Water Law Review

Volume 9 | Issue 1 Article 38

9-1-2005

# Coshow v. City of Escondido, No. D045382, 2005 Cal. App. LEXIS 1484 (Cal. Ct. App. Aug. 17, 2005)

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restrictions. The Board appealed, and the Court of Appeal of California reversed.

In deciding whether Boards must consider a wastewater treatment facility's compliance costs when issuing a NPDES permit, the Supreme Court of California examined the statute governing the Board's issuance of wastewater permits, the Act. Section 13263 of the statute prescribes water quality requirements of wastewater discharge, and makes express reference to the provisions of Section 13241. Section 13241 lists several factors regional boards shall consider in establishing water quality objectives, including economic considerations. The court found the plain language of Sections 13263 and 13241 indicated the Legislature's intent that the regional boards consider the cost of compliance when setting effluent limitations in a wastewater discharge permit.

However, the court further analyzed Sections 13263 and 13241 within the context of the Act's statutory scheme. Enacted shortly after the adoption of the Federal Water Pollution Control Act Amendments, the Court found that Section 13377 specifies that water discharge permits issued by California's regional boards must meet the federal standards set by federal law. Moreover, under Article VI of the United States Constitution ("Supremacy Clause"), a state law that conflicts with federal law is without effect. Thus, the Court concluded that California law cannot authorize what federal law forbids.

Because California's Porter-Cologne Act and federal law require regional boards to comply with federal clean water standards, and because the Supremacy Clause requires state law to yield to federal law, regional boards may not consider economic factors to justify restrictions that are less stringent than federal standards require. Rather, wastewater treatment plants must comply with federal clean water standards regardless of cost. However, California law allows regional boards to consider economic factors when deciding whether to make pollutant restrictions in a wastewater discharge permit more stringent than federal law requires. The court remanded the matter as to whether the numeric pollutant restriction set out in the NPDES permits meet or exceed the requirements of the federal Clean Water Act, and whether the Boards should have complied with Sections 13241 and 13263 of the Porter-Cologne Act by considering economic factors.

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**Coshow v. City of Escondido, No. D045382, 2005 Cal. App. LEXIS 1484 (Cal. Ct. App. Aug. 17, 2005)** (holding there is no violation of a fundamental constitutional right when the Safe Drinking Water Act regulates drinking water standards, and that the City's choice of hydrofluorosilicic acid is a function of the legislature, and fluoridation is not forced medication so there is no violation of the right to privacy or bodily integrity).

Paul Coshow and several residents of Escondido, California ("Coshow") sued the City of Escondido ("City") and California Department of Health Services ("Department") challenging the City's plan to fluoridate its drinking water with hydrofluorosilicic acid ("HFSA"). Coshow claimed the use of HFSA violated his constitutional rights and exposed the public to unnecessary health risks. The trial court granted judgment on the pleadings in favor of the City and Department after finding Coshow failed to state a cause of action for declaratory or injunctive relief. Coshow appealed on six main points.

Coshow filed his first complaint in September 2001, and subsequently filed four amended complaints. The relevant pleading for this case is the fourth amended complaint, challenging the constitutionality of using HFSA to fluoridate the City's public water supply. Coshow claimed the City's fluoridation plan violated his fundamental rights under the state and federal constitutions because the City planned to use HFSA without his informed consent. In addition, Coshow asserted the contracts signed by City were illegal and void for violating his constitutional rights.

The Court of Appeal of California, Fourth Appellate District, Division One upheld the decision of the Superior Court of San Diego in refusing Coshow's cause of action for declaratory or injunctive relief based on a violation of a fundamental constitutional right. In making this decision, the trial court evaluated the state Safe Drinking Water Act ("SDWA") and its implementing regulations, the legislature's effect on the City's choice of HFSA as a fluoridation agent, and Coshow's claim for violation of the right to privacy or bodily integrity.

Congress enacted the federal SDWA to reduce contamination of drinking water and to establish uniform quality standards for the public water system. State drinking water laws cannot be less stringent than those established by the Environmental Protection Agency. California's legislature enacted the state SDWA in 1976, adopting procedures that would ensure water delivered by the public water systems is pure, wholesome and potable at all times. The purpose of the SDWA is to be more protective than the minimum federal standards. The legislature delegated the responsibility for establishing drinking water standards, including determining the maximum levels of contaminants, to the Department in the SDWA. To ensure the City's compliance with the standards set forth by the Department, the SDWA sets forth a permitting system to operate public water systems, regulate the quality of the water supply, enforce regulations, and if necessary, impose penalties.

In September 1996, the legislature added a section to the SDWA requiring fluoridation of public water systems with at least 10,000 service connections to promote public health through the maintenance of dental health. Coshow challenged the manner of fluoridation set

forth by the SDWA and its implementing regulations, which established the concentration of fluoride in drinking water supplied to the public. The SDWA provides strict compliance and reporting requirements in regulating fluoridating water systems. However, it is not mandatory that water be completely free of contaminants when there are maximum contaminant levels ("MCL's") and detection limits. HFSA met the standards of the American National Standard Institute/National Sanitation Foundation Standard 60 and therefore, the statutory and regulatory schemes allow HFSA as a fluoridating agent if it complies with MCL's and detection limits for the contaminants it contains.

Coshow protested the choice of HFSA as a fluoridating agent. The legislature chooses the fluoridating agent and the court does not have the authority to exercise its independent judgment with respect to the performance of legislative functions. Under the SDWA, the Department has the authority to approve the method of fluoridation. The court held that Coshow should have brought his challenge to the use of HFSA at the administrative level due to the procedures the SDWA establishes to ensure public water systems deliver pure and safe water.

The court determined that Coshow could not state a claim for violation of the right to privacy or bodily integrity. The court found no fundamental constitutional right exists because neither the state nor federal constitution guarantees a right to a healthful or contaminant-free environment. In addition, the court established that using HFSA is not forced medication because Coshow can choose not to ingest HFSA by refusing to drink the water. Finally, the court determined that fluoridation with HFSA satisfies the rational basis test under due process principles. The challenged action is primarily concerned with health and safety, therefore no fundamental right is at stake. The legislature mandates and regulations permit the actions to fluoridate the public drinking water with HFSA. Accordingly, the court affirmed the trial court's judgment on all accounts.

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**Cmtys. for a Better Env't v. State Water Res. Control Bd., 34 Cal. Rptr. 3d 396 (Cal. Ct. App. 2005)** (holding that the 2000 permit for the Golden Eagle Refinery is valid because a water quality-based effluent limit does not always have to be numeric, and affirming the trial court's decision that the environmental groups were not entitled to mandate relief because the standard of review must extend appropriate deference to administrative agencies and their technical expertise in determining that (1) the permit did not violate the antibacksliding provisions of the Clean Water Act and (2) the permit schedule of compliance was valid).