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California: Barnes v. Hussa, 39 Cal. Rptr. 3d 659 (Cal. Ct. App. 2006)

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at issue because they were "suitable" for a TMDL according to the previous EPA determination.

The court suggested the EPA may amend its current regulation to better classify the suitability of daily loads for the pollutants, which would allow the EPA to avoid establishing TMDLs for certain pollutants where daily loads are inappropriate. Additionally, the court suggested that Congress may adopt new legislation expanding the current statute to include a broad maximum load timeframe. However, the court cannot interpret daily to mean anything other than its plain meaning because it must follow the unambiguous terms of the CWA. Therefore, daily means daily for all pollutants currently identified by the EPA as suitable for a TMDL.

Finally, the court addressed the special circumstances surrounding combined sewer systems in regards to water quality standards. The court recognized Congress's more flexible approach in the legislation involving water quality standards for these systems, but again held, despite Congress's conflicting approaches, the court must follow express terms of the TMDL statute within the CWA.

Ultimately, the United States Court of Appeals for the District of Columbia Circuit reversed the district court's decision and remanded with orders "to vacate the non-daily 'daily' loads."

Diane O'Neil

STATE COURTS

CALIFORNIA

Barnes v. Hussa, 39 Cal. Rptr. 3d 659 (Cal. Ct. App. 2006) (holding water users may change the place where they use the water so long as the change does not adversely affect the rights of other water users).

In May 2000, Rodney and Jan Barnes ("Barneses") brought suit in the Superior Court of Modoc County requesting an injunction against John and Linda Hussa ("Hussas"), and sought an order that the Barneses had an irrevocable right to the use of a pipeline. The Hussas, believing the Barneses abused their water rights by extending a pipeline, began to dig up the pipeline that traverses Barnses' property. The trial court issued a preliminary injunction in June 2000 preventing the Hussas from interfering with the Barneses' pipeline. In September 2000, the Hussas filed a cross-complaint for contempt and declaratory and injunctive relief. The trial court found that the Barneses had an irrevocable license to use the pipeline, that the extension of the pipeline did not substantially harm the Hussas, and that there was no evidence to support the Hussas' claim of forfeiture. The Hussas filed an appeal in the California Court of Appeals contending the trial court erred in holding that the Barneses did not injure them, that the Barneses did

not expand their license for the pipeline by extending the pipeline, and that the Barneses' predecessors had forfeited their right to additional water. The court found no error in the trial court's decision that the Barneses did not harm the Hussas by extending their pipeline. The court held that Water Code section 1706 governed the case because the Barneses' predecessors acquired their water rights before the Water Commission Act came into effect in 1914. As a result, the controlling test was that a water user may change the place where one uses the water as long as the change does not adversely affect the rights of other water users. Furthermore, the court held that the person seeking to change the place of use does not carry the burden of demonstrating that the change will not affect the rights of other water users.

The court held that the Barneses' predecessors in interest did not forfeit the right to use water that did not fit through the pipeline. Under California law, a water user forfeits the water rights the user does not exercise within a five year period. The court was unable to determine if the lower court believed the testimony of the witnesses. It found that even if the lower court believed the testimony regarding the excess water, the testimony was not sufficient to establish forfeiture of rights through the nonuse of the water. The court reasoned that the Hussas would have had to proffer evidence that water had been available for diversion for at least five years and that the Barneses' predecessors failed to divert it. The Hussas failed to proffer such evidence.

In affirming the trial courts decision, the court held that the Barneses had an irrevocable water right and that extending their pipeline to use water at a different location did not adversely affect the Hussas.

Jacki Lopez

N. Gualala Water Co. v. State Water Res. Control Bd., 43 Cal. Rptr. 3d 821 (Cal. Ct. App. 2006) (holding that the California State Water Resources Control Board had jurisdiction over North Gualala Water Company when it pumped from two wells that drew groundwater from a subterranean stream; that the Board correctly construed a statute compelling the Water Company to obtain a permit to pump groundwater from the two wells; and that the Board appropriately interpreted pumping limitations placed on the permit).

The North Gualala Water Company ("NGWC") provided water service for approximately 1,000 customers in the town of Gualala. Between 1965 and 1989, NGWC held a permit from the California State Water Resources Control Board's ("Board") predecessor which allowed them to operate an infiltration gallery to divert a limited amount of surface water directly from the North Fork of the Gualala River. In 1989 and 1996, NGWC developed two production wells near the North Fork. When developing the wells, NGWC believed the well pumped