NATURAL RESOURCES DEFENSE COUNCIL, INC. v. STATE WATER RESOURCES CONTROL BOARD
Case Number: BS156962
Hearing Date: October 7, 2020
Motion for New Trial Hearing Date: March 12, 2021

ORDER GRANTING VERIFIED PETITION FOR WRIT OF MANDATE
(Modified in Connection with New Trial Motion)

Petitioners, Natural Resource Defense Council, Inc. and Los Angeles Waterkeeper, filed this action against the State Water Resources Control Board (the State Board) and the California Water Quality Control Board, Los Angeles Region (the Regional Board) seeking a court order invalidating the 2012 Los Angeles County Municipal Separate Storm Sewer System Permit (the 2012 Permit), a National Pollutant Discharge Elimination System (NPDES) permit that regulates municipal separate storm sewer systems' (MS4s) discharge of storm water and urban runoff.

The court, the Honorable Amy Hogue, denied the petition for administrative mandamus in its entirety in January 2017. The Court of Appeal affirmed the trial court's anti-backsliding ruling, but reversed its anti-degradation ruling and remanded the matter with directions as set forth below. (*Natural Resources Defense Council v. State Water Resources Control Board* (Cal. Ct. App., Dec. 24, 2018, No. B282016) 2018 WL 6735201, at *1.)

With respect to the anti-degradation ruling, the Court of Appeal determined the trial court had correctly determined a simple anti-degradation analysis was appropriate based on substantial evidence. (*Id.* at *6.) However, the Court of Appeal also concluded:

> "Even when the simple anti-degradation analysis applies, a Regional Board must still decide whether the permit complies with anti-degradation policies. Plaintiffs contend that the trial court erred by applying the wrong standard of review when analyzing whether the 2012 Permit complies with anti-degradation policies. We agree." (*Ibid.*)

Accordingly, the Court of Appeal remanded the matter back to the trial court "with directions to reconsider, under the independent judgment standard of review, plaintiffs' assertion in their petition for writ of administrative mandamus that the 2012 Permit violates the federal and state anti-degradation policies." (*Id.* at *8.)

Parties in Intervention, 20 intervenor cities (the Cities), provide only a brief opposition relevant to the remand, arguing that the "State Board's Final Order fully addresses why the 2012 MS4 Permit satisfies the federal and state anti-degradation polices." (Cities' Opposition 10:23-11:4.).

Parties in Intervention, County of Los Angeles and Los Angeles Flood Control District (jointly, the County), also oppose the petition for the same reason expressed by the Cities.

Respondents, the State Board and the Regional Board, fully oppose on all grounds, including the anti-degradation policy.

Petitioners' request for judicial notice is denied. The material is not relevant to these proceedings because it post-dates the State Board's decision at issue here.

The Petition is GRANTED. The State Board's decision is set aside. The State Board may reconsider its decision in light of the court's opinion. (Code Civ. Proc. § 1094.5, subd. (f).) Any reconsideration should bridge the analytic gap between the evidence and the State Board's ultimate decision as described more fully herein.

STATEMENT OF THE CASE ON REMAND[1]

In 1915, the California Legislature enacted the Los Angeles County Flood Control Act. Its purpose was to provide for the control and conservation of flood, storm and other waste waters within the flood control district. In the ensuing decades, as Los Angeles grew rapidly and acres of undeveloped land were paved or otherwise developed, storm water that once would have been absorbed by the ground flowed into the region's rivers and creeks. When those waterways could not contain the increased water flow, extensive flooding resulted. To address the flooding, the United States Army Corps of Engineers lined the Los Angeles River and Ballona Creek with concrete and began to build an underground urban drainage system. As Los Angeles continued its expansion, that drainage system was also expanded, and ultimately developed into today's MS4 for Los Angeles County.

In 1972, Congress enacted the Clean Water Act (or the Act) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." (33 U.S.C. § 1251, subd. (a).)

"The Clean Water Act employs the basic strategy of prohibiting emissions from 'point sources,' [1] unless the [emitter] obtains . . . an NPDES permit." (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 872.) NPDES permits are required for "a discharge from a municipal separate storm sewer system [an MS4] serving a population of 250,000 or more." (33 U.S.C. § 1342, subd. (p)(2)(C).)

