

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

CHARLES J. CONWAY, JR., *et al.*,

Petitioners,

v.

STATE WATER RESOURCES CONTROL BOARD,
et al.,

Respondents.

On Petition for Writ of Certiorari
To The California Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Clean Water Act (33 U.S.C. §§ 1251 *et seq.*) requires all states to identify polluted water bodies within their jurisdiction, and for each such water body, to set “total maximum daily loads” (“TMDLs”) for pollutants causing the impairment of the water body. A TMDL is the maximum amount of a pollutant that a water body may receive from pollution sources and still meet water quality objectives.

The question presented is whether, under the Clean Water Act and its implementing regulations, must TMDLs for pollutants be expressed in terms of the amount of pollutants being introduced or “loaded” into the water.

**PARTIES TO THE PROCEEDING AND RULE 29.6
STATEMENT**

Petitioners, who were Plaintiffs-Appellants below, are: Charles J. Conway, Jr., Colleen F. Conway, Helen G. Haynes, William Berg, Marilyn Berg and Madge McKee. Petitioners are all individuals with an undivided 75% interest in land within which the northern portion of McGrath Lake in Ventura County, California, the situs of this action, is located.

Bill McKee, who was a Plaintiff-Appellant, is not a Petitioner.

None of the Petitioners are a nongovernmental corporation.

Respondents, who were Defendants-Appellees below, are: the California State Water Resources Control Board, and the Regional Water Quality Control Board – Los Angeles Region, both of which are governmental entities.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit this Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the California Court of Appeal for which review is sought, reported at 235 Cal. App. 4th 671 (2015), is included at A-1. The California Court of Appeal's subsequent denial of Petitioners' Petition for Rehearing is included at A-39. The California Supreme Court's later denial of Petitioners' Petition for Review is included at A-14.

The judgment of the Ventura County Superior Court, which judgment was affirmed by the above-described opinion of the California Court of Appeal, is included at A-15. The trial court's rationale for its judgment, found in its Statement of Decision, is included at A-18.

STATEMENT OF JURISDICTION

The California Supreme Court denied Petitioners' Petition for Review on June 17, 2015. This Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The appendix reproduces Section 1313(d) of the Clean Water Act and 40 C.F.R. Section 130.2.

STATEMENT OF THE CASE

This case concerns the development of TMDLs for McGrath Lake whereby state regulators, with the approval of the United States Environmental Protection Agency (“EPA”), have effectively disregarded and rendered irrelevant the “L” in “TMDL”.

McGrath Lake, located in Ventura County, California, has been described by the Respondents as one of the “most toxic hotspots” within California. Studies have found that lake bed sediments at McGrath Lake have some of highest levels of PCBs and pesticides in California.

The Clean Water Act requires all states to identify polluted water bodies within their jurisdiction. For each such water body, states are required to set TMDLs for pollutants causing the impairment of the water body. 33 U.S.C. § 1313(d)(1). A TMDL is the maximum amount of a pollutant that a water body may receive from pollution sources and still meet water quality objectives.

Pursuant to the Clean Water Act’s mandate, the California State Water Resources Board and one of its regional boards, the Regional Water Quality Control Board – Los Angeles Region (hereafter, collectively “Water Board”), developed TMDLs for McGrath Lake. In so doing, the Water Board developed TMDLs for, *inter alia*, pollutants (*e.g.*, PCBs and pesticides)

“desorbing” (or being “loaded”) from the lake bed sediment into the lake waters.

TMDLs may lawfully be expressed in terms of mass per time, toxicity or “other appropriate measure”. 40 C.F.R. Part 130.2(i). Here, the McGrath Lake TMDLs are not expressed in terms of “mass per time” or “toxicity” but instead are expressed in terms of concentrations in the lake bed sediment.¹ For example, the TMDLs provide that the levels of PCBs in the lake bed sediment may not exceed 22.7 *ug/kg*, and the levels of chlordane in the lake bed sediment may not exceed 0.5 *ug/kg*. Thus, the TMDLs for the pollutants in the lake bed sediment of McGrath Lake are expressed solely in terms of the concentrations of the pollutants (such as PCBs and pesticides) *entrained in the lake bed sediment*, not in terms of the amount or concentrations of such pollutants *being “loaded” from the lake bed sediment into the water*. Petitioners contend that by developing and approving such TMDLs for the lake bed sediment, Respondents have effectively removed the concept of “loading” from the TMDLs in contravention of the Clean Water Act and its implementing regulations.

¹ “Mass per time” would be expressed, for example, as 0.005 *ug per day* of a pollutant entering the water body. The McGrath Lake TMDLs are not considered to be expressed in terms of “mass per time” because, even though they are expressed in term of “mass” (*e.g.*, 22.7 *ug/kg* of PCBs), they are not expressed in terms of mass *per time*. “Toxicity” would be expressed, for example, as a fish mortality rate of 2% in the water body.

