Blogs
May 11, 2015
California Land Use & Development Law Report

Court of Appeal Sinks Challenge to TMDL for Lake Bed Sediment

A Court of Appeal has upheld the Regional Board's adoption of the total maximum daily load (TMDL) for concentration of pollutants in the sediment in McGrath Lake, rejecting the claim that TMDLs may not be stated in terms of concentrations of pollutants in lake bed sediments. *Conway v. State Water Resources Control Board*, No. B252688 (2nd Dist., March 30, 2015).

The Clean Water Act requires states to identify polluted water bodies within their jurisdictions, and to set TMDLs for those water bodies. The TMDL is the maximum amount of pollutants that can be discharged into an impaired water body from point and nonpoint sources. California implements the TMDLs in California through the Porter-Cologne Water Quality Control Act.

McGrath Lake is a small, black dune lake located at the southern end of McGrath State Beach Park in Ventura County. It is located within the McGrath Lake subwatershed, which consists primarily of agricultural fields, petroleum facilities, park lands, public roads, and a closed landfill. McGrath Lake was placed on the Clean Water Act Section 303(d) list on of impaired waters in 1998, 2002, and 2006 due to levels of organochlorine pesticides and PCBs.

In 2009, the Los Angeles Regional Water Quality Control Board set TMDLs for the lake through an amendment to the Los Angeles Basin Plan. The Board concluded that exposure of the McGrath Lake ecosystem to the organochlorine pesticides and PCBs in amounts exceeding the objectives and criteria had impaired beneficial uses, including aquatic life and recreational uses. The Basin Plan Amendment set TMDLs for contaminants from two primary sources: (1) agricultural runoff from surrounding fields that entered the lake largely through a Central Ditch; and (2) from lake bed sediment which could enter the lake by, among other ways, through desorption.

The TMDL for sediment was stated in terms of concentrations of pollutants in the sediment, not the concentration of pollutants in the lake's water column. While setting a goal of 14 years to achieve the TMDL for the lake bed sediment, the Basin Plan Amendment acknowledged that such a goal would not be achieved by natural attenuation, and that capping or dredging would be the possible methods of remediation.

The Basin Plan Amendment designated landowners within the lake's watershed as "cooperating parties," giving them two years from the effective date of the Amendment to enter into a Memorandum of Agreement with the Regional Board to implement the TMDL. If the cooperating parties failed to do so, the Basin Plan Amendment authorized the executive to assign responsibility for remediation to specific parties, and issue appropriate regulatory orders to those parties.

Adjacent landowners challenged the TMDL for the lake bed sediment, contending that the Basin Plan Amendment's adoption of TMDL for the lake sediment violated the Clean Water Act, California Water Code Section 13360, and CEQA. The petitioners argued that the Clean Water Act did not authorize the Regional Board to set load allocations expressed in terms of concentrations of pollutants in lake bed sediments.

The Court of Appeal rejected this argument, stating plainly: "The lake is its water and its sediment." Thus, the Court concluded, a sediment concentration-based TMDL was reasonable because lake bed sediment is not a

distinct physical environment. The Court found persuasive the fact that there are no natural outlets to the lake, and thus sediments pollutants do not regularly flush out of the lake. The Court also noted that it was not technically feasible to accurately measure the levels of pollutants desorbing from lake bed sediments to the water column along the lake bottom.

The Court of Appeal also found that the TMDL was consistent with Clean Water Act regulations, which provide that the TMDL "can be expressed in terms of either mass per time, toxicity, or other appropriate measure." 40 C.F.R. § 130.2. The Court stressed that this provision gave the Regional Board broad authority to select and "appropriate measure", and that such selection was afforded deference, particularly where, as here, the EPA had reviewed and approved the TMDL.

The petitioners' claim that the TMDL inappropriately dictated the means of compliance under the Porter-Cologne Act fell similarly flat. The petitioners conceded that the Basin Plan Amendment did not expressly require dredging, but maintained that the 14-year deadline could only practicably be met by dredging, which would violate Section 13360(a) of the Water Code. The Court rejected this claim, finding: (1) Section 13360(a) did not apply on its face because the TMDL is neither a "waste discharge requirement or other order"; and (2) there is no violation of Section 13360 "where lack of available alternatives is a constraint imposed by present technology and the law of nature" rather than a Board-specified manner of compliance.

Finally, the Court found that the Regional Board's adoption of the TMDL did not violate CEQA because "[a] TMDL is an informational document, not an implementation plan." Because a TMDL represents a goal for the level of a pollutant, and the plan to implement this goal had not yet been developed, the Court found that full environmental analysis was not yet required.

Blog series

California Land Use & Development Law Report

California Land Use & Development Law Report offers insights into legal issues relating to development and use of land and federal, state and local permitting and approval processes.

View the blog