"Under the . . . NPDES permit system, the states are required to develop water quality standards. [Citations.] A water quality standard 'establish[es] the desired condition of a waterway.' [Citation.] A water quality standard for any given waterway, or 'water body,' has two components: (1) the designated beneficial uses of the water body and (2) the water quality criteria sufficient to protect those uses. [Citations.]" (C*ommunities for a Better Environment v.*

---

[1] References to the administrative record are cited as "SB-AR" for the State Board record, "RB-AR" for the Regional Board record.

State Water Resources Control Bd. (2003) 109 Cal.App.4th 1089, 1092; see also 33 U.S.C. § 1313(a), (c)(2)(A); 40 C.F.R. § 131.3, subd. (i).)

The Act also requires states to "identify those waters within its boundaries for which the effluent limitations required by [the Act] are not stringent enough to implement any water quality standard applicable to such waters." (33 U.S.C. § 1313, subd. (d)(1)(A).) "This list of substandard waters is known as the '303(d) list' . . . ." (*City of Arcadia v. U.S. Environmental Protection Agency* (9th Cir.2005) 411 F.3d 1103, 1105.)

For any "impaired" water bodies a state must "establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters" (33 U.S.C. § 1313, subd. (d)(1)(A)), and "the total maximum daily load (TMDL) [ ] for those pollutants . . . at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." (33 U.S.C. § 1313, subd. (d)(1)(C); 40 C.F.R. 130.2, subd. (j); see also *City of Arcadia v. State Water Resources Control Bd*. (2006) 135 Cal.App.4th 1392, 1404.)

The EPA has authorized the State of California to issue NPDES permits. (33 U.S.C. § 1342, subd. (b).)

In 1990, the Regional Board issued a NPDES permit to regulate stormwater discharges in Los Angeles County. (SB-AR 13306.) The Regional Board amended the permit in 1996 and again in 2001 (the 2001 Permit). (RB-AR 51168.) The 2001 Permit covers discharges in Los Angeles County, the Los Angeles County Flood Control District, and 84 incorporated cities within the County. (RB-AR 51168.)

The Regional Board adopted the 2012 Permit on November 8, 2012. (SB-AR 13196.) The 2012 Permit "incorporates most of the pre-existing requirements" of the 2001 Permit, "including the water quality-based requirement not to cause or to contribute to exceedances of water quality standards in the receiving water." (SB-AR 13197.) The 2012 Permit also includes 33 total maximum daily loads (TDMLs) for various bodies of water. (SB-AR 13197.)

After the adoption of the 2012 Permit, Petitioners filed a petition for administrative review with the State Board under Water Code section 13320. (SB-AR 2118-2125.) On June 16, 2015, the State Board adopted Order WQ No. 2015-0075, which upheld the 2012 Permit after making certain findings. (SB-AR 13213-13245.)

This action ensued.

///

///

STANDARD OF REVIEW

"A party aggrieved by a final decision or order of a regional board . . . may obtain review of the decision or order of the regional board in the superior court by filing in the court a petition for writ of mandate." (Wat. Code § 13330, subd. (b).) Further, the Water Code specifies the petition for writ of mandate is governed by Code of Civil Procedure section 1094.5, subdivision (c), and "the court shall exercise its independent judgment on the evidence." (Wat. Code § 13330, subd. (e).)

Under Code of Civil Procedure section 1094.5, subdivision (b), the issues for review of an administrative decision are: whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial abuse of discretion. An abuse of discretion is established if the respondent has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (Code Civ. Proc. § 1094.5, subd. (b).)

" 'In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.' " (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.*, *supra*, 124 Cal.App.4th at 879.)

"The question is not whether any rational fact finder could make the finding below, but whether the reviewing court believe[s] the finding actually was correct." (*Coastal Environmental Rights Foundation v. California Regional Water Quality Control Bd.* (2017) 12 Cal.App.5th 178, 188.)