The Water Board adopted the McGrath Lake TMDLs via an amendment to the Water Quality Control Plan (the “Basin Plan Amendment”) for the Los Angeles Region. The EPA thereafter approved the Basin Plan Amendment. The Basin Plan Amendment could not take effect without approval from the EPA.

Upon the TMDLs taking effect, Petitioners timely filed a Verified Petition for Writ Mandate and Complaint for Declaratory Relief (“Petition”) in Ventura County Superior Court. Petitioners raised several issues in the Petition, including the issue presently before the Court, to wit, that the TMDLs for the lake bed sediment were not properly expressed under the Clean Water Act and its implementing regulations. A-24.

The Petition was denied following a bench trial in Ventura County Superior Court. In denying the Petition, the trial court expressly found the Petitioners’ argument “persuasive” but for one fact (the lack of natural outlets) that the trial court believed merited a different outcome. A-24. Petitioners thereafter timely appealed to the California Court of Appeal. The Court of Appeal, conducting a *de novo* review of the issues, affirmed the trial court’s denial of the Petition.

In its published opinion, the Court of Appeal concluded the Water Board may develop lake bed sediment TMDLs that are expressed only in terms of concentrations of pollutants contained in the lake bed (as opposed to expressing them in terms of

concentrations being “loaded” from the lake bed sediment into the water). A-6 to A-10. Petitioners’ Petition for Rehearing to the California Court of Appeal was denied.

Petitioners thereafter timely filed a Petition for Review with the California Supreme Court. In their Petition for Review, Petitioners expressly challenged the Court of Appeal’s opinion that the TMDLs were properly expressed under the Clean Water Act and its implementing regulations on the ground that the Court of Appeal’s reasoning directly contradicted this Court’s recent holding in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 133 S. Ct. 710 (2013). The Petition for Review was denied by the California Supreme Court on June 17, 2015.

REASONS FOR GRANTING THE PETITION

The Court should grant review because the California Court of Appeal decided an important federal question in a way that conflicts with relevant decisions of this Court. Rule 10(c).

I. **THERE ARE THOUSANDS OF POLLUTED WATERWAYS FOR WHICH TMDLS NEED TO BE DEVELOPED, AT SIGNIFICANT COST TO REGULATORS AND THE REGULATED COMMUNITY**

According to a 2012 report by the Congressional Research Service, more than 41,000 waterbodies throughout the nation do not meet water quality standards and are in need of a TMDL. U.S. Congressional Research Service, *Clean Water Act and Pollutant Total Maximum Daily Loads (TMDLs)* (R42752; September 21, 2012; p. 3). In California, where McGrath Lake is situated, the Water Board estimates that there are more than 1,883 impaired water body/pollutant combinations without adopted TMDLs requiring the development of more than 400 TMDL projects in the future. State Water Resources Control Board, *Total Maximum Daily Load Program, Background & Information* (http://www.waterboards.ca.gov/water_issues/programs/tmdl/background.shtml); State Water Resources Control Board, *The California Water Boards' Annual Performance Report – Fiscal Year 2013-14* (http://www.waterboards.ca.gov/about_us/performance_report_1314/plan_assess/11112_tmdl_outcomes.s

html). Furthermore, developing and implementing TMDLs is extremely costly. According to the Water Board, the cost to an agency alone to develop a TMDL can exceed \$1,000,000.00. State Water Resources Control Board, *Total Maximum Daily Loads (TMDL) Questions & Answers* (http://www.waterboards.ca.gov/water_issues/programs/tmdl/docs/tmdl_factsheet.pdf). The costs to entities and individuals required to implement TMDLs is far greater. For example, cost estimates to implement the TMDLs for McGrath Lake range from \$11,000,000.00 by the Water Board to \$19,000,000.00 by the Petitioners. The cost to implement TMDLs for larger water bodies can be much greater.

II. THERE IS LITTLE, IF ANY, JUDICIAL GUIDANCE ON THE ISSUE PRESENTED

Despite the number of future TMDLs to be developed across the nation, and the costs involved, there are no other known reported cases substantively addressing how TMDLs for *lake bed or riverbed sediment* may be expressed. That is, there are no other known cases that are *factually* similar. As for reported cases that may be *legally* similar, there is a dearth of cases. For example, there are no opinions from this Court discussing or concerning TMDLs. And with respect to reported decisions of lower federal courts, there are no cases substantively addressing the issue presented in this Petition (*i.e.*, the parameters of how the “load”

in “total maximum daily load” may be expressed).² Thus, this case presents the Court with a vehicle to provide much needed clarity, and preclude and prevent future confusion and uncertainty, about how the concept of “loading” must be reflected in TMDLs.

