

Regional Water Quality Control Board Unlawfully Delegated Authority to Modify Effluent Limits Under Discharge Permit



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federal Clean Water Act and California Porter-Cologne Water Quality Control Act authorize the State Water Resources Control Board, acting through its Regional Boards, to issue permits for point source discharges of pollutants into waters of the state. Pursuant to that authority, the Central Valley Regional Water Quality Control Board originally issued a wastewater discharge permit to the Malaga County Water District authorizing it to discharge up to 0.85 million gallons per day (mgd) of undisinfecting secondary treated wastewater from its wastewater treatment facility to onsite discharge ponds. When the discharge permit came up for renewal, Regional Board staff became concerned that Malaga's discharge ponds lacked the capacity to store 0.85 mgd, and accordingly approved a modified permit subject to a new total effluent limitation of 0.49 mgd. Unusually, the revised permit further provided that the Regional Board's Executive Officer could approve a "higher flow, up to 0.85 mgd," if requested by the discharger and supported by its submission of "supporting calculations and documentation" demonstrating sufficient disposal capacity on an average monthly basis. Malaga challenged the discharge permit as an unlawful delegation of the Regional Board's permitting authority under the Water Code, which expressly prohibits a Regional Board from delegating to its Executive Officer any powers and duties relating to the "issuance, modification, or revocation" of a discharge permit. Despite finding the dispute to be

moot (because the permit at issue had expired and a new permit had been issued), the Court of Appeal determined that the controversy implicated an issue of "great public concern capable of repetition yet evading review," and thus adjudicated the legality of the effluent verification process described in Malaga's discharge permit. Ultimately the Court of Appeal characterized the verification process by the Executive Officer as including authority to modify the discharge permit, and therefore held the Regional Board to have unlawfully delegated its permitting powers. The court distinguished past case law upholding delegations of authority allowing an Executive Officer to determine a "method of compliance" with a discharge permit. In the court's view, delegation of authority to the Executive Officer to review new evidentiary materials and to increase the maximum permitted effluent crossed the line from a permit enforcement tool to an authority to modify the discharge permit. The court also stressed the consistency of its holding with public participation purposes of the nondelegation principle. Limiting the authority to approve discharge permits and permit amendments to the Regional Board itself serves the "broader public purpose" of facilitating "meaningful opportunity to participate" by the public in waste discharge decisions potentially affecting their community. As the court noted, if the Executive Officer had sole authority to change effluent limitations without opportunity for public notice and comment, there would be "no effective way" for the public to review and test technical information relating to the decision such as the discharger's percolation rate calculations or proposed maintenance schedule. Accordingly, the court signaled that the most the Regional Board should delegate is an authority for the Executive Officer to review a discharger's request for increased effluent limits and make a recommendation to the Regional Board for how to handle the request following a public review process.

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