ANALYSIS

Relevant to the issues on remand, Petitioners argue the 2012 Permit violates specified state and federal antidegradation policies prohibiting degradation of high-quality waters and further degradation of waters that are already impaired by pollution. Petitioners contend the Regional Board failed to conduct analyses required by the law and the State Board accepted the Regional Board's "conclusory" analysis because the State Board lacked sufficient data to establish a baseline level of pollutants reaching back to water quality levels as they existed in 1968. Petitioners argue the State Board's conclusory statements regarding anti-degradation fail to bridge the analytical gap between the data relied on and their conclusion that there was no degradation.

Whether the 2012 Permit Violates Anti-Degradation Policies:

Federal regulation 40 C.F.R. section 131.12, subdivision (a) requires states to develop and adopt a statewide anti-degradation policy to ensure that "[e]xisting instream water uses and the level

of water quality necessary to protect [those] uses [are] maintained and protected." (See also SB-AR 9759.)

In 1968, the State Board in its Resolution No. 68-16 (Resolution 68-16), set forth the policy of the state to regulate permits for the disposal of wastes into the waters of the state so "as to achieve the 'highest water quality consistent with maximum benefit to the people of the State.'" (*Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Control Bd.* (2012) 210 Cal.App.4th 1255, 1261-1262 [*Agua*].) "High quality water" is the best water quality achieved since the State Board adopted the anti-degradation policy in 1968. (*Id.* at 1259.) That is, Resolution No. 68-16 is California's anti-degradation policy, which incorporates federal policy where federal policy apples. (SB-AR 13317, SB-AR 14889-14890 [Resolution No. 68-16].)

Resolution 68-16 resolves to preserve high quality waters requiring that any change deleterious to that quality "will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water, and will not result in water quality less than that prescribed in the polices." (SB-AR 14338.) It also requires the "best practicable treatment or control of the discharge" in order to assure the highest water quality "consistent with maximum benefit to the people of the State." (SB-AR 14338.)

This court is tasked with determining whether the 2012 Permit complied with anti-degradation policies. The court makes this determination under an independent judgment standard of review. (*Agua, supra*, 210 Cal.App.4th at 1267.)

Pursuant to Resolution No. 68-16, a permit complies with anti-degradation policies if the Regional Board makes certain findings. (*Id.* at 1278; SB-AR 14889-14890 [Resolution No. 68-16].)

> "The State Board has described these findings as a two-step process. 'The first step is if a discharge will degrade high quality water, the discharge may be allowed if any change in water quality (1) will be consistent with maximum benefit to the people of the State, (2) will not unreasonably affect present and anticipated beneficial use of such water, and (3) will not result in water quality less than that prescribed in state policies (e.g. water quality objectives in Water Quality Control Plans). The second step is that any activities that result in discharges to such high quality waters are required to use the best practicable treatment or control of the discharge necessary to avoid a pollution or nuisance and to maintain the highest water quality consistent with the maximum benefit to the people of the State.' [Citation.]" (*Agua, supra*, 210 Cal.App.4th at 1278.)

Here, the State Board addressed the question of anti-degradation and determined the 2012 was consistent with federal and state anti-degradation policies. (SB-AR 13218-13225.)

Petitioners contend "[t]he Boards . . . failed to comply with federal and state anti-degradation policies because they allowed degradation of impaired waters—which the law prohibits

entirely—and because they allowed degradation of high quality waters without a proper analysis or findings." (Opening Brief 17:9-11.) Specifically, Petitioners challenge the State Board's conclusions regarding the 2012 Permit on three grounds. First, they argue "the State Board failed to identify which waters covered by the 2012 Permit qualify as high quality." (Opening Brief 18:22-23.) Second, they assert "the State Board did not support its finding that there would be no degradation of impaired waters with any evidence . . . ." (Opening Brief 19:7-8.) Finally, they contend "the State Board's eleventh-hour anti-degradation analysis for high-quality waters was legally inadequate." (Opening Brief 20:11-12.)

The court addresses each claim in turn below.