III. THE CALIFORNIA COURT OF APPEAL’S DECISION IS BASED UPON RATIONALE THAT CONFLICTS WITH DECISIONS OF THIS COURT

In concluding the TMDLs were properly expressed under the Clean Water Act and its implementing regulations, the California Court of Appeal employed rationale that directly conflicts with this Court’s decisions in *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.*, 133 S. Ct. 710 (2013) and *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004). In those two cases, this Court held that the transfer of polluted water between two parts of the same water body does not constitute a discharge of pollutants under the Clean Water Act.

² There are federal cases addressing whether TMDLs must be expressed on a “daily” basis, but those cases focus on the *temporal* aspect of TMDLs (*i.e.*, the term “daily” in “total maximum daily loads”) and not the *spatial* aspect of TMDLs (*i.e.*, the term “load” in “total maximum daily loads”). *See, e.g.*, *Friends of the Earth, Inc. v. Environmental Protection Agency*, 446 F.3d 140 (D.C. Cir. 2006); *Natural Resources Defense Council, Inc. v. Muszynski*, 268 F.3d 91 (2d Cir. 2001).

More specifically, Petitioners argued to the Court of Appeal that since re-suspension of streambed sediment (*i.e.*, sediment at the bottom of a stream) into the waters of a river is considered a “discharge” of pollutants under the Clean Water Act (citing to *Rybachek v. United States EPA*, 904 F.2d 1276, 1285-1286 (9th Cir. 1990)), and since one cannot discharge from a receiving water into the same receiving water, it logically followed that the lake bed sediment was not a component of the waters of the lake but instead was a separate physical environment distinct from the water. Hence, the Petitioners argued, the lake bed sediment TMDLs were unlawfully expressed in terms of the amount of a pollutant (such as PCBs) existing in a distinct physical environment and not in terms of the amount of pollutants being “loaded” from the lake bed sediment into the lake water. In rejecting this key legal argument by the Petitioners, the Court of Appeal expressly reasoned and held that “one can discharge a pollutant from one part of the receiving waters into another part of the same receiving waters”. A-7. However, this reasoning and holding directly contradicts this Court’s holdings in *Los Angeles County Flood Control District* and *Miccossukee Tribe*, wherein this Court clearly and unambiguously held that the transfer of polluted water between two parts of the same water body did not constitute a discharge of pollutants under the Clean Water Act. *Los Angeles County Flood Control District*, 133 S. Ct. at 713; *Miccossukee Tribe*, 541 U.S. at 109-112.

If there was extensive (or even limited) federal case law on the issue presented, then perhaps the Court of Appeal's decision could be characterized as a distinguishable, outlying case. However, given the dearth of federal case law on the issue presented, the Court of Appeal's decision takes on a much more prominent role on the issue as the EPA and state environmental agencies tackle the 41,000 TMDLs that need to be developed.

CONCLUSION

This Petition for Writ of Certiorari should be granted, as the important issue under the Clean Water Act presented by this case extends far beyond the shores of McGrath Lake.

Respectfully submitted,

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September 14, 2015

APPENDIX A

Conway v. State Water Resources Control Bd.
Court of Appeal of California, Second Appellate
District, Division Six
March 30, 2015, Opinion Filed
No. B252688

235 Cal. App. 4th 671

CHARLES J. CONWAY, JR., et al., Plaintiffs and
Appellants, v. STATE WATER RESOURCES
CONTROL BOARD et al., Defendants and
Respondents.

Counsel: Hinson Gravelle & Adair, Douglas A. Gravelle;
Law Offices of Charles J. Conway, Jr., Charles J.
Conway, Jr. and, for Plaintiffs and Appellants.

Kamala D. Harris, Attorney General, Robert W. Byrne,
Assistant Attorney General, Gary E. Tavetian and Eric
M. Katz, Deputy Attorneys General, for Defendants and
Respondents.

Judges: Opinion by Gilbert, P. J., with Yegan and
Perren, JJ., concurring.

Opinion by: Gilbert, P. J.

Opinion

GILBERT, P. J.—McGrath Lake is polluted. The Los Angeles Regional Water Quality Control Board has established the total maximum daily load (TMDL) of pollutants allowed in the lake. Owners of private property within which a portion of the lake is located will likely be held responsible for remediation of the pollution. They contend the TMDL may not be stated in terms of concentration of pollutants in lake bed sediment. The trial court denied their petition for a writ of mandate. The lake is its water and its sediment. We affirm.

