

**RECENT CALIFORNIA DECISIONS**

**FOURTH DISTRICT HOLDS REGIONAL WATER BOARD HAS NO DUTY TO REVISE BASIN PLAN DURING TRIENNIAL REVIEW AND MAY BASE WATER QUALITY OBJECTIVES ON 'POTENTIAL' BENEFICIAL USES**

*City of Arcadia v. State Water Resources Control Board*, \_\_\_ Cal.App.4th \_\_\_,  
Case No. G041545 2010 (4th Dist. Dec. 14, 2010).

The California Court of Appeal for the Fourth Appellate District has held that, under federal and state law, water quality control plans must be periodically reviewed, but need not be revised or modified as part of the review and that water quality objectives can be based upon "potential" beneficial uses of water bodies covered by the water quality control plan.

**Legal Background**

The federal Clean Water Act's (CWA) primary goal is to eliminate the discharge of pollutants into the nation's waters by means of National Pollutant Discharge Elimination System (NPDES) permits. Originally, NPDES permits regulated "point sources," such as discharges from industrial or commercial sites. Later, non-point sources of pollution such as storm water and urban runoff were included. California has been authorized to administer the federal NPDES permit program. California's Porter Cologne Water Quality Act has similar goals and provides for issuance of "waste discharge requirements" (WDRs). States may set stricter water quality standards than the federal laws and regulations, but not less strict.

The California agencies that regulate water quality are the State Water Resources Control Board (SWRCB) and nine Regional Water Quality Control Boards (RWQCBs). The CWA requires states to develop water quality objectives for their water bodies based upon the beneficial uses of the water body and the water quality criteria required to protect those uses. California law has similar requirements. The RWQCBs develop basin plans for water bodies within their jurisdictional boundaries that include beneficial uses, water quality objectives and an implementation plan. The RWQCB must hold a hearing before adopting the basin plan; the SWRCB must approve the plan; and the plan must be periodically reviewed and may be revised. (California Water Code §§ 13240 et seq.)

If a water body fails to meet the objectives, the RWQCB determines the total maximum daily load (TMDL) of a pollutant that the water body can receive to meet water quality objectives. The RWQCB then allocates the TMDL among all the permitted discharges. In 1987, Congress expanded the CWA to include municipal storm water and required permits for such discharges. RWQCBs throughout the state have issued such permits (MS4 permits) to local governments, most of which have in turn enacted ordinances to require residents and businesses to follow best management practices designed to minimize pollutants in storm water.

**Factual Background**

The Los Angeles RWQCB (hereinafter the RWQCB) adopted separate basin plans for the Los Angeles River and the Santa Clarita River basins in 1975. In 1990 the RWQCB issued the first MS4 permit to Los Angeles County and the incorporated cities within the county. In 1994 it consolidated the two basin plans into one. The MS4 permit was renewed in 1996 and relied upon best management practices to protect water quality. In December 2001, the MS4 permit was again renewed and contained a number of findings that indicated the permit would be stricter in the future: (1) In 1991 the EPA had entered into a consent decree with environmental groups that required the RWQCB to adopt total maximum daily loads (TMDLs) for the Los Angeles region watershed within 13 years; (2) the SWRCB adopted a policy requiring that dischargers comply with TMDLs within 20 years of adoption; (3) the SWRCB adopted revised water quality objectives for the Ocean waters of California that apply to all discharges to coastal waters; and (4) the RWQCB adopted TMDLs for trash in the Los Angeles River and Ballona Creek. The 2001 MS4 permit also provided that the future

TMDL load allocations for municipal storm water discharges would be implemented through the permit. In 2002 the RWQCB adopted an amendment to the basin plan to revise criteria for bacteria objectives to protect waters with a beneficial use of water contact recreation.

When the RWQCB conducted its 2004 triennial review of the basin plan, a number of stakeholders commented that the basin plan should be comprehensively updated to correct the "patchwork" nature of the various amendments and policies that had been adopted since 1994. Permittees alleged that the RWQCB did not follow the requirements of Water Code § 13241 in establishing water quality objectives:

Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following: (a) Past, present, and probable future beneficial uses of water. (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto. (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors, which affect water quality in the area. (d) Economic considerations. (e) The need for developing housing within the region. (f) The need to develop and use recycled water.

(Water Code § 13241.)

