Violation(s)	Penalty	Status
H.H. Bear Inc, dba/Santa Clara Chevron Eugene	Failing to conduct monitoring and to keep proper maintenance records for underground storage tank system ($3,600); failing to perform required tests for UST system piping ($2,995)	$6,595 (total)	Appealed
Rickey and Sherry Matthews Eagle Point	Open burning of prohibited materials (including electrical wiring, aerosol cans, paint and insulation)	$1,222	Appealed
In Kwon Lee, aka Inkwon Lee, dba/PARTS Salem	Performing an asbestos abatement project without a license	$1,800	No Response Penalty Due
Grey Oaks Development Inc. Shady Cove	Open burning of prohibited materials (including electrical wiring, furniture and vinyl floor covering) on Grey Oaks Development Inc. rock quarry property	$1,404	Paid

For info, contact: Jane Hickman, DEQ Compliance & Enforcement Office, 503/ 229-5555

TOXICS USE REDUCTION REPORTS

NEW DEQ SYSTEM ONLONE

DEQ has launched a new web-based system that helps businesses report reductions of toxic chemicals and hazardous wastes. As part of Oregon's streamlined Toxics Use and Hazardous Waste Reduction Act (see Briefs, ***Insiders*** #370 & #372), the public will have access via the Internet to see how companies in the state have reduced toxic chemical use and hazardous waste generation. The new changes mean that DEQ is using email almost exclusively to notify businesses about the reporting requirements and an online system to receive information from these toxic chemical users and hazardous waste generators.

Affected businesses—about 400 around the state—are going online at www.deq.state.or.us/wmc/hw/tuwrap/tur/reporting.htm to complete the reporting and get assistance and other information about what they need to report to the state. DEQ staff will provide specialized assistance for businesses that do not have Internet access. DEQ hazardous waste technical assistance specialists are providing direct help to businesses seeking guidance.

Businesses that have already completed a plan or environmental management system had until Feb. 1 to submit a one-time Implementation Summary. Later this spring, DEQ will post these summaries and provide a link to its website clearinghouse at: www.deq.state.or.us/wmc/hw/tuwrap/tur.html so the public can follow waste reduction efforts throughout the state. Businesses that have yet to complete a waste reduction plan or environmental management system must complete two implementation summaries.

The new law states that when DEQ notifies a business that it is a toxics user or hazardous waste producer, a company must complete a toxics use reduction and hazardous waste reduction plan or an environmental management system within 120 days. In mid-February, DEQ will begin notifying more than 200 businesses that need to develop a reduction plan or system. They will have until about June 15 to submit a notification stating they completed a plan or system. DEQ expects that 25 to 50 new businesses will enter the program annually.

For info, contact: David Livengood, DEQ Hazardous Waste Program, 503/ 229-5181

ENVIRO BRIEFS

PERCHLORATE CLEANUP

EPA GUIDANCE

EPA has issued new guidance for cleaning up perchlorate contamination, recommending a preliminary clean-up goal for perchlorate of 24.5 parts per billion in water. EPA's guidance is derived from the agency's reference dose for perchlorate which is based on the 2005 recommendations and conclusions of National Academy of Sciences. EPA's action offers guidance to site managers to help ensure national consistency in evaluating perchlorate in light of widely varying state guidance.

Perchlorate has been detected in groundwater or drinking water at approximately 45 of the 1,500 sites on the EPA's National Priorities List. Perchlorate salts were first produced in the United States in the mid-1940s, primarily for use by the United States military for explosives and rocket propellants. Perchlorate salts also have been used in other applications, including pyrotechnics and fireworks, blasting agents, matches, lubricating oils, air bags and certain types of fertilizers.
For info, contact: Kerry Humphrey, 202/ 564-4355 or email: humphrey.kerry@epa.gov
EPA website: http://epa.gov/newsroom/perchlorate.pdf

BIOMASS

ODF WORK GROUP

A recently-formed Forest Biomass Work Group has been meeting at the Oregon Department of Forestry (ODF) to explore how utilizing biomass can improve forest health and create a viable biomass industry using previously unmerchantable raw material from Oregon's forests. Similar efforts relative to agricultural biomass and urban wood waste are also ongoing in Oregon, and the Department of Energy is currently establishing a renewable energy action group that will explore ways to create markets for renewable resources.