FACTS

BACKGROUND

McGrath Lake, situated at the southern end of McGrath State Beach Park, has about 12 acres of surface area. It is located in the McGrath Lake subwatershed. The subwatershed is approximately 1,200 acres consisting primarily of agricultural fields, petroleum facilities, park land, public roads and a closed landfill. The primary activity in the subwatershed is agriculture. [*675] McGrath Lake receives runoff from the agricultural lands. Much of the runoff reaches the lake by a ditch known as the “Central Ditch.” The lake is a terminal lake; that is, it has no natural outlet. McGrath Lake including its lake bed sediment is polluted with pesticides and polychlorinated byphenyls (PCBs). The Federal Water Pollution Control Act, also known as the Clean Water

Act (33 U.S.C. § 1251 et seq.), requires all states to identify polluted water bodies within their jurisdictions. (*Id.*, § 1313(d).) For all such water bodies the state must set “total maximum daily load[s].” (*Ibid.*) A TMDL is the maximum amount of pollutants (or load) that a water body can receive from point and nonpoint sources. (40 C.F.R. § 130.2(i) (2014).) A point source is a discrete discharge source such as the Central Ditch; a nonpoint source is any other type of source. (See *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1425, fn. 2 [259 Cal. Rptr. 132].)

California implements the Clean Water Act through the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) Under the Porter-Cologne Water Quality Control Act, the State Water Resources Control Board (State Board) is charged with implementing the federal act including the development of TMDLs. (Water Code, §§ 13160, 13191.3, subd. (a).) Regional Water Quality Control Boards (Regional Board) regulate the quality of water within their regions under the purview of the State Board. (See *City of Arcadia v. State Water Resources Control Bd.* (2006) 135 Cal.App.4th 1392, 1405 [38 Cal. Rptr. 3d 373].) Regional Boards adopt water quality control plans, commonly called “basin plans.” (*Ibid.*) A Regional board may establish TMDLs by amendment to the basin plan. (*Id.* at p. 1406.)

Basin Plan Amendment

The Regional Board's "Basin Plan Amendment" established TMDLs for McGrath Lake for two sources of pollution. One source is pollutants coming into the lake from the Central Ditch. The TMDL for this source of pollution is not disputed.

The second source is pollutants in the lake bed sediment. These pollutants can enter the water column of the lake by, among other means, desorption. The TMDL for this source is not stated in terms of pollutants coming into the lake's water column or in the water column itself. Instead, the TMDL is stated in terms of concentrations of pollutants in the sediment. The Basin Plan Amendment sets a goal of 14 years to achieve the TMDL for the lake bed sediment. [*676]

The Basin Plan Amendment does not mandate any particular method of remediation. It notes, however, that natural attenuation of the pollutants would take longer than 14 years, leaving capping or dredging as possible methods of remediation.

The Basin Plan Amendment includes landowners within the lake's watershed among persons and entities optimistically designated as "cooperative parties." The amendment gives cooperative parties two years from the effective date of the TMDL to enter into a memorandum of agreement (MOA) with the Regional Board to implement the TMDL. If the cooperative parties fail to obtain an MOA within two years or do not comply with the terms of the MOA, the executive officer of the Regional Board shall "(1) identify the responsible

parties, whether named in this TMDL or not, whose discharges of the legacy pollutants have caused or contributed to the impairment of the lake; (2) ascertain the whereabouts and capacities of those responsible parties and/or their successors; (3) determine the parties to whom responsibility for remediation of sediments should be assigned; and (4) issue appropriate regulatory orders to those responsible parties.”

After a public hearing, the Regional Board adopted the Basin Plan Amendment establishing TMDLs for McGrath Lake. The amendment was approved by the State Board, the Office of Administrative Law and the federal Environmental Protection Agency (EPA).

Petition for Writ of Mandate

Charles J. Conway, Jr., Colleen Conway, Helen G. Haynes, William Berg, Marilyn Berg, Madge McKee and Bill McKee (collectively Conway) petitioned for a writ of mandate. They alleged the Basin Plan Amendment violates the Clean Water Act, Water Code section 13360, and the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). They further alleged they have an undivided 75 percent interest in 60 acres of land within which the northern portion of McGrath Lake is located. They allege they are harmed by the Basin Plan Amendment in that the State and Regional Boards will hold them responsible for the remediation of the pollution. They request the court declare the Basin Plan Amendment void and to vacate the State and Regional Boards' adoption and approval of the amendment.

In its answer, the Regional Board admitted that it is informed and believes Conway owns an interest in land in which a portion of McGrath Lake is located; that Conway is legally responsible for some or all of the pollution in the McGrath Lake; and that if Conway does not conform to the Basin Plan Amendment and MOA, it may take action against him. [*677]

The trial court denied the petition.

DISCUSSION

I.

Conway contends the Regional Board cannot set load allocations expressed only in terms of concentrations of pollutants contained in lake bed sediment.

Conway argues a TMDL can only regulate the movement of pollutants into the water column. Conway points to the Code of Federal Regulations definition of a “Load” as the “amount of matter [contaminants] introduced into a receiving water.” (40 C.F.R. § 130.2(e) (2014), italics omitted.) He claims the lake bed sediment is not part of the “receiving waters.”

