

The Role of Economic Considerations in Stormwater Permits

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Court Cases

I. Building Ind. Assoc. of SD Cnty v. SWRCB

124 Cal.App.4th 866 (4th App. Dist. 2004)

II. Cnty of Los Angeles v. CA RWQCB

2nd App. Dist. Case No.: B184034 (June 21, 2005)

III. City of Burbank v. SWRCB

35 Cal. 4th 613 (2005)

I. Building Industry Association of San Diego County v. State Water Resources Control Board

BIA filed petition and appeals from SDRB's MS4 permit.

Contention

Permit violates federal law because it allows the Regional Board to impose control measures more stringent than the federal "MEP" standard. 402(p)(3)(B)(iii).

Holding:

4th District Court of Appeal held that the Regional Board had the authority to include a permit provision requiring compliance with state water quality standards.

Background:

Shortly after the 1972 revisions to the Federal Water Pollution Control Act of 1948, the EPA promulgated regulations exempting most municipal storm sewers from NPDES permit requirements.

Environmental groups challenged -- the D.C. Circuit Court held a storm sewer is a point source; and, the EPA did not have authority to exempt categories of point sources. NRDS, Inc. v. Costle (D.C. Cir. 1977) 568 F.2d 1369, at pp. 1374-1383.

In 1987, CWA amended the CWA NPDES permit requirements for storm sewer discharges for industrial and municipal discharges:

Industrial – subject to effluent limitations under specific timetables.

Municipal – EPA has authority to fashion permit requirements “to meet water quality standards.

-- The 402(p) Provisions:

Permits ... shall require control to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and systems, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." (Emphasis added). 402(p)(3)(B)(iii)

State Authority

1969 – California Legislature adopted the Porter-Cologne Water Quality Control Act seeking to “attain the highest water quality which is reasonable. . . .” (Water Code §13000)

To ensure it would obtain EPA approval to issue NPDES permits, California amended the Water Code to require “waste discharge requirements . . . which apply and ensure compliance with all applicable provisions [of the CWA], together with any more stringent effluent standards or limitations necessary to implement water quality control plans, or for the protection of beneficial uses, or to prevent nuisance.” (Water Code § 13377)

The San Diego MS4 Permit

The SDMS4 permit includes several prohibitions:

First – municipalities are prohibited from discharging those pollutants “which have not been reduced to the maximum extent practicable.

Second – municipalities are prohibited from discharging pollutants “which cause or contribute to exceedances of receiving water quality objectives . . .” and/or that “cause or contribute to the violation of water quality standards. . . .”

The permit provided for an “iterative” process for enforcing violations of those standards; but the Regional Board reserved the right to enforce the permit provisions while the iterative process was going on.

The permit also required SUSMP to ensure new development and redevelopment control runoff.

BIA's Contention

The MEP is the "exclusive measure that may be applied to MS4 discharges and the municipalities do not have to comply with a state water quality standard if the required controls exceed "MEP." Anything more stringent violates federal law, is too expensive and cannot possibly be achieved.

- **The SDMS4 defined MEP to consider “economics” and noted that MEP “is generally, but not necessarily, less stringent than BAT.”**
- **If MEP is less stringent than technology based standards, it does not mean anything more stringent than MEP is impossible.**

II. In Re Los Angeles County Municipal Storm Water Permit Litigation, #BS080458 Los Angeles County Superior Court (March 24, 2005) (Now on appeal to the Second District Court of Appeals)

The Los Angeles MS4 Stormwater Decision:

On March 24 a Los Angeles Superior Court upheld municipal stormwater permit issued by the LARB.