The 2005 Legislature, through Senate Bill 1072, directed the State Forester and ODF to take specific actions to increase the use of forest biomass, particularly on federal lands. The work group will identify existing barriers of utilizing biomass in Oregon and discuss ways to overcome them. Forestry and the Oregon Department of Energy are overseeing these collaborative efforts. The work group will also address the renewable energy goals articulated in Governor's April 2005 Renewable Energy Action Plan.

At the group's January 18th meeting, six critical paths were identified as areas to address to move forest biomass development forward in the state: predictable supply; stakeholder and public consensus; a supportive regulatory environment; research and development; extraction (of biomass), production and infrastructure development; and economic and market development.

Members of the public are invited to attend the next Forest Biomass Work Group meeting on March 2, 2006—exact time and location to be determined.
For info, contact: Cathy Clem, ODF, 503-945-7411

PESTICIDE VIOLATIONS

ODA ISSUES PENALTY

The Oregon Department of Agriculture (ODA) has issued a civil penalty in the amount of $151,626 to the Cascade Division of Western Farm Service Inc., headquartered in Tangent, for 191 pesticide-related violations that occurred from 2002 to early 2005. The violations include sales of restricted use pesticides to unlicensed applicators, falsification of records, and selling restricted use pesticides without a pesticide dealer license. The civil penalty is the largest issued by ODA for violations of Oregon's Pesticide Law.

The penalty stems from investigations performed by ODA's Pesticides Division, which conducted routine investigations of "restricted use" product sales. Some of these investigations were initiated due to the death of migratory geese in 2005 from exposure to zinc phosphide used as a rodenticide in the Willamette Valley.

Over the course of 15 months, the Western Farm Service store in Hubbard sold "restricted use" pesticide products without having the required pesticide dealer license. ODA documented 128 separate sales of "restricted use" products during that time. Each sale is counted as a violation. Among the five Western Farm Service stores, ODA documented 62 counts of selling a "restricted use" product to unlicensed individuals, and one count of falsification of required sales records.

Western Farm Service has cooperated with ODA and is working with the department to ensure current and future compliance with Oregon's Pesticide Law.
For info, contact: Dale Mitchell, ODF, 503/ 986-4646.

STREAM THREATS

EPA DIAGNOSIS TOOL

EPA has released a new web-based tool, the Causal Analysis/Diagnosis Decision Information System (CADDIS), which simplifies determining the cause of contamination in impaired rivers, streams and estuaries. An impaired body of water does not meet the state or federal water quality standards for one or more pollutants.

Many US water bodies have been identified as impaired, and in many cases, the cause is unknown. There are many possible sources of pollution such as industrial waste, municipal sewage, agricultural runoff, naturally occurring minerals in rock and sand, and biological materials. Before restorative or remedial actions can be taken, the cause of impairment must be determined. CADDIS provides a standardized and easily accessible system to help scientists find, use and share information to determine the causes of aquatic impairment. Causal analyses look at stressor-response relationships, meaning the effect of a specific substance or activity (stressor) on the environment. Typical water stressors include excess fine sediments, nutrients, or toxic substances. The version of CADDIS recently released is the first of three. Future versions will include modules to quantify stressor-response relationships, and databases and syntheses of relevant literature on sediments and toxic metals.
For info, contact: Suzanne Ackerman, EPA, 202/ 564-4355 or email: ackerman.suzanne@epa.gov
EPA CADDIS WEBSITE: www.epa.gov/caddis

ENVIRO BRIEFS

PESTICIDE RESIDUALS

DEQ EVALUATION GUIDANCE

DEQ has finalized guidance designed for evaluating former agricultural sites for the presence of persistent residual pesticides. This guidance is for sites that are likely to be (or already have been) converted to residential, school, commercial, or industrial uses. The guidance emphasizes human health pathways of concern over ecological issues and generally calls for sampling (at different but defined densities for various uses) where past applications of persistent pesticides are known or suspected. Except in unusual circumstances, investigations will not extend off-site.