But the sediment is wet, it is intermixed with the lake waters and it is part of the lake. The Regional Board could reasonably determine that the lake bed sediment is not, as Conway argues, a distinct physical environment. Instead, the lake waters and the lake bed sediment form a single physical environment.

Conway cites *Pronsolino v. Marcus* (N.D.Cal. 2000) 91 F.Supp.2d 1337, 1352, for the proposition that streambed sediment is a “discharge” under the Clean Water Act. From this Conway concludes “if re-suspension of lake bed sediment is a discharge into the lake, then that lake bed sediment itself cannot be part of the receiving waters (since one cannot logically discharge from a receiving water into the same receiving water.)” But one can discharge a pollutant from one part of the receiving waters into another part of the same receiving waters. In fact, all pollution spreads from one part of the receiving waters into another part.

If the Regional Board were required to express load allocations in terms of the movement of pollutants, we presume the federal regulation that specifies how TMDLs may be expressed would have said so. Instead, EPA regulations provide that “TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure.” (40 C.F.R. § 130.2(i) (2014).) Thus the regulations give the Regional Board broad authority to select an “appropriate measure.” Nothing in the regulations, or elsewhere, prohibits the Board from expressing TMDLs in terms of concentrations of pollutants in sediment.

The Regional Board determined that a concentration based TMDL is appropriate for two reasons. First, because the lake has no natural outlets, pollutants do not regularly flush out. Expressing TMDLs in terms of mass per [*678] time, such as kilograms entering the lake per year, would mean that pollutants in the lake

bed would never be reduced to levels sufficient to meet federal and state standards. Second, it is not technically feasible to measure the levels of pollutants desorbing from lake bed sediments to the water column all along the lake bottom with any degree of accuracy.

Conway argues there is no evidence that lack of natural outlets to the lake has any relevance to the manner in which TMDLs “must be expressed.” He claims any such inference is based on unsupported speculation. (Citing *Malkasian v. Irwin* (1964) 61 Cal.2d 738, 747 [40 Cal. Rptr. 78, 394 P.2d 822] [counsel may not invite the jury to speculate as to unsupported inferences].)

That McGrath Lake has no natural outlets is relevant to show that pollution will not be removed from sediment by the natural flow of water through the lake. Thus a TMDL may be appropriately stated in terms of pollution remaining in the sediment. As we have stated, federal regulations give the Regional Board broad authority to determine the appropriate measure for a TMDL.

Conway argues that the second reason given by the Regional Board for expressing the TMDL in terms of concentration of pollutants is not supported by the evidence. The second reason is that it is the only practical method of stating the TMDL. But it is irrelevant that there may be other methods of stating the TMDL. The Regional Board has broad discretion to choose any reasonable method. It has done so.

Conway argues the “impermeable barrier example” illustrates why a TMDL stated in terms of

concentrations of pollution is not legally sound. Conway points out that if an impermeable barrier is placed over the lake bed, it would completely prevent any contamination from reaching the water. But the lake bed sediment would still be contaminated, he argues, and thus, would still violate the TMDL.

The flaw in Conway's argument is that the impermeable barrier would be a new uncontaminated lake bed that would comply with the TMDL. The old contaminated sediment would no longer be part of the lake bed, and would not have to comply with the TMDL. In fact, such capping of the sediment is one method of remediation mentioned in the Basin Plan Amendment.

Conway argues allowing the Regional Board to express TMDLs in terms of concentration presents a slippery slope. Conway posits that such a rule would allow the Regional Board to regulate pesticide use on agricultural lands located miles from McGrath Lake without regard to the amount of pesticides actually being loaded into the lake. [*679]

But slipping down the slope stops where application of a law or regulation becomes unreasonable. (See *Cedars of Lebanon Hosp. v. County of L.A.* (1950) 35 Cal.2d 729, 735 [221 P.2d 31] ["a fair and reasonable interpretation must be made of all laws ..."].) If it would be unreasonable or absurd to interpret the law and regulations as applying to land miles from the lake, the law and regulations will not be so interpreted. Here we are not concerned with land miles from the lake, but with the lake bed itself.

Finally, we give deference to an agency's interpretation of its regulations, so long as the interpretation is reasonable. (See *Chevron U. S. A. v. Natural Res. Def. Council* (1984) 467 U.S. 837, 844 [81 L.Ed.2d 694, 104 S.Ct. 2778].) Here the EPA approved the Board's TMDL as applied to the lake bed sediment. For the reasons stated above, the EPA's interpretation of its regulations was reasonable.

II.

Conway argues the TMDL violates Water Code section 13360, subdivision (a).

Water Code section 13360, subdivision (a) provides in part: “No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawful manner.”

Conway concedes the Basin Plan Amendment does not expressly require dredging or any other method of remediation. Instead, Conway argues dredging is the only practical way of meeting the 14-year deadline for achieving lake bed sediment load allocations. Conway claims natural attenuation would take too long and the lake is too shallow for capping.

