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## Friends of the Eel River v. Sonoma County Water Agency, 108 Cal. App. 4th 859 (Cal. Ct. App. 2003)

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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

project. The Agency certified the EIR and approved a project to increase the Agency's diversion of water from the Russian River from 75,000 acre-feet of water per year ("a.f.y.") to 100,000 a.f.y. The Agency designed the project to meet the future demands of its customers. Friends first challenged the EIR at the administrative level; they asserted that the EIR was insufficient and failed to comply with the California Environmental Quality Act ("CEQA"). The Agency rejected their arguments, certified the EIR, and approved the project. Friends then petitioned the superior court for a writ of mandate vacating the Agency's certification and approval. The superior court denied the petition. Friends then appealed to the Court of Appeal of California, First Appellate District, Division One. The court reviewed the Agency's decision de novo, using a standard of review whereby the court could only overturn the Agency's decision upon a finding of an abuse of discretion. The appellate court concluded that the EIR did not contain a sufficient discussion of the cumulative impacts of the proposed project, contained a deficient discussion of alternatives, failed to adequately describe the proposed project's environmental setting, and inadequately responded to several comments. The court also held that the EIR did comply with applicable planning laws. However, because of the deficiencies in the EIR, the court reversed the trial court's decision and remanded the matter to the trial court with directions to grant Friends' petition for a writ of mandate.

The court first determined whether the EIR's cumulative impacts analysis was flawed. CEQA guidelines require an agency to consider past, present, and probable future projects producing related or cumulative impacts; and reviewing courts must determine if inclusion of such projects was reasonable and practical and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately. Friends contended that the EIR was flawed because it failed to include several proposals pending before the Federal Energy Regulatory Commission ("FERC") to curtail the diversion of water from the Eel River into the Russian River. The court found that the amount of water available to the Agency for diversion from the Russian River directly depended on the diversion of water from the Eel River into the Russian River. Since every proposal before FERC suggested a decrease in this diversion, the court concluded that the failure of the Agency to include these proposals in the EIR rendered the EIR an inadequate informational tool for the public and for decision makers regarding the cumulative impact of the project on minimum stream flow requirements and the Agency's ability to satisfy customer demands. The court rejected the Agency's argument that the proposals before FERC were speculative, and therefore not required to be included in the EIR. The court determined that since the Agency initiated the federally-mandated Environmental Impact Statements ("EIS") for the FERC proposals, and since it actively participated in the FERC proceedings, the proposals were reasonably foreseeable and the Agency was therefore required to discuss the proposals in the EIR.

The court then considered the adequacy of the EIR's alternatives analysis. An EIR must include a discussion of reasonable alternatives which could feasibly attain the goals of the project, and which are capable of reducing or eliminating any significant adverse environmental impacts of the project. The court determined that the EIR's alternatives analysis was based on the EIR's cumulative impact analysis; the court reasoned that because the cumulative impacts analysis was flawed, the alternatives analysis was flawed as well.

Next, the court evaluated the EIR's description of the project's environmental setting. An EIR must include an accurate description of the physical environmental conditions in the vicinity of the project to accurately assess the environmental impacts of the project. The court found that the EIR failed to address both the impact of increased diversion of water from the Eel River on the salmonid species in that river, and the FERC proposals to curtail the diversion of water from the Eel River in order to prevent harm to these species. Furthermore, the court determined that the EIR focused on the southern portion of the water supply system at issue, and omitted any discussion of the northern portion—including the diversion of water from the Eel River. Therefore, the court concluded that the EIR's description of the project's environmental setting was inadequate.

The court then evaluated whether the EIR adequately responded to several public comments. The CEQA requires an agency to respond to the most significant environmental questions presented and to respond to these questions adequately, completely, and with a good faith effort at full disclosure. The court determined that the EIR failed to comply with this requirement with regard to several comments, and that a revised EIR must include adequate responses to these comments.

Lastly, the court addressed whether the Agency complied with certain planning law requirements in connection with its project. Friends first argued that the Agency's project failed to comply with applicable building and zoning ordinances; however, the court determined that the pertinent Government Codes only contemplate compliance; they do not mandate such compliance. Secondly, Friends contended that the applicable government codes required the Agency to submit its project to the planning agencies in all of the counties in which its water supply system is located. The court rejected this argument and read the Government Codes as requiring the Agency to submit its plan only to the planning agencies of Sonoma County, which the Agency did. Lastly, Friends argued that the Agency's EIR was in direct conflict with the Sonoma County general plan. The record was insufficient for the court to conclude whether this conflict existed, but the court concluded that a revised EIR must include a discussion of any such inconsistencies.

*Kate O. Lively*