For info, contact: Gil Wistar, DEQ, 503/ 229-5512 or email: wistar.gil@deq.state.or.us

DEQ WEBSITE: www.deq.state.or.us/wmc/cleanup/guidelst.htm

CALENDAR

February 1

Department of State Lands (DSL) Statewide Programmatic General Permit (SPGP) Training/ Workshop, Medford, Santos Community Center, 710 N. Columbus, 1pm-5pm. (See Brief, ***Insider*** #384). For info: Eric Metz, DSL, 503/ 378-3805 x266; Julie Curtis, DSL, 503/ 378-3805 x298

February 2

Department of State Lands (DSL) Statewide Programmatic General Permit (SPGP) Training/ Workshop, Roseburg, ODFW Umpqua Watershed Dist. Office, 4192 N. Umpqua Highway, 1pm-5pm. (See Brief, ***Insider*** #384). For info: Eric Metz, DSL, 503/ 378-3805 x266; Julie Curtis, DSL, 503/ 378-3805 x298

February 2

Transportation Planning Rules Amendment, Public Hearing, Salem, Agriculture Bldg, 635 Capitol St. NE, Basement Hearing Rm, 9am. RE: Local Transportation System Plans (see Brief, ***Insider*** #382)) For info: Shelia Preston, LCDD, 503/ 373-0050 x222

February 2-3

Hanford Advisory Board Meeting, Kennewick, WA Red Lion Hotel Columbia Center 1101 N. Columbia Center Blvd., 2/2: 9am-5pm; 2/3: 8:30am-3:30pm. For info: Erik Olds, 509/ 372-8656

February 2-3

Environmental Regulations of Oregon: An Overview of Federal and State Law, Portland, Ecotrust (Jean Vollum Natural Capital Center) Conference Center, 721 NW 9th Ave, Suite 200, 8:30am-5pm. Instructors: Jeff Dresser, Bridgewater Group, Inc.; Dr. Shane Latimer, Jones & Stokes Consulting; Candee Hatch, CH2M Hill; Ann Levine, DEQ; and April Zohn, Jones & Stokes Consulting. For info: NWAEP 206/ 762-1976

February 2-3

NEPA and Federal Land Development Conference, Denver, CO. Sponsored by Rocky Mountain Mineral Law Foundation. For info: RMMLF, 303/ 321-8100, email: info@rmmlf.org, or website: www.rmmlf.org

February 2-4

Land Conservation and Development Commission Meeting, Salem, Agriculture Building, 635 Capitol St. NE. For info: Cliff Voliva, DLCD Communications, 503/ 373-0050 x268 or email: cliff.voliva@state.or.us

February 5-9

National Water Conference USDA-CSREES, San Antonio, TX, Marriott Rivercenter. RE: Ag Best Management Practices, Rural Environmental Protection, Conservation & Resource Management, Watershed Assessment & Restoration. For info: USDA-CSREES website: www.soil.ncsu.edu/swetc/waterconf/2006/main.htm

February 8

Department of State Lands (DSL) Statewide Programmatic General Permit (SPGP) Training/ Workshop, La Grande, Union County Extension Service, 10507 N. McAlister Road, 1pm-5pm. (See Brief, ***Insider*** #384). For info: Eric Metz, DSL, 503/ 378-3805 x266; Julie Curtis, DSL, 503/ 378-3805 x298

February 9

Department of State Lands (DSL) Statewide Programmatic General Permit (SPGP) Training/ Workshop, Baker City, Oregon Trail Electric Consumers Cooperative, 4005 23rd Street, 1pm-5pm. (See Brief, ***Insider*** #384). For info: Eric Metz, DSL, 503/ 378-3805 x266; Julie Curtis, DSL, 503/ 378-3805 x298