But it has not been determined that dredging is the only practical method of remediation. That is the subject of

the MOA to be negotiated between the cooperative parties and the Regional Board. In any event, even assuming dredging is the only practical method of remediation, Conway's argument has two fatal flaws: First, Water Code section 13360, subdivision (a) does not apply on its face. The TMDL is neither a “waste discharge requirement or other order.” (Wat. Code, § 13360, subd. (a).) It does not require or order anything. Second, where lack of available alternatives is a constraint imposed by present technology and the law of nature, rather than the Board specifying a particular manner of compliance, there is no violation [*680] of Water Code section 13360. (*Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.*, *supra*, 210 Cal.App.3d at p. 1438.)

III.

Conway contends the Board failed to comply with the CEQA. (Pub. Resources Code, § 21000 et seq.)

The Basin Plan Amendment that adopted the TMDLs is a certified regulatory program. (Pub. Resources Code, § 21080.5, subd. (b)(2); Cal. Code Regs., tit. 14, § 15251, subd. (g).) A certified regulatory program is exempt from the requirement of an environmental impact report (EIR). (Pub. Resources Code, § 21080.5, subd. (c).) Nevertheless, there must be significant documentation. The document used as a substitute for an EIR must include a description of the proposed activity with alternatives to the activity and mitigation measures as well as written responses to significant environmental points raised during the evaluation

process. (*Id.*, subds. (d)(2)(D) & (d)(3)(A); Cal. Code Regs., tit. 14, § 15252, subd. (a).)

A certified regulatory program is subject to the broad policy goals and substantive standards of CEQA. (*City of Arcadia v. State Water Resources Control Bd.*, *supra*, 135 Cal.App.4th at p. 1422.) It is said that the substitute documents serve as the functional equivalent of an EIR. (*Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 943 [77 Cal. Rptr. 3d 239, 183 P.3d 1210].)

An EIR prepared for a program, plan, policy, or ordinance may be tiered. (Pub. Resources Code, § 21094, subd. (a).) The first tier concentrates on the program, plan, policy, or ordinance, and later EIRs discuss application to a particular project. (See *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1169 [77 Cal.Rptr.3d 578, 184 P.3d 709].)

A TMDL is an informational document, not an implementation plan. (*American Farm Bureau Federation v. United States EPA* (M.D.Pa. 2013) 984 F.Supp.2d 289, 326.) It does not by itself prohibit any conduct or require any actions. (*City of Arcadia v. United States EPA* (N.D.Cal. 2003) 265 F.Supp.2d 1142, 1144.) Instead, a TMDL represents a goal for the level of a pollutant in a water body. (*Ibid.*) Thus only a first-tier analysis is necessary.

Conway argues the substitute documents inadequately analyze the environmental impacts of and economic factors associated with dredging. But dredging is a remediation measure. A TMDL does nothing more than

[*681] establish maximum loads. Remediation measures are beyond the scope of the TMDL; thus, beyond the scope of the first-tier environmental analysis necessary for a TMDL.

Conway argues the only practical method of remediation is dredging. That has not been determined. The Basin Plan Amendment calls for the cooperative parties and the Regional Board to work together to formulate an MOA on how the TMDL for lake sediment will be implemented. Until such a plan is formulated, a full environmental analysis of any particular method of remediation is premature. If dredging is indeed chosen as the method, a full analysis can be made on a second tier.

The judgment is affirmed. Costs are awarded to respondents.

Yegan, J., and Perren, J., concurred.

APPENDIX B

Conway v. State Water Resources Control Bd.

Supreme Court of California

June 17, 2015, Opinion Filed

S226313

CHARLES J. CONWAY, et al., Plaintiffs and
Appellants, v. STATE WATER RESOURCES
CONTROL BOARD, et al., Defendants and
Respondents.

Opinion

The request for judicial notice is denied.

The petition for review is denied.

APPENDIX C

**SUPERIOR COURT OF THE STATE OF
CALIFORNIA**

COUNTY OF VENTURA

Case No. 56-2011-00399391-CU-WM-VTA

**CHARLES J. CONWAY, JR., COLLEEN F.
CONWAY, HELEN G. HAYNES, WILLIAM BERG,
MARILYN BERG, MADGE MCKEE, and BILL
MCKEE,**

Petitioner,

v.

**STATE WATER RESOURCES CONTROL BOARD
AND REGIONAL WATER QUALITY CONTROL
BOARD – LOS ANGELES REGION, and DOES 1
through 20, inclusive,**

Respondent.

