

## **Water Quality, Stormwater, and Rights Update**

### ***Water Quality Standards Rulemaking***

by Lori Terry

The Washington State Department of Ecology is in the process of significantly revising the State Water Quality Standards. Among other things, the proposed standards will revise the temperature, dissolved oxygen, bacteria, and ammonia standards, and will contain a new anti-degradation rule.

The comment period for Washington's draft water quality standards ended on March 7, 2003. FPS lawyers Lori Terry and Joe Brogan represented numerous clients throughout the comment period and continue to track the rulemaking process. Ecology received extensive comments from various stakeholders and the federal government. For more information on any aspect of the rulemaking process, please contact Lori or Joe, and look for information on the process in future newsletters.

On March 31, 2003, a federal judge in Oregon issued a decision about water quality standards that could have significant ramifications for Washington's water quality standards revision process. In *Northwest Environmental Advocates v. U.S. EPA and National Marine Fisheries Services*, Case No. CV-01-510-HA (Order on Summary Judgment, 3/31/03), the court ruled, among other things, that:

- EPA improperly approved Oregon's revised temperature and dissolved oxygen standards for the lower Willamette River. EPA was ordered to rescind its approval of temperature and dissolved oxygen and to promulgate revised criteria.
- The National Marine Fisheries Service biological opinion on Oregon's revised water quality standards was ordered withdrawn, and NMFS was ordered to reinitiate consultation and issue a new opinion.

Because Washington's proposed revised standards parallel Oregon's in several respects, the decision is being carefully reviewed by Ecology and others who have been involved in the water quality standards revision process. Any facilities (public or private) that discharge to waterways in the State of Washington may find it useful to review this decision. For more information, please contact Lori Terry.

### ***Stormwater***

On the stormwater front, Ecology has not yet issued a construction stormwater general permit for small construction sites that are between one and five acres in size. The deadline for Ecology to have issued the permit in time to meet EPA's Phase II rules was March 10, 2003. Ecology anticipates having permit coverage available in July of this year.

***Operators of a one-five acre site that need coverage in the interim are advised to apply for coverage under the current Stormwater General Permit for Construction Activities.*** Operators

who believe they may need coverage are advised to analyze the situation carefully and allow enough time to obtain permit coverage. Discharges to “impaired waterways” must provide additional information to Ecology prior to obtaining the permit and all dischargers must have developed and implemented a Stormwater Pollution Prevention Plan before starting the construction project under the General Permit.

Industrial stormwater dischargers are probably aware of the pending permit appeal before the Pollution Control Hearings Board. The General Permit for Stormwater Discharges Associated with Industrial Activities is available pending the outcome of this litigation. Ecology is in the process of revising the Guidance Manual for Developing a Stormwater Pollution Prevention Plan for Industrial Facilities. The first meeting on the new manual was held November 29, 2002.

Finally, a “Conditional No Exposure Certificate” is available for industrial facilities that have no industrial activities or materials exposed to stormwater. If a facility meets the requirements for the Certificate, then coverage under the stormwater permit is not required. Information regarding the Certificate is available on Ecology’s web page:

[http://www.ecy.wa.gov/programs/wq/stormwater/industrial/index.html#no\\_exposure](http://www.ecy.wa.gov/programs/wq/stormwater/industrial/index.html#no_exposure).

### ***News on the water rights front:***

On February 27, 2003, the Pollution Control Hearings Board issued an Order On Partial Summary Judgment in the *Methow Valley Irrigation District v. Washington State Department of Ecology* case (PCHB No. 02-071). The case is important because it reviews whether the Washington State Department of Ecology (“Ecology”) has authority under RCW 90.48 (Washington’s Water Pollution Control Act) to issue administrative orders regulating seepage from irrigation canals.

The Methow Valley Irrigation District’s (“MVID”) irrigation system consists of two main canals that are largely unlined and open. These canals divert irrigation water from the Twisp and Methow Rivers. Ecology assessed the MVID delivery system and concluded that the system wastes water primarily through seepage in MVID’s conveyance ditches. Ecology issued a Notice of Violation to the MVID that linked the loss of water of water in the system to impacts on water quality and water resources in the Twisp and Methow Rivers.

The Board affirmed Ecology’s authority to issue orders concerning waste under the Water Code. However, the Board reserved for hearing whether Ecology may, through an enforcement order, impose flow conditions upon a water right pursuant to Chapter 90.48 RCW. We will continue to follow this case as it may have profound implications on the scope of Ecology’s statutory authority in the water rights arena.