February 9

Green Building: UO Sustainability Program Workshop, Eugene, Baker Downtown Center, 8:30am-4:30pm. For info: Registration Office, 541/ 346-4231 or website: http://sustain.uoregon.edu

February 9

DEQ Environmental Cleanup Program Update, Northwest Environmental Business Council Presentation, Portland, Fifth Avenue Suites, 506 SW Washington, 11:30am-1pm. Speaker: Keith Johnson, DEQ, on DEQ Priorities under Expected Fuding Shortfalls. For info: Linda, NEBC, email: linda@nebc.org

February 9-10

Environmental Law, Washington DC (suburban). For info: ALI-ABA, 800/ CLE-NEWS, or website: www.ali-aba.org

February 13

NEPA: Turning Complexities Into Strategies, San Francisco. For info: CLE Int'l, 800/873-7130, or website: www.cle.com

February 13-14

2006 National Water Resource Symposium, La Jolla, CA, Estancia La Jolla Hotel & Spa. RE: Market, Legal, Technical & Financial Components of Water Marketing and Water Resource Development. For info: Christa Riekert, WestWater Research, 307/ 742-3232 or website: http://waterexchange.com/symposium2006/conference2006.html

February 14

State Land Board Meeting (Tentative), Salem, Dept of State Lands, 775 Summer St NE. For info: Gail Lowry, DSL, 503/ 378-3805 or Gail.Lowry@dsl.state.or.us

February 15

Department of State Lands (DSL) Statewide Programmatic General Permit (SPGP) Training/ Workshop, Wilsonville, Wilsonville Public Library, 8200 SW Wilsonville Road, 1pm-5pm. (See Brief, ***Insider*** #384). For info: Eric Metz, DSL, 503/ 378-3805 x266; Julie Curtis, DSL, 503/ 378-3805 x298

February 15

Natural Resource Damage Litigation, Seattle, Renaissance Seattle Hotel. For info: Law Seminars Int'l, 800/ 854-8009, website: www.lawseminars.com/seminars/06NRDWA.php

February 15-17

Pacific Salmonid Recovery Conference, Seattle, Mountaineers Conference Center, 300 Third Avenue West. Regional Conference includes Speakers and Participants from Alaska, B.C. Canada, California, Idaho, Montana, Oregon, and Washington. Best Available Fisheries Science, Regulatory Updates, and Innovative Strategies. Sponsored by the National Marine Fisheries Service's (NMFS/NOAA Fisheries') Northwest Fisheries Science Center. For info: Conference website: www.nwetc.org/bio-500_02-06_seattle.htm

February 16

LCDC Citizen Involvement Advisory Committee (CIAC) Meeting, Salem, Agriculture Building, 635 Capitol St. NE, Conf Rm "D"—9:30am. CIAC Advises the Land Conservation and Development Commission on Issues Relating to Citizen Involvement. For info: Cliff Voliva, DLCD Communications, 503/ 373-0050 x268 or email: cliff.voliva@state.or.us

(continued from previous page)

February 17

Water Quality Conference, Portland, World Trade Center Auditorium, 25 SW Salmon, RE: TMDLs, Water Quality Monitoring, Data Management; Federal & State Water Programs; Litigation, Appeals, Regulations, Permitting; Watershed Planning; Water Quality Standards; Use Attainability Analysis; Turbidity; Toxics & Water Quality Permits; Temperature Standard; Mixing Zones; Wetlands Regulation; Stormwater Permits & More. For info: Holly Duncan, ELEC, 503/ 282-5220 or email: hduncan@elecenter.com or website: www.elecenter.com

February 20-23

International Erosion Control Association Annual Conference, Long Beach, CA, Long Beach Convention & Entertainment. Center. For info: Kate Nowak, IECA Director of Conferences and Meetings, 970/ 879-3010 or website: www.ieca.org/Conference/Annual/LongBeach06.asp

