

1-1-2005

Cent. Delta Water Agency v. State Water Res. Control Bd., 124 Cal. App. 4th 245 (2004)

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nial of the Building Industry's administrative challenge. The trial court held that the Building Industry failed to meet its burden establishing that the State Water Board abused its discretion in approving the permit, or that the permit requirements were "impracticable under federal law or unreasonable under state law." The Building Industry appealed to the California Court of Appeal, Fourth Appellate District.

In reviewing the trial court's legal determinations, the court conducted a *de novo* review. The court acknowledged that the statutory language of section 1342(p)(3)(B)(iii) of the CWA was susceptible to more than one reasonable interpretation. The court looked to the legislative history, public policy, and administrative construction of the section to determine its meaning. The court held that the language in section 1342(p)(3)(B)(iii) allowed the EPA, or an approved state agency permitted to issue NPDES permits, to impose appropriate water pollution controls in addition to those that come within the definition of "maximum extent practicable." The court found that Congress did not intend to bar the EPA or state agency from imposing a more stringent water quality standard if the agency, based on its expertise and technical factual information, and after the required administrative hearing procedure, found this standard to be a necessary and workable enforcement mechanism to achieving the goals of the CWA. Therefore, the court found the NPDES permit did not violate federal law and the water boards had the authority to include a permit provision requiring compliance with the more stringent state water quality standards. Accordingly, the court affirmed the superior court's decision.

James E. Downing

Cent. Delta Water Agency v. State Water Res. Control Bd., 124 Cal.

App. 4th 245 (2004) (holding permits for appropriation of water that did not specify actual uses, amounts, or places of use were speculative and insufficient to satisfy requirements of the California Constitution, the California Water Code, and the California Environmental Quality Act).

Central Delta Water Agency, CCRC Farms, LLC, Plan Tract Farms, the County of San Joaquin, San Joaquin County Flood Control and Water Conservation District, and several Reclamation Districts (collectively "districts") challenged permits issued by the State Water Resources Control Board ("Board") for a wetlands project to divert water into reservoirs that would be constructed on two islands for later rediversion and sale to potential purchasers. In issuing the permits, the Board did not require the proponents of the project, Delta Wetlands Properties ("DW"), to specify amounts, nature of, impacts of, or beneficial use of water sold. As such, the permits defined beneficial use generally to include "domestic, irrigation, municipal, industrial, and fish and wildlife" uses, but did not include environmental conse-

quences. The Superior Court of Sacramento County, California, held the permits were valid and the districts appealed to the Court of Appeal of California, Third Appellate District.

The court first addressed on review whether the Board violated the California Constitution and the California Water Code by failing to evaluate the uses to which the appropriated water would be put before issuing the permits. The Constitution and Water Code both required the Board to formulate the reasonable amount of water available for beneficial use and to state that amount in definite terms. The court found DW's permit applications failed to set forth the specific amount of water, the place the water would be used, the use of the impounded water, and that the intended use would be beneficial. As such, the Board was unable to determine the actual or intended uses of the proposed water appropriation. The court thus found the Board's general statement of potential beneficial use was speculative and insufficient to satisfy the requirements of the Constitution and Water Code.

The court next addressed whether DW could divert water from DW's appropriated reservoirs to a would-be purchaser. As a condition to issuing DW's permit, the Board required DW to demonstrate that DW could reliably "wheel" water for the project. DW had not contracted to provide water to a specific customer, nor had DW contracted with a conveyance facility to provide delivery to a customer. As such, the court concluded the Board could not determine that DW could reliably wheel water until DW demonstrated that DW had contracted to provide water to a specific customer and obtained approval for the necessary conveyance facilities.

Finally, the court assessed whether the Board violated the California Environmental Quality Act ("CEQA") by failing to evaluate the environmental impacts of the delivery of water to actual purchasers. CEQA required a public agency to prepare an Environmental Impact Report ("EIR") to determine whether a proposed project would have a significant impact on the environment. The agency must assimilate EIR findings into conditions placed on the permits to mitigate environmental consequences of the intended beneficial use of the impounded water prior to issuance of a permit. The Board's final EIR stated the site-specific analysis was speculative because the area of delivery and end uses of the project water were unknown.

The court ordered the trial court to set aside the permits and directed the Board to require DW to amend its permit applications to specify an actual use and the amounts of the proposed water appropriation consistent with the requirements of the California Constitution and California Water Code. Additionally, the court ordered the Board to evaluate the specified uses to determine whether the uses were beneficial and whether the amounts were wheelable. Lastly, the court reversed the CEQA determination and required the Board to

conduct an environmental analysis once DW specified the end users in the amended permits.

The court thus reversed the trial court's validation of DW's permit.

Michael Graetz

City of Brentwood v. Cent. Valley Regional Water Quality Control Bd., 123 Cal. App. 4th 714 (2004) (holding a party discharging pollutants bore the burden of proving the exceptions in the California Water Code relieved the party of liability for mandatory minimum penalties).

The City of Brentwood ("City") appealed the Alameda County Superior Court's decision to uphold the Central Valley Regional Water Control Board's ("Board") imposition of \$243,000 in mandatory minimum penalties for violations of the City's wastewater discharge permit. The City operated a wastewater treatment plant that discharged treated wastewater into Marsh Creek. In June 2000, the Board issued the City a wastewater discharge permit mandating the concentration of dissolved oxygen in the plant's discharge not fall below 5.5 milligrams per liter. The permit required the City to monitor the dissolved oxygen level of its discharge daily and make monthly reports to the Board.

The monitoring requirements went into effect in July 2001, and the oxygen levels consistently fell below the proscribed minimums through September. The City installed blower equipment to boost the oxygen levels of the discharge. Following the installation, dissolved oxygen levels returned to acceptable levels. However, oxygen levels fell periodically below the proscribed minimum due to equipment failures.

In June 2001 the Board issued a complaint charging the City with eighty-one violations of the effluent limitation. Each violation carried a \$3000 penalty pursuant to the California Water Code ("Code"). The Code stated that mandatory minimum penalties be assessed for each violation where a party exceeded waste discharge limitations four or more times in any period of six consecutive months. The Code enumerated exceptions for natural disasters or other occurrences of "exceptional, inevitable, and irresistible character." The City asserted the natural phenomenon exception applied because of a change in the composition of the groundwater and the City could not otherwise explain the dissolved oxygen fluctuations. The City did not provide any evidence to back this assertion, and further claimed the Board had the burden of disproving the exception applied. The Board took the position that no exceptional circumstances beyond the City's control existed and the burden was therefore on the City to prove otherwise.

On appeal, the Court of Appeals of California considered whether the exceptions to liability in the Code were elements of the offense or affirmative defenses. If the exceptions were elements of the offense, the burden of proof would be on the Board. If the exceptions were