As an initial matter, as noted by the Court of Appeal (quoting our Supreme Court), "In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

Alleged Failure to Identify High Quality Waters[2]

Petitioners argue the State Board failed to identify which waters covered by the 2012 Permit qualify as "high quality." Petitioners contend this failure effectively prohibits the State Board from performing the required baseline comparison of water quality because the State Board provided no evidence for its baseline for comparison dating back to 1968 as required under Administrative Procedures Update (APU) 90-004 (APU 90-004). Relying on the Regional Board's evidence, the State Board found there was insufficient data to determine whether any of the waters at issue were impaired as early as 1968. (SB AR 13220, 13224.) Petitioner contends the State Board's reliance on the Regional Board's evidence was "patently inadequate" to make its findings and it cannot argue no such record exists when no effort was made to find the evidence.[3] This baseline determination is an essential foundation for any anti-degradation analysis.

Petitioners argue the law required the State Board to conduct a receiving water analysis "on a pollutant-by-pollutant basis." (Opening Brief 18:6.)

---

[2] Petitioners' argument appears to be the Boards failed to proceed as required by law. That is, Petitioners contend the Board did not conduct the legally required analysis. An agency's alleged failure to comply with the law is reviewed under the court's independent judgment. (Code Civ. Proc. § 1094.5, subd. (b).)

[3] The Cities note although available data is insufficient to show impairment as early 1968, the data available does demonstrate impairment dating back more than two decades. (SB-AR 13222.) The Cities' position merely relies on the findings of the State Board and fails to identify any evidence in the record the court may rely on to consider under its independent judgment—the weight of the evidence. The County similarly relies on the State Board's findings rather than evidence the court can consider with its independent judgment.

The court agrees if the State Board was required to conduct a "complete" anti-degradation analysis, to determine a baseline for receiving waters, the State Board would have had to have conducted a pollutant specific analysis. (SB-AR 14333.) Here, however, the APU allowed a "simple" anti-degradation analysis to be conducted. (SB-AR 14331.) While the APU does not specify the exact analysis required to be undertaken for a simple analysis (as it does with a complete analysis), the APU does not require the pollutant specific analysis with a simple analysis. The Court of Appeal found no error with the Boards' reliance on a simple anti-degradation analysis here. (*Natural Resources Defense Council v. State Water Resources Control Board* (Cal. Ct. App., Dec. 24, 2018, No. B282016) 2018 WL 6735201, at *6.)

The Boards assert there is "little to no evidence" to determine a baseline from 1968, but to the extent there is evidence of past water quality in the region, it shows impairment. (Opposition 18:24-19:1 [Citing SB-AR 9859-9860, fn. 193].) Respondents also contend there is significant evidence in the record to support a finding "Los Angeles County receiving waters have been heavily impacted for several decades." (Opposition 18:23-24.) Certainly, the record is replete with historical information noted by the State Board related to impairment.[4] In fact, Petitioners alleged as much to the State Board. (SB-AR 11522, 11525.)

---

[4] See e.g. Water Resources Control Board, State of California, Toxic Substances Monitoring Program, Ten Year Summary Report 1978-1987 (August 1990) (Administrative Record, Order No. 01-082, R0044666-44669); The Santa Monica Bay Restoration Project, An Assessment of Inputs of Fecal Indicator Organisms and Human Enteric Viruses from Two Santa Monica Storm Drains (June 1990) (Administrative Record, Order No. 01-082, R0047130-47174); Santa Monica Bay Restoration Project, Pathogens and Indicators in Storm Drains Within the Santa Monica Bay Watershed (June 1992) (Administrative Record, Order No. 01-082, R0047688-47748); Santa Monica Bay Restoration Project, Storm Drains as a Source of Surf Zone Bacterial Indicators and Human Enteric Viruses to Santa Monica Bay (August 1991) (Administrative Record, Order No. 01-082, R004779-47780); James M. Danza, Water Quality and Beneficial Use Investigation of the Los Angeles River: Prospects for Restored Beneficial Use (1994) (Administrative Record, Order No. 01-082, R0048073-48204); Southern California Coastal Water Research Project, Annual Report (1987) (Administrative Record, Order No. 01-082, R0048205-8304); National Research Council, Monitoring Southern California's Coastal Waters (1990) (Administrative Record, Order No. 01-082, R0048306-48473); Southern California Coastal Water Research Project, Annual Report (1988-89) (Administrative Record, Order No. 01-082, R0048476-48482); City of Los Angeles, Wastewater Program Management Division, Santa Monica Bay Stormwater Pollutant Reduction Study (December 1987) (Administrative Record, Order No. 01-082, 0048485-48561; Santa Monica Bay Restoration Project, Santa Monica Bay Characterization Study Chapter 7, Urban Runoff (1993) (Administrative Record, Order No. 01-082, R0048714-48733); To California Regional Water Quality Control Board, Stormwater Runoff in Los Angeles and Ventura Counties (June 1988) (Administrative Record, Order No. 01- 082, R0050795-50888); Heal the Bay's State of the Marina Report, Marina del Rey (July 9, 1993) (Administrative Record, Order No. 01-082, R0050999-0051022); County of Los Angeles, Department of Beaches and Harbors, The Marine Environment of Marina del Rey (October 1991-June 1992)

