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Comms. for a Better Env't v. State Water Res. Control Bd., 1 Cal. Rptr. 3d 76 (Cal. CL App. 2003)

Comms. for a Better Env't v. State Water Res. Control Bd., 1 Cal. Rptr. 3d 76 (Cal. Ct. App. 2003) (holding water quality based effluent limit for dioxin discharges need not be numeric in all cases, and need not be numeric in present case where three administrative agencies properly approved the non-numeric limitation as a valid means of pollution control).

Tesoro Refining and Marketing Company ("Tesoro") operated the Golden Eagle Refinery ("Refinery") on the shores of the Suisun Bay near Avon, California to produce gasoline and diesel fuel. With a National Pollutant Discharge Elimination System ("NPDES") permit from the Regional Water Quality Control Board of San Francisco ("Regional Board") the Refinery was able to discharge regulated amounts of dioxins into Suisun Bay. Dioxins are dangerous and toxic compounds, which are unavoidable byproducts of combustion and the use of some chlorinated chemical compounds. This case revolved around the Regional Board's June 2000 amendment to the Refinery's permit, which eliminated the previous "water quality based effluent limit" ("WQBEL") of 0.14 picograms per liter ("pg/L") because it was no longer appropriate for the Refinery. The Regional Board noted numerous reasons for this conclusion, such as the need for a "region wide cross media assessment of the dioxin problem," the Refinery's reduction in dioxin discharge, and the fact that complying with a numeric WQBEL would place a heavy economic burden on the Refinery. The amended permit replaced the numeric limitation with a performance-based interim effluent limitation based on facility performance and the actual concentrations of dioxins in the Refinery's discharge. It also contained numerous provisions for monitoring compliance.

Two organizations, Communities for a Better Environment ("CBE") and San Francisco BayKeeper, challenged the amendment on grounds that it neglected to establish the requisite numeric WQBEL for the Refinery's dioxin discharges. The Regional Board reviewed the matter on administrative appeal but decided to reissue the amended permit. The State Water Resources Control Board ("State Board") upheld that decision. CBE then appealed to the Superior Court of the City and County of San Francisco with a petition for writ of mandate asserting the 2000 permit's omission of a WQBEL for dioxins violated the Clean Water Act ("CWA"). The superior court granted the petition, acknowledging the 2000 Amendment violated the CWA by omitting the necessary numeric WQBEL. Furthermore, the superior court held performance-based limitations were not sufficient for a WQBEL. Tesoro appealed and brought this case before the California Court of Appeals, presenting two central issues: (1) whether a WQBEL must be numeric; and (2) whether the permit at issue contained any WQBEL, numeric or otherwise.

On the first matter, the court applied the EPA regulation that established the limitation system for NPDES permits in compliance

with the CWA. Section 122.44(d)(1)(vi)(A) of the Code of Federal Regulations provided one method for a permitting authority to establish effluent limits was to use “calculated numeric water quality criterion for the pollutant” in order to maintain water quality criteria. Noting it must give considerable deference to administrative agencies’ interpretations of regulations involving its expertise, the court analyzed the precise language of section 122.44(d).

The court found the word “numeric” only modified “water quality criterion,” not “effluent limitation.” Furthermore, the CWA’s definition of “effluent limitation” included “any restriction” without requiring it to be numeric, and section 122.44(k)(3) permitted non-numeric WQBEL’s where numeric ones were not feasible. In addition, the court noted limited case law revealed Congress’ intent was to create a flexible approach to regulating pollution discharges rather than requiring a numeric effluent limitation in all cases. Thus, the court held the WQBEL need not be numeric under all circumstances.

In response, CBE raised the second issue for review, contending the amended permit contained no WQBEL at all, numeric or otherwise, because the effluent limitations depended on the future completion of a total maximum daily load (“TMDL”) and failed to provide any current limitations. The court first discussed the Refinery’s unique position as a minor contributor of dioxin discharges in comparison to the natural sources, out of the Refinery’s control, which were the primary source of dioxins in Suisun Bay. In this light, the court analyzed the permit’s rigorous schedule of compliance requiring the Refinery to either comply with a dioxin waste load allocation (“WLA”) in the completed TMDL or reduce its dioxin discharges to zero by the termination of the TMDL preparation period. Noting water quality planning is a dynamic process that must vary over time, the court held these two limitations qualified as WQBEL’s for the 2000 permit, emphasizing that three separate administrative agencies had approved this approach. Therefore, the court reversed the superior court’s decision and remanded for determination of other issues.

Jessica L. Grether

Friends of the Eel River v. Sonoma County Water Agency, 108 Cal. App. 4th 859 (Cal. Ct. App. 2003) (holding that the trial court erred in denying appellant’s writ of mandate vacating water agency’s certification of an Environmental Impact Report and approval of a proposed project because the Environmental Impact Report was inadequate).

Friends of the Eel River (“Friends”) appealed the Sonoma County Superior Court’s denial of their petition for a writ of mandate vacating the Sonoma County Water Agency’s (“Agency”) certification of its Environmental Impact Report (“EIR”) and approval of its proposed