**JUDGMENT DENYING PETITION FOR WRIT OF
MANDATE AND DENYING COMPLAINT FOR
DECLARATORY RELIEF**

The Petition for Writ of Mandate and Complaint for Declaratory Relief filed by Petitioners/Plaintiffs Charles J. Conway, Jr., Colleen F. Conway, Helen G. Haynes, William Berg, Marilyn Berg, Madge McKee and Bill McKee challenging the Regional Water Quality Control Board – Los Angeles Region's

Resolution No. R09-006 and challenging the State Water Resources Control Board's Resolution No. 2010-0065, seeking a declaration that the subject Basin Plan Amendment is void, and for an order directing the Regional Water Quality Control Board – Los Angeles Region to prepare a report in compliance with CEQA, came on regularly for hearing on February 27, 2012 in Department 41 of the above-entitled Court, the Honorable Frederick Bysshe, Judge of the Superior Court, presiding. Douglas A. Gravelle and Charles J. Conway, Jr. appeared on behalf of Petitioners/Plaintiffs Charles J. Conway, Jr., Colleen F. Conway, Helen G. Haynes, William Berg, Marilyn Berg, Madge McKee and Bill McKee. Deputy Attorney General Gary E. Tavetian appeared on behalf of Respondents/Defendants Regional Water Quality Control Board – Los Angeles Region and State Water Resources Control Board.

The record of the administrative proceedings was received into evidence and examined by the Court. Briefs were filed by all parties, arguments were presented and the matter was submitted for decision and taken under submission by the Court.

The Court being fully advised, and having issued its Second Revised Statement of Decision Re: Petition for Writ of Mandate:

IT IS ORDERED, ADJUDGED, AND DECREED:

1. The Petition for Writ of Mandate filed by Petitioners Charles J. Conway, Jr., Colleen F. Conway, Helen G. Haynes, William Berg, Marilyn Berg, Madge McKee and Bill McKee be, and the same hereby is, denied;

2. The Complaint for Declaratory Relief filed by Petitioners/Plaintiffs Charles J. Conway, Jr., Colleen F. Conway, Helen G. Haynes, William Berg, Marilyn Berg, Madge McKee and Bill McKee is hereby denied as to all claims and all requested relief; and

3. Respondents Regional Water Quality Control Board – Los Angeles Region and State Water Resources Control Board are entitled to their costs of suit in the amount of \$_____.

Dated: June 25, 2013

s/Frederick H. Bysshe
Judge of the Superior
Court

APPENDIX D

SUPERIOR COURT OF THE STATE OF
CALIFORNIA

COUNTY OF VENTURA

Case No. 56-2011-00399391-CU-WM-VTA

CHARLES J. CONWAY, JR., COLLEEN F.
CONWAY, HELEN G. HAYNES, WILLIAM BERG,
MARILYN BERG, MADGE MCKEE, and BILL
MCKEE,

Petitioner/Plaintiffs,

v.

STATE WATER RESOURCES CONTROL BOARD
AND REGIONAL WATER QUALITY CONTROL
BOARD – LOS ANGELES REGION, and DOES 1
through 20, inclusive,

Respondents/Defendants.

SECOND REVISED STATEMENT OF DECISION
RE: PETITION FOR WRIT OF MANDATE

I. INTRODUCTION

On February 27, 2012, the court held a hearing on this petition for writ of mandate. Petitioners

Marilyn Berg, William Berg, Bill McKee, Madge McKee, Colleen F. Conway, Charles J. Conway, Jr., and Helen G. Haynes were present with counsel, Douglas A. Gravelle and Charles J. Conway, Jr. Deputy Attorney General Gary Tavetian was present for Respondents Regional Water Quality Control Board - Los Angeles Region and State Water Resources Control Board. The matter was taken under submission on February 27, 2012, after receipt of all briefs, evidence and argument. The court now issues its Statement of Decision Re: Petition for Writ of Mandate as follows:

Petitioners, the owners of approximately 75% of the land in and around McGrath Lake, filed a petition for writ of mandate to order (1) the Regional Water Quality Control Board – Los Angeles Region (RWQCB) to vacate and set aside RWQCB's Resolution No. R09-006, (2) to order the State Water Resources Control Board to set aside its Resolution No. 2010-0065, (3) for a declaration that the Basin Plan Amendment is void, and (4) to order the RWQCB to prepare a proper report in compliance with CEQA in reference to the environmental and economic impacts of dredging sediment from McGrath Lake.

In more specific terms, Petitioners contend that these requested orders are necessary because:

(a) The Basin Plan Amendment is invalid under 33 U.S.C. § 1313(d)(1)(C) and 40 CFR Part 130.2 because it improperly sets load allocations for pollutants in the lake bed sediment that are expressed in terms of concentrations of pollutants

entrained in a physical medium distinct from water (instead of being expressed in terms of the amount of pollutants being introduced into the water body);

(b) In the substitute environmental documentation pursuant to which the Basin Plan Amendment was adopted, there is an inadequate analysis of the reasonably foreseeable environmental impacts of dredging in violation of California Public Resources Code Section 21159(a)(1), and there is also an inadequate analysis of the economic factors associated with dredging in violation of California Public Resources Code Section 21159(c); and

(c) The Basin Plan Amendment is invalid under California Water Code Section 13360(a) because it effectively mandates a particular remediation strategy – dredging.

