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City of Brentwood v. Cent. Valley Regional Water Quality Control Bd., 123 Cal. App. 4th 714 (2004)

Kevin Kennedy

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conduct an environmental analysis once DW specified the end users in the amended permits.

The court thus reversed the trial court's validation of DW's permit.

Michael Graetz

City of Brentwood v. Cent. Valley Regional Water Quality Control Bd., 123 Cal. App. 4th 714 (2004) (holding a party discharging pollutants bore the burden of proving the exceptions in the California Water Code relieved the party of liability for mandatory minimum penalties).

The City of Brentwood ("City") appealed the Alameda County Superior Court's decision to uphold the Central Valley Regional Water Control Board's ("Board") imposition of \$243,000 in mandatory minimum penalties for violations of the City's wastewater discharge permit. The City operated a wastewater treatment plant that discharged treated wastewater into Marsh Creek. In June 2000, the Board issued the City a wastewater discharge permit mandating the concentration of dissolved oxygen in the plant's discharge not fall below 5.5 milligrams per liter. The permit required the City to monitor the dissolved oxygen level of its discharge daily and make monthly reports to the Board.

The monitoring requirements went into effect in July 2001, and the oxygen levels consistently fell below the proscribed minimums through September. The City installed blower equipment to boost the oxygen levels of the discharge. Following the installation, dissolved oxygen levels returned to acceptable levels. However, oxygen levels fell periodically below the proscribed minimum due to equipment failures.

In June 2001 the Board issued a complaint charging the City with eighty-one violations of the effluent limitation. Each violation carried a \$3000 penalty pursuant to the California Water Code ("Code"). The Code stated that mandatory minimum penalties be assessed for each violation where a party exceeded waste discharge limitations four or more times in any period of six consecutive months. The Code enumerated exceptions for natural disasters or other occurrences of "exceptional, inevitable, and irresistible character." The City asserted the natural phenomenon exception applied because of a change in the composition of the groundwater and the City could not otherwise explain the dissolved oxygen fluctuations. The City did not provide any evidence to back this assertion, and further claimed the Board had the burden of disproving the exception applied. The Board took the position that no exceptional circumstances beyond the City's control existed and the burden was therefore on the City to prove otherwise.

On appeal, the Court of Appeals of California considered whether the exceptions to liability in the Code were elements of the offense or affirmative defenses. If the exceptions were elements of the offense, the burden of proof would be on the Board. If the exceptions were

affirmative defenses, the burden of proof would be on the City. The court determined that while the plain language of the statute was silent as to the burden of proof, the purpose and structure of the Clean Water Act's statutory scheme strongly supported construing the exceptions as affirmative defenses. Concluding otherwise would require "water quality control boards to affirmatively disprove each of the exceptions in [their respective subdivisions and] would undermine the legislative goal of simple and swift enforcement with a minimum of fact-finding and investigation."

The court concluded the legislative intent behind the Code was to provide swift and efficient enforcement, which would create incentive for dischargers to comply with permit requirements. Furthermore, mandatory penalties eliminated the need for time-consuming discretion and fact finding, while providing for consistent enforcement. The court also reasoned the "descriptive nature test," as derived from criminal law, supported this conclusion. Specifically, the court determined the Code's exceptions were limited to proscribed conduct and did not define the offense. Thus, the discharger properly bore the burden of proof.

The court affirmed the superior court's decision to uphold the Board's imposition of mandatory minimum penalties.

Kevin Kennedy

Johnson v. State Water Res. Control Bd., 2004 Cal. App. Unpub. LEXIS 9141 (Cal. Ct. App. Oct. 7, 2004) (holding that the State Water Resources Control Board's discretionary decision as to whether to review a regional board's decision imposing administrative penalties is not subject to judicial review).

William P. Johnson owned Vail Lake USA, LLC ("Vail Lake"), which owned a 9,000-acre Riverside County ("County") ranch ("Property"). He applied for an Agricultural/Clearing Exemption ("Exemption") for the initial clearing and farming of grapes, olives, barley, and oats. The County denied the application and required Vail Lake to obtain a grading permit. Further, the California Regional Water Quality Control Board ("Regional Board") concluded that Vail Lake's best management practices were inadequate. The Regional Board required Vail Lake to file a notice of intent and a storm water pollution prevention plan, to implement additional erosion prevention and sediment controls, and to obtain a grading permit.

In February 2001, Vail Lake filed a notice of intent to grade eleven acres of the property for a residential project. In June 2001, the Regional Board filed a complaint against Johnson seeking \$406,700 for failure to file a timely notice of intent and failure to submit a technical report. Johnson requested the Regional Board rescind the penalty because a notice of intent had never before been required in Califor-