



# Court of Appeal Upholds Regional Water Quality Control Board's TMDL Based on Pollutants in Lake Bed Sediment

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On March 30, 2015, the California Court of Appeal for the Second Appellate District upheld a novel, sediment-based total maximum daily load (TMDL) set by the Regional Water Quality Control Board (Regional Board) for McGrath Lake, a polluted lake located at the southern end of McGrath State Park Beach in Oxnard. *Conway et al. v. State Water Resources Control Bd.*, 2015 Cal. App. LEXIS 272.

The federal Clean Water Act requires all states to identify polluted water bodies within their jurisdiction and to set TMDLs for the maximum amount of pollutant that each polluted water body can receive. California implements the Clean Water Act through the Porter-Cologne Act, pursuant to which Regional Boards regulate the quality of water within their regions by setting TMDLs that must be approved by the State Water Resources Control Board. For Lake McGrath, the Regional Board established TMDLs for two sources of pollution: (1) pollutants coming into the lake from a nearby ditch, and (2) pollutants in the lake bed sediment. Only the TMDL for lake bed sediment was at issue in the case.

The Regional Board defined the TMDL for lake bed sediment in terms of concentrations of pollutants in the sediment and set a goal of 14 years for achieving the TMDL. The Regional Board designated landowners within the lake's watershed as "cooperative parties" who are required to enter into a Memorandum of Agreement (MOA) with the Regional Board to implement the TMDL. If a cooperative party fails to enter into an MOA within two years of the effective date of the TMDL, the Regional Board may issue regulatory orders requiring that party to take remedial action.

Several property owners on Lake McGrath who are "cooperative parties" required to enter into MOAs with the Regional Board filed a lawsuit seeking to vacate the Regional Board's adoption of the TMDL. They argued that a TMDL cannot be defined in terms of concentrations of pollutants in lake bed sediment

because TMDLs may only regulate the movement of pollutants into a water column. Moreover, they argued, federal regulations define a "load" as pollution introduced "into a receiving water," and lake bed sediment is not a "receiving water." The court disagreed, holding that sediment is intermixed with lake water and is part of the receiving water. Moreover, the court held that, pursuant to federal Clean Water Act regulations, the Regional Board has "broad discretion to choose any reasonable method" to regulate water quality. In this case, the Regional Board had determined that a concentration-based TMDL is appropriate for Lake McGrath for two reasons. First, because the lake is a terminal lake (it has no natural outlets), pollutants do not regularly flush out of the lake. Therefore, expressing TMDLs in terms of mass per time or other similar measure would mean that pollutants in the lake bed would never be reduced to levels sufficient to meet regulatory standards. Second, it is not technically feasible to accurately measure the levels of pollutants moving from lake bed sediment into the water column.

Petitioners also argued that the TMDL violates California Water Code section 13360(a), which prohibits the Regional Board from setting a waste discharge requirement that specifies a particular manner of compliance. Although the Regional Board in this case did not specify a manner for remediation, petitioners argued that dredging is the only practical way to meet the 14-year deadline for achieving lake bed sediment load allocations. The court rejected this argument, holding that it had not been determined that dredging is the only practical method of remediation, and, in fact, any particular method of remediation would be the subject of the MOA to be negotiated between cooperative parties and the Regional Board. The court also held that Water Code section 13360(a) does not apply to TMDLs on its face because Water Code section 13360(a) applies only to a "waste discharge requirement or other order of a regional board," and a TMDL does not require or order anything.

Finally, the court rejected Petitioners argument that the Regional Board violated the California Environmental Quality Act (CEQA) by failing to analyze the environmental impacts of dredging. The court again stated that it had yet to be determined whether dredging would be required. Moreover, because the TMDL is only the first step in a certified regulatory program (with identification of remediation measures done at a later date), the court held that the Regional Board could properly tier its environmental analysis. According to the court, remedial measures such as dredging are "beyond the scope of the first tier environmental analysis necessary for a TMDL."