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San Francisco Baykeeper v. California State Water Res. Control Bd., No. A08908, 2003 WL 21235472 (Cal. Ct. App. May 28, 2003)

Adriano Martinez

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for summary judgment, which the trial court granted.

On appeal, the Arkansas Court of Appeals found summary judgment was improper because genuine issues of material fact remained as to both whether the public had acquired a prescriptive right and as to the navigability of the Echubby Area waters. The court came to this decision by relying on a previous holding by the Arkansas Supreme Court, which stated that once water from a navigable body artificially covers a riparian owner's land without the owner's consent for a sufficient length of time, the public acquires the right to use the newly covered land. Thus, because the dam caused water from the Arkansas River, which was navigable, to cover the Club's land without its consent, questions as to the public's prescriptive right to the water over the covered land remained.

Next, the court quickly rejected the Club's contentions that conditions on the date of statehood determine navigability of a water body and that the court should determine navigability by the condition of the area before any improvements. Regarding the Club's first contention, the court relied on a prior United States Supreme Court precedent indicating that while navigability to fix ownership of a river bed or riparian rights is determined as of the date of statehood, navigability for other purposes, as was the case here, may arise later. Regarding the Club's second contention, the court concluded the current conditions of the Echubby Area were not due to any improvements to the Echubby Area itself, but rather were secondary effects from improvements to a different body of water, the Arkansas River. Further, no precedent existed which requires closing water to the public simply because it was rendered navigable through improvements made to another body of water. Finding the trial court erred in granting summary judgment when questions of material fact remained regarding the public's prescriptive easement and the navigability of the water, the court reversed and remanded the case for further proceedings.

Aimee H. Wagstaff

CALIFORNIA

San Francisco Baykeeper v. California State Water Res. Control Bd., No. A08908, 2003 WL 21235472 (Cal. Ct. App. May 28, 2003) (holding that in the period between a determination that a water body is an impaired body under section 303(d) of the Clean Water Act and the development of a Total Maximum Daily Load for that particular pollutant, an interim permit that allows an increase in the discharge of a pollutant does not necessarily constitute a degradation of the level of water quality needed to protect existing uses nor a degradation of the existing beneficial uses violative of the antidegradation policy for a Tier 1 water).

San Francisco Baykeeper ("Baykeeper") filed a petition for a writ of mandate in the California Superior Court seeking to vacate the California Regional Water Quality Control Board, San Francisco Bay Region's ("Regional Board") issuance of two National Pollution Discharge Elimination System ("NPDES") permits to two sewage treatment plants. Baykeeper specifically alleged that mass effluent limits for mercury used in both permits failed to comply with California's antidegradation policy. The superior court concluded that: (1) California's antidegradation policy for Tier 1 waters does not completely prohibit increasing the discharge of mercury, (2) the Regional Board made an authorized policy choice in its decision to include trigger levels approximating the actual mass discharged into the water and enacting mass limitations rewarding reclamation, and (3) the administrative record supported the Regional Board's determinations as to the interim permit.⁶ The superior court upheld the permits. Baykeeper appealed to the California Court of Appeal, First District, Division 2. The appellate court examined whether the superior court prejudicially abused its discretion and concluded the interim mass limits did not violate the antidegradation policy.

The City of Petaluma ("Petaluma") owns a secondary treatment plant that discharges some of its treated wastewater into the Petaluma River, which eventually leads to the San Pablo Bay. The Fairfield Suisun Sewer District ("FSSD") owns a tertiary level treatment plant that discharges treated wastewater to Boynton Slough, part of Suisun Marsh and a tributary to Suisun Bay and Suisun Slough. In 1998, the Regional Board issued its 1998 Section 303(d) List of Impaired Water Bodies and Priorities for Development of Total Maximum Daily Loads ("TMDL") for the San Francisco Bay Region. The Environmental Protection Agency ("EPA") approved this list. The list identifies both San Pablo Bay and Suisun Bay as water bodies impaired by mercury. In 1998, the Regional Board reissued permits for the Petaluma and FSSD plants. The permit expressed effluent limitations in terms of mass and concentration and listed final and interim concentration limits. The Regional Board created the final limit for mercury based on its best professional judgment of the limit needed to comply with the objectives outlined in the 1995 basin plan for the San Francisco Bay Region. The final and interim concentration limits contained more stringent concentration limits for mercury than the previous 1990 permits for these two plants.

Baykeeper argued that the Regional Board prejudicially abused its discretion by determining that the mass effluent limitations for mercury complied with California's antidegradation policy. The federal government created the antidegradation policy in 1983; it required that states adopt their own antidegradation policy. California adopted an antidegradation policy that protects three categories of waters. California classified the waters concerned in the present case as Tier 1 waters. California's antidegradation policy protects the "existing instream water uses and the level of water quality necessary to protect" those uses for Tier 1 waters. The antidegradation policy for

Tier 1 waters applies when a future action results in “significantly lowered” water quality or when a future action causes “significant” or “substantial” augmentation of pollutant loadings.

The appellate court started the analysis with four important considerations: (1) the court should accord substantial weight to the Regional Board’s interpretation, (2) the Regional Board has more experience than the court with the scientific and technical considerations of the issues considered in this case, (3) the permits expired in July 2003, and (4) the Regional Board set a date to implement the TMDL for mercury after the permits expired. The appellate court further concluded that for Tier 1 waters, an increase in mercury discharge does not necessarily equate to either a degradation of existing uses that are beneficial or degradation of the water quality level needed to protect the existing uses. The appellate court held that an action triggers the federal and state antidegradation policies when it causes a lowering of the water quality and not necessarily when there is an increase in the discharge of a pollutant. It also affirmed the superior court’s determination that allowing higher mass limits for plants with significant reclamation programs does not violate the antidegradation policy.

The superior court deferred to the Regional Board’s determination that an increase in the amount of mercury allowable under the permit would not cause undue degradation to these water bodies and upheld the superior court’s affirmation of the permits. In turn, the appellate court held that the superior court did not prejudicially abuse its discretion. According to the appellate court, Baykeeper urged the court to make a policy choice, which the court had no authority to make. Concluding, the appellate court stated that the legislature vested the regional and state water boards—not the courts—with the authority to make the policy choices on this type of issue.

Adriano Martinez

Huls v. Thorpe, 2003 Cal. App. Unpub. LEXIS 11333 (Cal. Ct. App. Dec. 4, 2003) (holding that no triable issue of fact existed where upper landowner did not engage in affirmative conduct causing property damage resulting from surface water flow onto lower landowner’s property).

Ralph and Edna Huls owned property directly behind and below property owned by Richard and Diane Thorpe. From December 1997 through March 1998, seasonal heavy rains caused flooding from the Thorpe property onto the Huls property. Although the Hulses installed a drain on their property, water from the Thorpe property continued to flood their land. The water flow allegedly caused mold, mildew, and fungus to grow in the Hulses’ home, adversely affecting their health and property. The Hulses filed a lawsuit in the