Water Law Review

Volume 9 | Issue 1 Article 71

9-1-2005

Crutchfield v. State Water Control Bd., 612 S.E.2d 249 (Va. Ct. App. 2005)

David B. Oakley

VIRGINIA

Crutchfield v. State Water Control Bd., 612 S.E.2d 249 (Va. Ct. App. 2005) (affirming the trial court's approval of the State Water Control Board's decision to issue an effluent discharge permit to Hanover County, Virginia because state law dictates deferential treatment of agency decisions when supported by substantial evidence in the record).

In 1997, Hanover County in Virginia ("County") applied for a Virginia Pollution Discharge Elimination System ("VPDES") permit to discharge treated wastewater into the Pamunkey River. Frances Broaddus Crutchfield and Henry Ruffin Broaddus (collectively "Crutchfield") owned a farm along the Pamunkey River where the discharge would occur under the permit. Crutchfield and others opposed the permit during the public hearing held by the State Water Control Board ("SWCB"). On April 28, 1999 the SWCB approved the County's VPDES permit. Crutchfield appealed the SWCB decision to the Circuit Court, City of Richmond. The trial court found the SWCB properly issued the permit, and Crutchfield appealed again to the Court of Appeals of Virginia, Alexandria.

On appeal, Crutchfield argued the trial court improperly affirmed the SWCB's decision to approve the permit because: (1) the record did not contain substantial evidence the effluent discharge would not further degrade the water quality, and (2) state statute requires the Virginia Department of Environmental Quality ("VDEQ") to perform a load allocation prior to permit issuance to determine if the river can support new discharges if the water segment already does not meet water quality standards.

The court found the record did contain substantial evidence to support the VPDES permit approval. Since established state law principles required deference to agency decisions, the court reasoned the numerous technical reports, consultation with other state and federal agencies, issuance of stricter permit requirements in response to public comments, and additional scientific evidence in the agency record established substantial evidence to support the agency's decision. Specifically, the court noted the technical reports indicated the effluent restrictions placed on the permit were "self-sustaining." In other words, the discharges into the river would not exceed water quality standards even if the river contained only effluent. The court also refused to consider new evidence introduced by Crutchfield during the appeal. The Virginia Administrative Procedure Act only allows supplementation of the record when no record exists. Here, a sufficient agency record already existed.

Next, the court agreed with the trial court's interpretation of VPDES regulations concerning the permitting process. The VPDES

regulation required a permittee seeking a permit for a water segment that does not already meet water quality standards to show the segment could support additional effluent based on a VDEQ load allocation. Crutchfield argued the regulation required a VDEQ load allocation prior to permit issuance. The court reasoned the permitting process did not trigger this provision merely because the Pamunkey River did not meet water quality standards at the time of permit issuance. Instead, the court found the VDEQ could only trigger this provision if they perform the load allocation first, and the regulations did not require the VDEQ to perform the load allocation. Here, the record did not show any load allocation by the VDEQ. Therefore, the court decided the VDEQ did not trigger the provision.

In conclusion, by deferring to the agency decision-making process, the court affirmed the trial court's findings that the record contained substantial evidence to support the VPDES permit issuance, and regulations governing the permit application process do not require the VDEQ to perform a load allocation prior to permit approval.

David B. Oakley

WASHINGTON

Nelson v. Shorewood Hills Homeowners Assoc., No. 53891-8-I, 2005 Wash. App. LEXIS 1573 (Wash. Ct. App. Jul. 5, 2005) (holding adjacent property owners did not violate the surface water common enemy doctrine by paving and grading their property).

Homeowners in Shorewood Hills, a private housing community, sued Shorewood Hills Homeowners Association (the "Association") for damages stemming from a severely eroded ravine adjacent to their property. In turn, the Association sued the City of Shoreline (the "City") and Shoreline Community College (the "College") as third party defendants for contribution. The Superior Court of King County denied the Association's motion for summary judgment and granted the City and College's motion. The Association appealed to the Court of Appeals of Washington, Division One.

The Association first asserted that the City and College were liable because they trespassed by water by overburdening an easement and their actions did not fall under any of the exceptions to the common enemy doctrine. The common enemy doctrine has been the foundation of surface water law in Washington since 1896. This doctrine states that landowners may use any means to protect their land from unwanted surface water without incurring liability to neighboring landowners. The doctrine has three exceptions: (1) landowners may not inhibit the flow of a natural watercourse; (2) landowners may not collect, channel, and thrust water, whether by gutter, culvert, street, or