Specific stakeholder concerns were the use of "potential" beneficial uses and failure to consider economics of additional requirements in the MS4 permits. The RWQCB declined to revise or amend the basin plan or eliminate its use of "potential" beneficial uses. Eighteen Los Angeles County municipalities and the Building Industry Legal Defense Foundation (collectively: plaintiffs) challenged the RWQCB's 2004 triennial review of its water quality control plan.

## At the Trial Court

Plaintiffs main allegations were that the RWQCB failed to hold a public hearing during the triennial review, that the water quality objectives contain numerous beneficial use designations based upon "potential" uses and did not consider Water Code §§ 13000 and 13421 factors with respect to storm water and urban runoff. The trial court agreed and vacated the RWQCB's resolution re: approval of the 2004 triennial review, directed the RWQCB to either reopen the prior review or, at its next scheduled review, conduct a public hearing on the basin plan's water quality objectives applicable to storm water and urban runoff and, if necessary, revise the objectives in light of the factors in Water Code §§ 13000 and 13241. The court also barred the RWQCB from using "potential" beneficial uses of water bodies in setting water quality objectives but allowed the RWQCB to continue using the current basin plan pending the next review to "avoid unintended consequences." (*City of Arcadia v. State Water Resources Control Board*, 2010 Cal.App. LEXIS 2150, p. 3.)

## The Court of Appeal's Decision

### Public Hearing Claim

The Court of Appeal reversed. It summarily disposed of the claim that no public hearing was held because the administrative record demonstrated that the RWQCB held a number of workshops during the 2004 triennial review to discuss priorities for the basin plan.

### Water Code Sections 13000 and 13241

The court then considered whether the RWQCB had a duty to consider Water Code §§ 13000 and 13241 during the triennial review process and determined it did not.

The court found that Water Code § 13000 is a general statement of legislative intent that does not impose any affirmative duty that would be enforceable through a writ of mandate. It found that Water Code § 13241 does impose enforceable obligations. However, the court determined that the factors in § 13241 need only be considered when "establishing water quality objectives," which are only one element of a basin plan because the Water Code defines "water quality control plan" as:

...a designation or establishment for the waters within a specified area of...: (1) beneficial uses to be protected. (2) water quality objectives. (3) a program of implementation needed for achieving water quality objectives.

(Water Code § 13050 (j).) The court noted that the administrative record contained findings made by the RWQCB in its resolutions that the RWQCB did consider the § 13241 economic factors when it adopted the original basin plans in 1975, when it consolidated them into one basin plan in 1994, when it adopted the 2001 MS4 permit and also when it revised the bacteria objectives in 2002. The court also relied upon general principles that, in the absence of evidence to the contrary, it is presumed that official duties have been regularly performed. (*City of Arcadia, supra* at 24.)

The court also rejected plaintiffs' argument that § 13241 factors should have been considered in relation to storm water, noting that the 1994 basin plan (which dealt with storm water) did include a reference to the § 13241 factors, but also relying on the court's view that a basin plan's focus is on the water bodies and their beneficial uses, not the potential sources of pollution for the water body, such as storm water.

### 'Potential' Beneficial Uses

The court rejected the argument that it is inappropriate to use "potential" beneficial uses in a basin plan. It relied on the language in § 13241(a): "...factors to be considered....shall include, *but not neces-*

*sarily be limited to...*" ... past, present and probable future beneficial uses..." (emphasis added) as demonstrating legislative intent to allow enlargement to include items not specifically in the statute. Using "potential" beneficial uses is simply an enlargement of the language consistent with the intent of the legislature.

Lastly, the court also relied upon deference to an agency's interpretation of statutes within its area of expertise to support the RWQCB's use of "potential" beneficial uses in establishing water quality objectives.

### Conclusion and Implications

The Court of Appeal resolved every argument in favor of the RWQCB and strongly upheld deference to agency interpretation of laws and regulations within the agency's area of expertise. Some observers have expressed concern that allowing "potential" rather than "probable" future uses to be the standard for determining beneficial uses may serve to greatly expand the discretion of the RWQCB; and that the phrase "not necessarily be limited to" arguably allows the addition of factors beyond those listed in subsections (a) through (f) of Water Code § 13241 rather than to allow "probable future beneficial uses" to be diminished to "potential future beneficial uses."

It is interesting that the court never discussed the difference in the meaning of the two words. The decision appears to allow designation of a beneficial use unless it is shown not to be possible in the future. (Jan Driscoll, David Osias)