



SOMACH SIMMONS & DUNN

A law firm solving complex natural resources, land use
and environmental problems nationwide.

When it rains, it pours: Stormwater Litigation in Southern California

Theresa “Tess” Dunham

Somach, Simmons & Dunn

November 12, 2008

NACWA - Developments in Clean Water Law

SACRAMENTO, CA • FRESNO, CA
WASHINGTON, DC

The Beginning...

- *County of Los Angeles et al. v. SWRCB*
 - (Nov. 2006) 143 Cal.App.4th 985
- 33 Cities, County of Los Angeles, Building Industry Legal Defense Fund, County Flood Control District, Construction Industry Association
- Interveners: NRDC, Santa Monica Baykeeper, Heal-the-Bay
- MS4 Permit – Issued Dec. 2001

Issues In Litigation

- Regional Water Board Does Not Have Authority to Issue NPDES Permits
- Permit Interfered with Local Land Use Authority
- Permittees entitled to Declaratory Relief
- Permit issuance process violates California Environmental Quality Act (CEQA)

The Result

- Regional Water Board has authority – plaintiffs' argument has no merit.
- Declaratory relief unavailable because remedies designated by the Legislature
- So long as decisions carry out federal and state water quality mandates, no separation of powers issue
- CEQA review not required prior to issuance of an NPDES permit

The Trash TMDL

- *City of Arcadia et al. v. SWRCB*
 - (January 2006) 135 Cal.App.4th 1392
- 22 Cities
- Reaches of Los Angeles River listed as impaired for trash (1996 & 1998)
- Regional Water Board adopted TMDL (2001)
- TMDL approved by EPA (2002)

The Trash TMDL

- The Los Angeles River
 - 51 mile flood control channel
 - Mostly concrete lined
- Narrative Water Quality Objective
 - “Waters shall not contain floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses.”
- Numeric Target of Zero
 - Phased over 14 years
 - Target reviewed after 50% reduction achieved
- Use of full capture would be deemed in compliance

The Litigation

- Trial Court Partially Granted Petition for Writ of Mandate Finding:
 - Assimilative capacity study required
 - Cost-benefit and consideration of economic factors required under state law
 - Trash target not applicable to unlisted waterbody
 - Regional Water Board failed to comply with CEQA

On Appeal

- Assimilative capacity study not required
- TMDL discussion of compliance costs is adequate
- Regional Water Board may submit impaired listing and TMDL simultaneously
- Notwithstanding, TMDL invalidated because CEQA document inadequate

Interesting Side Note...

- Cities argued on appeal that zero target was unattainable and thus the TMDL violated the law by not deeming compliance through federal maximum extent practicable standard.
- Appeals court upheld trial court finding:
 - 402(p) inapplicable to adoption of TMDL
 - 303(d) does not include practicality as a consideration

Challenge MS4 Permit Provisions as Unfunded State Mandate

- *County of Los Angeles v. Commission on State Mandates*
 - (May 2007) 150 Cal. App. 4th 898
- 14 Cities, County of LA, LA Flood Control District
- Challenged MS4 Permit Provisions:
 - Inspection of industrial, commercial and construction sites
 - Install & maintain trash receptacles at transit stops

Legal Premise

- CA Constitution requires state to provide subvention of funds when the legislature or any state agency mandates a new program or higher level of service.
- CA statute exempted any order or permit issued by Regional Water Board or State Water Board.

On appeal

- Exemption in statute for Regional and State Water Boards unconstitutional
- Federal mandates exempt but questions if these requirements are federal mandates
- To determine if federal mandates or state mandates – must consider the facts
- Claims to Commission must be remanded and considered on the merits

The Metals TMDL

- *Cities of Bellflower et al. v. SWRCB*
 - Superior Court of Los Angeles County
 - Case No. BS101732
- 8 cities
- Applies to Los Angeles River & Ballona Creek
- Regional Water Board adopted TMDL (2005)
- Trial Court Ruling (February 2, 2007)
- Pending on Appeal

Cities Claims

- TMDL violates CEQA
- Applied TMDL to unlisted water bodies without notice
- No program of implementation for nonpoint sources
- Arbitrary load and waste load allocations
- Improper application of CTR criteria to stormwater
- Failed to comply with other provisions in state law

Trial Court Decision

- CEQA analysis not perfect but supported by substantial evidence, no violation of CEQA
- Claim for improper notice for listing of unlisted water bodies untimely
- Regional Water Board has no obligation to control nonpoint source discharges through TMDL
- Regional Water Board's estimates of load and wasteload allocations not arbitrary
- CTR criteria apply to stormwater
- Regional Water Board did not arbitrarily ignore other state requirements

Basin Plan Challenge – Arcadia II

- *Cities of Arcadia et al. v. State Water Board*
 - Orange County Superior Court
 - Case Number 06CC02974
 - Minute Order March 2008: Judgment & Writ July 2008: Vacated Judgment & Writ August 2008: Hearing on Motion for Reconsideration November 2008
- 21 Cities & the Building Industry Defense Foundation
- Challenged
 - Application of Water Quality Objectives to Stormwater
 - Failure of Triennial Review Process to Consider application of objectives to stormwater
 - Potential beneficial uses does not equal probable future beneficial use

Minute Order – March 2008

- Basing standards on “potential” beneficial uses inconsistent with state law which considers “probable future” uses
- Water standards cannot be applied to stormwater without considering Water code section 13241/13000 factors
- Regional Water Board should have considered comments made in 2004 triennial review

Writ of Mandate

- Review/revise standards applied to stormwater in light of 13241/13000 factors
- Revise standards that apply to stormwater such that no “potential” use designations remain
- Cease, desist, and suspend all activities relating to the implementation, application, and/or enforcement of all standards to achieve “potential” beneficial uses
- Cease, desist, and suspend all activities as applied to stormwater (e.g. TMDLs, NPDES permits, etc.)

The Aftermath...

- State Water Board halted all new enrollments under general construction and industrial stormwater permits
- All other stormwater permitting and regulatory activities in Los Angeles Region ceased
- Court allowed NRDC to intervene
- Court vacated judgment & writ in the interests of justice to allow use of standards while standards are reviewed
- Motion for Reconsideration heard on November 7, 2008

Summary

- CEQA applies to TMDLs, not NPDES permits
- TMDL allocations do not need to consider practicality, or ability to be achieved
- MS4 Permit requirements may exceed federal law, just have not seen any yet
- When adopting water quality standards, must consider application to stormwater
- Regional Water Board can continue to use flawed standards, until such time that the standards are reviewed



SOMACH SIMMONS & DUNN

A law firm solving complex natural resources, land use
and environmental problems nationwide.

Contact Information

Theresa "Tess" Dunham
Somach, Simmons & Dunn
813 Sixth Street, Suite 300
Sacramento, California 95814
(916) 446-7979

tdunham@somachlaw.com

www.somachlaw.com

SACRAMENTO, CA • FRESNO, CA
WASHINGTON, DC