Based on its own statements, the State Board appears to have admitted it did have evidence before it from which it could determine baselines back to 1968 for *some* as to some receiving waters. More specifically, the State Board noted the evidence in the record "indicates that it was unlikely that many water bodies were high quality even as far back as 1968, but [it] could not make a blanket statement to that effect." (SB-AR 13222.) The State Board findings also suggest some evidence did exist for which it could determine "whether these water bodies were impaired as early as 1968 . . . ." (SB AR 13224.) Such evidence did not exist, however, for "most cases." (SB AR 13224.) Thus, based on its own statements, some historical evidence may have been available to the State Board in the administrative record dating back to 1968.

As noted by the Boards, "Petitioners have not identified any other data to dispute these facts, nor did they seek to augment the record with such data." (Board's Opposition 19:1-3.)

Nonetheless, given that the Boards were entitled to conduct a simple anti-degradation analysis the court finds the Boards were not required to undertake "a pollutant-by-pollutant" evaluation. (Opening Brief 18:6) Instead, as instructed in the APU, the focus for the Boards was whether "the discharge will not be adverse to the intent and purpose of the State and federal anti-degradation policies" based on "all available pertinent information." (SB-AR 14331.) Whether the Boards' findings are supported by the weight of the evidence is subsumed within Petitioners' second and third claims addressed below.

Finally, to the extent Petitioners take issue with the State Board's factual finding related to impaired waters generally, the court finds the weight of the evidence demonstrates the water quality in the region has long been impaired. (See Footnote 4 *supra*.) In fact, as noted earlier, Petitioners took that position in the administrative proceeding before the State Board. (SB-AR 11522, 11525.)

Based on the foregoing, the court concludes Petitioners are not entitled to relief on their claim the Boards failed to proceed in the manner required by law related to any alleged failure to identify high quality waters.

///

///

(Administrative Record, Order No. 01-082, R0051023-51344); Prepared for American Oceans Campaign, Chemical Contaminant Release into the Santa Monica Bay, A Pilot Study (June 12, 1993) (Administrative Record, Order No. 01-082, R0051345-51557; Report to the Department of Beaches and Harbors, County of Los Angeles, The Marine Environment of Marina del Rey, October 1989 to September 1990 (March 1991) (Administrative Record, Order No. 01-082, R0052394 - 52721).

Whether the Evidence Supports the Finding of No Degradation of Impaired Waters

Petitioners argue the State Board did not support its finding there would be no degradation of impaired waters with any evidence. Petitioners' argument, however, should be more precisely framed in the language of the applicable federal regulations—does the weight of the evidence support a finding the 2012 Permit ensures "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses [are] maintained and protected"? (40 C.F.R. § 131.12, subd. (a).)

Petitioners contend the circumstances here are similar to those in *Agua*, *supra*, 210 Cal.App.4th at 1272-1273, where the Court rejected the water board's findings as conclusory and factually incorrect. Here, the State Board claimed there would be no degradation because the 2012 Permit requires the permittees to comply with pollution limits designed to meet water quality standards. (SB-AR 13224.)

