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Johnson v. State Water Res. Control Bd., 2004 Cal. App. Unpub. LEXIS 9141 (Cal. Ct. App. Oct. 7, 2004)

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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-

nia for an access road on an agricultural ranch of this size. Johnson also argued access roads within agricultural zones should not be subject to permitting requirements. The Regional Board denied the request and imposed a fine.

Johnson sought review by the State Water Resources Control Board ("State Board"). The State Board dismissed the petition, citing the informal rule against reviewing administrative civil penalties imposed by regional boards. Johnson then filed this action for a writ of mandate and damages against both the State and Regional Boards in the Superior Court of San Diego County. Johnson alleged not only that the State Board abused its discretion in dismissing their request, but also that the State Board's informal rule constituted an abdication of its administrative oversight duties and violated due process and equal protection by imposing unequal penalties across the state. The State Board demurred to the claims against it. The trial court sustained the demurrer and dismissed the State Board from the proceedings. Johnson appealed to the California Court of Appeals, Fourth Appellate District, Division One. The court addressed whether the State Board's refusal to consider a petition challenging a regional board's action or inaction is subject to judicial review.

The Porter-Cologne Water Quality Control Act ("Act") established a statewide program of water quality control maintained through regional administration. This Act divided the state into nine regions, each governed by a board. Each board must formulate and adopt water quality control plans within its region and establish water quality objectives to ensure the protection of state waters. Pursuant to the Act, a regional board may issue orders to enforce its plans and may impose administrative penalties. An aggrieved party may seek administrative review by petition to the State Board. The State Board has discretion to review such orders and may refuse review if the petition fails to raise substantial issues appropriate for review. The court relied on an earlier case holding that the State Board's exercise of discretion to determine which issues were substantial and appropriate for review was itself not subject to judicial review.

Here, the court held that a discretionary decision by the State Board as to whether to review a regional board's decision imposing administrative penalties is not subject to judicial review. Moreover, the state protected Johnson's due process and equal protection rights by virtue of the statutory scheme that provides for direct judicial review of a regional board decision where the State Board declines review. The court affirmed the dismissal order.

Jennifer Suh

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, 127 Cal.App.4th 490 (Cal. Ct. App. 2005) (holding that an environmental impact report must adequately describe the anticipated