

WATER COMMITTEE ISSUE SUMMARIES
PERMIT APPEALS
OCTOBER 2003

The majority of recently-issued POTW permits throughout the State have been appealed. The SWRCB reports nearly 200 appeals pending before them currently. Below are some of the administrative and judicial appeal updates.

LA/Burbank (3 permits)

The City of Los Angeles/Burbank appeals yielded a favorable initial ruling in 2001 from a Los Angeles Superior Court judge, who determined that the regional board failed to consider economics, potential environmental impacts and other public interest factors when adopting the permits, as required by the Porter-Cologne Water Quality Control Act and Clean Water Act. The judge also found that the regional board failed to “bridge the analytical gap” between narrative standards and numeric limits, and failed to state how it intended to translate narrative water quality objectives into numeric permit limits, as required by federal regulations (40 CFR 131.11(a)(2).)

The Attorney General (AG), representing the SWRCB and LARWQCB, appealed of the LA/Burbank decisions. The cities simultaneously filed an appeal of the judge’s denial of attorney’s fees. Hearings on these issues were held on November 13, 2002. The AG did not appeal all of the issues decided in the case, including the overruling of daily max permit limits for POTWs, the invalidation of language prescribing particular manner of compliance, and the determination that the regional board failed to “bridge the analytical gap” between narrative standards and numeric limits. These unappealed items are now “law of the case” and will apply to the reissued LA and Burbank permits (and arguably any other similar permits issued by the Regional Board (and State Board?) as they are parties bound by the decision. On December 24, 2002, the Court of Appeals issued an unpublished opinion reversing the trial court on all appealed issues. However, the Court vacated its decision after the Cities filed a Petition for Rehearing. While not taking up the Petition for Rehearing, the Court took the decision back up on its own motion and a new decision was issued on August 14, 2003. After another rehearing request, the Cities appealed to the California Supreme Court. Review will be granted or denied no later than December 21, 2003 at the latest. The Supreme Court, as of mid-October, had received letters from 43 cities, the League of California Cities, and from 15 other special districts and trade organizations requesting review of the case.

Napa Sanitation District’s Permit

After receiving a dismissal of its stay request by the SWRCB, the Napa Sanitation District filed a petition for writ of mandate with the Napa County Superior Court along with a Motion for Stay of portions of the permit. The case was subsequently transferred to Solano Superior Court and the Bay Area Clean Water Agencies was added as a Petitioner. An administrative stay from the SWRCB and a supplemental judicial stay are in place until the writ appealing the permit and the SWRCB’s order on the permit is decided. In October of 2002, the Regional Board adopted permit amendments removing many of the challenged effluent limits and making more reasonable several of the other interim limits, so the issues in the judicial appeal narrowed slightly. The hearing on the writ was held on January 7, 2003. The main issues are the propriety of mass limits based on a narrative objective that may act as growth control in the absence of a TMDL, the propriety of 85% removal requirements where cost effective I/I repairs have been made, the requirement to implement a pollution prevention plan, and the failure to include a compliance schedule for the start up of the new plant. A decision was issued denying relief to Napa and BACWA. The decision has been appealed to the Court of Appeals and briefing will begin this winter if the case is not referred to mediation.

Vacaville's Permit

The SWRCB heard the City of Vacaville's Permit appeal on September 11-13th, 2001. CASA/SCAP/Tri-TAC were consolidated as one party in this evidentiary hearing. Other parties included the City of Turlock, LACSD, DeltaKeeper, and Heal the Bay/Southern California Keepers. On October 3, 2002, the SWRCB adopted its final order addressing many, but not all of the issues, and mostly in a manner unfavorable to Vacaville (e.g., improper beneficial uses, blending prohibitions, etc.). Both the City of Vacaville and CASA have recently appealed the SWRCB's decision to Solano County Superior Court. Venue has been changed to Contra Costa County. It is expected that venue a stipulation will be entered setting dates for briefing and hearing since the administrative record has now been prepared.

East Bay MUD Permit

This permit, like so many other Bay Area permits, was appealed mainly on the issue of performance based mass limits and dilution credits. Because of an unfavorable SWRCB decision, EBMUD and the Bay Area Clean Water Agencies (BACWA) appealed the decision. A Settlement Agreement was signed earlier this year removing some of the limits and agreeing to perform special studies. If no one appeals the permit amendments, this case will be concluded.

Los Angeles County Sanitation Districts (3 Permits)

Three permits issued to the Districts' Water Reclamation Plants were administratively appealed to the SWRCB. Because the compliance schedules were not included in the permit, and because the interim limits are not able to be complied with 100% of the time, the Districts requested a stay of the final and interim limits in two permits, which was denied by the SWRCB and a superior court.

The SWRCB has held many workshops on two of the permits to discuss the last remaining issue of numeric effluent limits for chronic toxicity. A final decision on these permits was issued on September 16, 2003, which replaced the numeric chronic toxicity limit with a narrative limit. The final orders were served on October 7 and 10, 2003, so any litigation on these permits would need to be filed in early November.

Sunnyvale Permit

Sunnyvale and BACWA appealed this recently issued permit over the mercury concentration limit of 0.12 ug/L imposed. Instead of using the numeric objective in the Basin Plan of 0.25, or the CTR objective of 0.50, the Regional Board carried over an interim limit from the previous permit. The appeal to the State Board was deemed complete on October 15, 2003.

Woodland's Permit

The City of Woodland received a permit requiring tertiary treatment (coagulation, filtration) even though its plant meets the numeric tertiary requirements with its secondary treatment plant. This issue raises the question as to whether the Regional Board can require a specific manner of compliance. The permit also requires the plant to meet an electrical conductivity (EC) limit of 700 umhos that cannot be met without Reverse Osmosis. This limit was imposed based on an agricultural goal through a narrative objective to protect non-existent crops (strawberries) that someone might want to grow in the Yolo Bypass someday. The State Board has until February of 2004 to take this case up.

Storm Water Permits

Numerous storm water permits are in various levels of appeal throughout the State. The San Diego permit, decided adversely in SWRCB Water Quality Order No. 2001-15 was recently upheld in San Diego Superior Court and was appealed to the Court of Appeal. The Los Angeles permit was denied review by the State Board in December 2002, and at least five petitions for writ of mandate have been filed on that permit in Los Angeles County Superior Court. The appeal of the Stockton/San Joaquin County permit was accepted by the State Board, but the Sacramento County permit was denied review and an appeal is pending in Sacramento Superior Court. The primary issue in each of these cases is the lack of an explicit “safe harbor” for permit compliance, including following the “iterative process” whenever water quality standards are exceeded, and the limitation of Maximum Extent Practicable (MEP) on all municipal storm water requirements.

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