As noted above, the weight of the evidence demonstrates overall regional water quality impairment. The court agrees with Petitioners' characterization that the State Board concluded there would be no degradation of these regionally impaired waters because the 2012 Permit requires permittees to comply with pollution limits designed to meet water quality standards. (SB-AR 13224.) Petitioners contend the State Board's analysis, however, is based on the "safe harbor" provisions in the 2012 Permit allowing permittees "to violate water quality standards indefinitely." (Opening Brief 19:17-18.) Petitioners argue the State Board's conclusionary statements are inadequate to show no degradation will occur.

This case is distinguishable from *Agua, supra,* 210 Cal.App.4th at 1255. In *Agua*, the water board permitted the discharge of pollutants allowed by "historic practices to continue without change." (*Id.* at 1273.) Those historic practices were in part responsible for groundwater impairment. Thus, without changing discharge practices, of course "degradation will continue." (*Ibid.*)

In contrast to the discharge order in *Agua*, the permittees here are required to implement certain minimum control requirements whether they elect to develop a water management plan (WMP) or enhanced water management plan (EWMP). (SB-AR 9858-9860. ["Permit does not allow permittees' historical practices to continue where those practices are inadequate to protect water quality. Either the permittee must implement a WMP/EWMP that is demonstrated to achieve water quality standards, or the permittee must meet stringent RWLs [receiving water limitations]. In neither instance does the Permit allow a continuation of a status quo that fails to meet applicable standards."]) Accordingly, the 2012 Permit requires action by a permittee; it does not merely continue past practices in a business-as-usual fashion as in *Agua*.[5]

[5] As noted by the State Board, the WMP/EWMP provisions of the 2012 Permit "must be considered in the context of the many other terms and conditions in the Permit." (SB-AR 9858.) During program development, "permittees must maintain the control measures in their existing

Additionally, the 2012 Permit requires an extensive monitoring program designed to identify changes in water quality. Instead of monitoring only seven mass emission stations located in receiving waters, the 2012 Permit requires monitoring at hundreds of outfall monitoring sites. The extensive monitoring ensures accountability by dischargers unlike the after-the-fact monitoring systems required in *Agua.*

Thus, the weight of the evidence supports the State Board's findings. The evidence demonstrates the 2012 Permit is more restrictive than the 2001 Permit. As argued by the Boards, the 2012 Permit—which imposes the same RWLs as the 2001 Permit—now regulates the discharge of pollutants by imposing effluent limitations[6] based on 33 new watershed-based TDMLs designed to bring impaired water bodies back to water quality standards. (SB-AR 13594, 13827-13828 [Amended 2012 Permit]; SB-AR 13217-13219.) The 2012 Permit also requires enhanced monitoring as well to ensure only water quality standards compliance.

Whether the State Board's Decision is Supported by the Weight of the Evidence:

Petitioners argue the State Board's degradation analysis "is legally inadequate." (Opening Brief 20:11-12.) Petitioners contend the State Board was required to undertake a complete anti-degradation analysis under here. (Opening Brief 20:15-18 [citing SB-AR 14333 (complete analysis)].) The Court of Appeal, however, agreed with this court's previous determination the State Board was within its discretion to conduct a simple anti-degradation analysis here.

Nonetheless, Petitioners contend the evidence before the State Board does not support the State Board's findings for <u>any</u> anti-degradation analysis. (Code Civ. Proc. § 1094.5, subd. (b).) They contend the State Board failed to perform the required (complete anti-degradation) analysis here and instead provided only a cursory discussion of the benefits of degradation or the extent of the impact. (SB-AR 13224-13225.) Petitioners assert the State Board did not even make any attempt to determine the cost of compliance, to determine whether maintaining high-quality waters will interfere with development, or to determine whether any particular

---

storm water management plans and TMDL implementation plans, and comply with other Permit terms." (SB-AR 9858.)