The court considered the following issues:

- could the regional board impose requirements that the dischargers control waste to an extent greater than the “maximum extent practicable” (“MEP”), or the state’s “reasonably achievable” standard?**
- was it within the regional board’s authority to require that receiving water quality standards be met by the dischargers, and was there a “safe harbor” for the dischargers when they could not achieve such standards through implementation of BMPs?**
- should the regional board have considered the economic impact of the permit requirements? (The judge found that the permit was imposed to comply with federal law and even if economic factors should be considered, that the regional board adequately documented the costs and benefits in this permit.)**

III. The City of Burbank Decision

- **On April 4, 2005, the California Supreme Court ruled that Regional Water Quality Control Boards may not consider the economic costs to the discharger in meeting the effluent limits of a NPDES permit if those limits are necessary for the discharge to meet federal water quality standards.**
- **However, where the effluent limits are necessary to meet more stringent state requirements, economic factors must be considered.**
- **While this case deals with effluent limits the principles of the holding apply to NPDES permits.**

IV. Background

- The cities of Los Angeles and Burbank operate sewage treatment plants that discharge treated waste water into the Los Angeles River.**
- In 1998 the regional board re-issued the NPDES permits to the cities and included numeric effluent limits to implement a Basin Plan narrative toxicity standard.**
- The cities argued that the annual costs of compliance was equal to 40% (Los Angeles) and 100% (Burbank) of their annual operating budgets.**

- **The cities claimed that sections 13241 and 13263 required that the regional board consider the economic burdens.**
- **Section 13241 requires that each regional board:**
 - **“shall establish such water quality objectives and water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses” and,**
 - **that in establishing water quality objectives that one factor to consider is the “economic” impact of the objective.**

- **Section 13263(a) provides that a regional board shall prescribe requirements as to the nature of any proposed discharge, must implement relevant water quality plans and must consider beneficial uses, water quality objectives, other waste discharges, and the "provision of Section 13241."**

Lower Courts

- **The trial court ruled that the regional board should have considered the cost of compliance not only when it adopted the Basin Plan but also when it issued the NPDES permit.**
- **The court of appeal reversed the trial court and concluded that Sections 13241 and 13263 require a regional board to take “economic considerations” into account only when it adopts water quality standards in a basin plan but not in a discharge permit.**

California Supreme Court

- **The California Supreme Court held that Water Code section 13377 forbids a regional board from considering economic hardship on the part of the permit holder if doing so would result in a lessening of the requirements in the Clean Water Act (“CWA”).**
- **However, if those discharge restrictions exceed or are more stringent than the requirements of federal law, then economic considerations must be considered pursuant to Water Code sections 13241 and 13263.**
- **The Supreme Court remanded because it was not clear whether the regional board acted only to implement requirements of the CWA or instead to impose limitations that exceeded the federal requirements.**

Discussion Points

- **The 13241 factors apply to MS4 permits that contain state water quality standards, even if those controls exceeds what is necessary to achieve MEP.**
- **Note: 402(p)(3)(B)(iii) allows for “such other provisions” as the State determines is appropriate to control the discharge of pollutants.**

- **The Burbank court provided no guidance on how the regional boards are to determine what is a federal requirement as opposed to a more stringent state requirement.**
- **Nor did the court provide guidance on when the EPA or State has authority to go beyond the MEP standard to impose water quality based standards in an NPDES permit. Section 301(b)(1)(C) provides regulatory agencies with the authority to impose “any more stringent limitation, including those necessary to meet water quality standards.”**

Economic Consideration

- **The regional board is only required to “consider” the economic and other Section 13241 factors.**
- **What evidence is sufficient to demonstrate “economic impact?”**
- **Can economic factors play a role where the discharge is to 303(d) waters?**
- **Can economic factors play a role in stormwater discharges to ASBSs?**

(Note: the State Board predetermines permit conditions)

- **Any judicial review is likely to be conducted pursuant to the Code Civil Procedure section 1094.5 “substantial evidence” test.**
- **It is also likely that a reviewing body will give great deference to the regional boards:**
 - **Provided they demonstrate some reasonable or rational basis to justify their consideration; and,**
 - **That the record contains substantial evidentiary support**
 - **Dischargers should provide evidentiary support for their claims of economic impact and not rely on broad speculation.**

- **Section 13241 requires the regional boards to consider not only economic factors but also environmental characteristics, water quality conditions, the need to develop and use recycled water, and the need for developing housing within a region.**
- **Dischargers should carefully review these factors and request consideration of these factors if appropriate.**

V. Effect of Decision & Discussion Points

- **Separate and track all costs of compliance, even though only those related to the state requirements will be subject to economic consideration.**