February 21

DEQ Motor Vehicle Standards Rulemaking, Public Hearing, Medford, Community Justice Center, 1101 W Main St., Suite 101, 7pm. DEQ is Proposing Rules Requiring New Motor Vehicles Sold in Oregon to Meet Tighter Emission Standards Beginning With 2009 Models. For info: Dave Nordberg, DEQ/AQ, 503/ 229-5519

February 22

DEQ Motor Vehicle Standards Rulemaking, Public Hearing, Bend, Central Oregon Association of Realtors, 2112 NE 4th St, 7pm. DEQ is Proposing Rules Requiring New Motor Vehicles Sold in Oregon to Meet Tighter Emission Standards Beginning With 2009 Models. For info: Dave Nordberg, DEQ/AQ, 503/ 229-5519

February 22-25

24th Annual Salmonid Restoration Conference, Santa Barbara, CA. "Rediscovering Urban Creeks and Creating Healthy Watersheds" For info: Dana Stolzman, Salmonid Restoration Federation, 707/ 923-7501 or email: srf@calsalmon.org or website: /www.calsalmon.org/

February 23

DEQ Motor Vehicle Standards Rulemaking, Public Hearing, Pendleton, Pendleton City Hall, Community Room, 500 SW Dorian Ave, 7pm. DEQ is Proposing Rules Requiring New Motor Vehicles Sold in Oregon to Meet Tighter Emission Standards Beginning With 2009 Models. For info: Dave Nordberg, DEQ/AQ, 503/ 229-5519

February 23-24

24th Annual Water Law Conference (ABA), San Diego, CA, Hotel Del Coronado. For info: ABA website, www.abanet.org/environ/committees/waterresources/home.html

February 27

DEQ Motor Vehicle Standards Rulemaking, Public Hearing, Portland, DEQ Headquarters, 811 SW 6th Ave, Room 3A, 7pm. DEQ is Proposing Rules Requiring New Motor Vehicles Sold in Oregon to Meet Tighter Emission Standards Beginning With 2009 Models. For info: Dave Nordberg, DEQ/AQ, 503/ 229-5519

February 27-28

Harvesting Clean Energy Conference, Spokane, RE: Bringing Together the Agriculture and Energy Industries. For info: Website: www.harvestcleanenergy.org/conference

February 28-March 2

State/Tribal/Federal Coordination Workshop: Federal and State Wetland Programs in Transition: Opportunities and Challenges, Washington, DC RE: Opportunities for Restoring, Protecting & Enhancing Wetlands, Supreme Court Challenges, Funding, Federal and State Rule-Making, Program Integration, Wetland Status and Trends Analyses, Mapping, & Wetland Water Quality Standards. For info: Association of State Wetland Managers, email: laura@aswm.org or website: www.aswm.org

March 1-3

Fourth Annual Environmental Industry Summit, Coronado, CA, Coronado Island Marriott Resort. The West Coast's Annual Gathering of Environmental Industry Professionals. For info: Environmental Business Journal website: www.ebiusa.com/summit2006/

March 3

Brownfields Redevelopment, Anchorage, AK, Sheraton Anchorage Hotel. RE**:** Liability Protections, Funding Opportunities & New Enforcement Provisions. For info: Law Seminars International, 800/ 854-8009, or website: www.lawseminars.com/

March 9-12

35th Conference on Environmental Law (ABA), Keystone, CO. Keystone Resort & Convention Center. For info: ABA website, www.abanet.org/environ/programs/keystone/2006/

March 16-18

Land Conservation and Development Commission Meeting, Salem, Agriculture Building, 635 Capitol St. NE. For info: Cliff Voliva, DLCD Communications, 503/ 373-0050 x268 or email: cliff.voliva@state.or.us

March 20-21

Clean Water and Storm Water Conference, Seattle. For info: Law Seminars International, 800/ 854-8009, or website: www.lawseminars.com/

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