[6] An "effluent limitation" is a restriction on pollutants discharged into certain waters. (33 U.S.C. § 1362, subd. (11).) States are required to identify waters within their boundaries for which the effluent limitations in sections 1311(b)(1)(A) and 1311(b)(1)(B) of the Clean Water Act are not stringent enough to implement the water quality standard applicable to those waters. (33 U.S.C. § 1313, subd. (d)(1)(A).) Such waters are called "impaired waters." (*City of Kennett, Missouri v. Environmental Protection Agency* (8th Cir. 2018) 887 F.3d 424, 427.) For impaired waters, states are required to establish TMDLs for certain pollutants. (33 U.S.C. § 1313, subd. (d)(1)(C).) TMDLs calculate the impaired water's "loading capacity"—that is, the greatest amount of a pollutant that can be discharged into the water without violating water quality standards. (*City of Kennett, Missouri v. Environmental Protection Agency, supra,* 887 F.3d at p. 428.)

development is economically or socially important.[7] (See *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.)

As noted earlier, certain findings must be made to support high quality water degradation:

> "The State Board has described these findings as a two-step process. 'The first step is if a discharge will degrade high quality water, the discharge may be allowed if any change in water quality (1) will be consistent with maximum benefit to the people of the State, (2) will not unreasonably affect present and anticipated beneficial use of such water, and (3) will not result in water quality less than that prescribed in state policies (e.g. water quality objectives in Water Quality Control Plans). The second step is that any activities that result in discharges to such high quality waters are required to use the best practicable treatment or control of the discharge necessary to avoid a pollution or nuisance and to maintain the highest water quality consistent with the maximum benefit to the people of the State.' [Citation.]" (*Agua, supra*, 210 Cal.App.4th at 1278.) (See also SB-AR 14330.)

In addition, the APU specifies:

> "To implement the antidegradation policy, the Regional Boards must consider the need to include a finding that specifies that water quality degradation is permissible when balanced against benefit to the public of the activity in question. The determination as to whether a finding is needed must be made when issuing, reissuing, amending or revising an NPDES permit. . . . The findings should specifically state that the Regional Board has considered antidegradation pursuant to 40 CFR 131.12 and State Board Resolution No. 68-16 and finds that permitted discharge is consistent with those provisions. If the Regional Board finds that lowering of water quality is consistent with the conditions established in the State policy and the federal regulation, the findings should indicate: ¶ 1. The pollutants that will lower water quality; ¶ 2. The socioeconomic and public benefits that result from lowered water quality; and ¶ 3. The beneficial uses that will be affected." (SB-AR 14330.)

The State Board found the Regional Board did not provide "appropriate analysis regarding economic and social benefits . . . ." in connection with an antidegradation analysis. (SB-AR 13221.) The State Board thereafter elected not to remand the "antidegradation issue" to the Regional Board but chose to make the findings on the record before it. (SB-AR 13222.)

---

[7] Petitioners argue: "The State Board did not make any serious attempt to determine the costs of compliance, whether maintaining high-quality waters will interfere with development, whether any particular development is economically or socially important, and whether the reduction in water quality—including corresponding increase in illnesses, beach closures, and harm to wildlife—is consistent with the maximum benefit of the people of the state." (Opening Brief 21:3-7.)

Here, the State Board recites two paragraphs of findings. (SB-AR 13224-13225.) The fact sheet recites the same findings. (SB-AR 13592-13593.) The State Board argues the court must also consider the evidence contained in the 163-page fact sheet as well as the fact sheet's analysis to determine whether the weight of the evidence supports the State Board's findings. (SB-AR 13573-13735.)

The State Board's findings to support high quality water degradation as to the "first step" of the analysis are as follows:

> "Allowing limited degradation of high quality water bodies through MS4 discharges is necessary to accommodate important economic or social development in the area and is consistent with the maximum benefit to the people of the state. The discharge of storm water in certain circumstances is to the maximum benefit to the people of the state because it can assist with maintaining instream flows that support beneficial uses, may spur the development of multiple-benefit projects, and may be necessary for flood control, and public safety as well as to accommodate development in the area. The alternative – capturing all storm water from all storm events – would be an enormous opportunity cost that would preclude MS4 permittees from spending substantial funds on other important social needs. The Order ensures that any limited degradation does not affect existing and anticipated future uses of the water and does not result in water quality less than established standards. The Order requires compliance with receiving water limitations that act as a floor to any limited degradation. (SB-AR 13224-13225.)

Of course, the State Board's findings " 'need not be stated with the formality required in judicial proceedings.' " (*Topanga Assn. for a Scenic Community v. County of Los Angeles*, *supra*, 11 Cal.3d at 517 fn. 16 [citation omitted].) Merely "setting forth findings solely in the language of applicable legislation," however, is insufficient. (*Ibid.*) The "findings requirement serves to conduce the administrative body to draw legally relevant sub-conclusions supportive of its ultimate decision; the intended effect is to facilitate orderly analysis and minimize the likelihood the agency will randomly leap from evidence to conclusions." (*Id.* at 516.) Administrative "findings enable the reviewing court to trace and examine the agency's mode of analysis." (*Ibid.*)

At argument, the court requested the State Board address the evidence to support its findings for this first step of the analysis. The court explained it appeared the State Board relied upon mere conclusions to support its analysis—that is, the court questioned whether the evidence supported the findings such that the State Board did not abuse its discretion when it issued the 2012 Permit.

In response to the court's request, during argument the State Board stitched together numerous snippets and passages of the administrative record in what appeared to be "a post

hoc cure . . ." to apparently unsupported administrative findings. (*American Funeral Concepts v. Board of Funeral Directors* (1982) 136 Cal.App.3d 303, 311.) Without an "orderly analysis" by an administrative agency, the court "is forced into unguided and resource-consuming explorations" where it is required "to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order or decision of the agency." (*Topanga Assn. for a Scenic Community v. County of Los Angeles*, *supra*, 11 Cal.3d at 516.) Importantly, the court is precluded "from cutting and pasting its premise upon an agency determination founded on a different premise." (*American Funeral Concepts v. Board of Funeral Directors, supra,* 136 Cal.App.3d at 311.)

Under the court's independent judgment, those sections of the fact sheet the State Board cited during oral argument[8] are insufficient to allow the court to determine the weight of the evidence supports the State Board's decision. With the exception of a reference to two studies and discharge necessary for flood control and public safety (SB-AR 013221 fn. 88), the court is "forced into unguided and resource-consuming explorations." (*Topanga Assn. for a Scenic Community v. County of Los Angeles*, *supra*, 11 Cal.3d at 516.) The court is left "to grope through the record to determine whether some combination of credible evidentiary items which supported some line of factual and legal conclusions supported the ultimate order" of the State Board. (*Ibid.*)

Of course, the weight of the evidence (the referenced flood control studies) supports the State Board's antidegradation finding that limited degradation "may be necessary for flood control, and public safety." (SB-AR 013224.) The evidence for the balance of the findings eludes the court such that the court cannot find the weight of the evidence supports the findings. For example, the court has not been directed to evidence to support the State Board's findings limited degradation is necessary "to accommodate development in the area" or to "spur the development of multiple-benefit projects." (SB-AR 013224.)

The court recognizes—based on the evidence presented—complete capture of storm water would be costly. (RB-AR 21118.) The extent to which "other important social needs" would be impacted by MS4 permittees, however, appears to be based on expense alone without specifics. The court has not been directed to any evidence of what actual impact there would be on social needs or what trade-offs with social needs might be required to capture all storm water from all storm events.

On this record and on the State Board's citations, the court is unable to " 'articulate[] [any] independent finding regarding' the State Board's justification for degradation." (*Natural Resources Defense Council v. State Water Resources Control Board*, *supra,* 2018 WL 6735201 at

[8] See SB-AR 13712 through 13719 and 13728 (¶ 2). The State Board cited many other pages of the administrative record, including the administrative record from the Regional Board's proceedings. The court reviewed each citation mentioned by the State Board during argument.

*8 [citation omitted].) Thus, the court cannot find the weight of the evidence supports the State Board's antidegradation findings.

Accordingly, under its independent judgment, the court cannot find the State Board performed a legally adequate antidegradation analysis.

CONCLUSION

Based on the foregoing, the State Board's decision is set aside. The State Board may reconsider its decision based upon the existing record in light of the court's opinion. (Code Civ. Proc. § 1094.5, subd. (f).) Any reconsideration should bridge the analytic gap between the evidence, the findings and the State Board's ultimate decision as described more fully herein.

IT IS SO ORDERED.

March 29, 2021

Hon. Mitchell Beckloff
Judge of the Superior Court

03/30/2021