II. PROCEDURAL ISSUES

Petitioners' request for judicial notice of Respondents' answer filed in this case [Exhibit A] is **granted**.

Respondents' request for judicial notice of Exhibit A [EPA's Water Quality Handbook: Equilibrium Partitioning and Recommendation for concentration of a substance in sediment] is **granted**. Exhibit B [EPA's letter dated August 25, 2009 to Respondents approving their Basin Plan Amendment], Exhibit C [Landfill information for Chiquita Canyon Landfill], Exhibit D [Landfill info for Calabasas Sanitary Landfill], Exhibit E [Toland

Road Landfill info] and Exhibit F [Simi Valley Landfill Info] is **granted**. (Evid. Code §§ 451, 452.)

Petitioners' objection # 1 to Exhibits C-F [landfill information] is overruled, but note the Court is only taking notice of those documents (that there are potential landfills that can take the dredged sediment) and not accepting them as true.

Petitioners' objection # 2 is **overruled**. It is not an evidentiary objection. Petitioners dispute claims made in Respondents' opposition: that only the top 2 centimeters of the lake bed need to be monitored; Petitioners were under the impression that a depth of 2.5 to 4.9 ft would need to be dredged. This objection should be overruled. Respondents are saying that the top two centimeters need to be monitored; there is nothing in the papers about limiting dredging to only two centimeters.

Objection #3 is **overruled**. This is not an evidentiary objection but a dispute re: the characterization of facts. Each party is free to present their case as they see fit.

Objection# 4 is **overruled**. This is not an evidentiary objection, but a dispute regarding the characterization of the evidence.

Objection# 5 is **overruled**. *Supra*.

III. DISCUSSION

Introduction

Courts have limited review in mandamus proceedings, deferring to the judgment of the agency unless it is arbitrary, capricious, lacking in evidentiary support, or contrary to law. (*City of Arcadia v. State Water Resources Control Bd* (2006) 135 Cal.App.4th 1392, 1409.) This standard is applicable to the first cause of action for exceeding the scope of authority under the Clean Water Act and the third cause of action for violating CA Water Code section 13360.

Courts can also review for an agency's prejudicial abuse of discretion. This standard is applicable to the second cause of action for violating CEQA. (PRC section 21168.5.)

Courts can ensure that the relevant agency has adequately considered all relevant factors, demonstrating a rational connection between those factors, the choices made, and the purposes of enabling statute. (*Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal.App.4th 986, 1003.)

Issues.

There is no great dispute in the facts here. What is at issue is how one views the pollution of the water in and the sediment at the bottom of McGrath Lake. Years of agricultural run-off have laid a deposit of

PCBs and pesticides in the lakebed sediment. McGrath Lake has been designated as a highly polluted body of water by the EPA and State water agencies under §303 of the Clean Water Act and is targeted for clean-up. As there are no natural outlets from the lake [pollutants do not naturally flush out of the lake], all the entering pollutants have embedded themselves in the lakebed sediment: with a certain concentration of that pollution being reabsorbed by the water.

Respondents want the Petitioners, who Respondents allege are legally responsible for some of the contamination in McGrath Lake, to clean not only the water in this shallow lake, but also the lakebed sediment, via dredging, in-situ capping, and/or natural attenuation, to accomplish these goals. The governmental agencies set a Total Maximum Daily Load (TMDL) of 22.7 micrograms of PCBs per kg of dry sediment. That limit was taken from the NOAA guidelines, a federal agency that is responsible for making environmental guidelines.

Petitioners contend that this TMDL is arbitrary and capricious: that it would be too expensive to dredge (the only practical solution based on 14-year time line) all that sediment out. Instead they recommend that the TMDL be set as an 'x' amount of PCBs per kg of WATER instead of the sediment. Obviously, it would be easier to monitor/test/ and clean the water rather than monitoring and remediating the soil which is at the bottom of the lake.

For other bodies of water with natural outlets, Petitioners' argument is persuasive. But, as mentioned above, McGrath Lake is different; it has no natural outlets. The only method to improve its water quality due to pollution from the lake bed sediment is to remediate the source of pollution: the contaminated lake bed sediment.

First Issue: setting Total Max Daily Loads for PCB's at 'x' micrograms per kilogram of dry lake-bed sediment instead of at 'x' micrograms of PCBs per kilogram of lake water.

Petitioners argue that the TMDL must be expressed in terms of pollutants introduced into a water body: not in terms of concentrations of a pollutant within a physical environment distinct and separate from the water body.

Under the Clean Water Act, a 'load' is the amount of pollution or contaminant introduced into a receiving water. 40 CFR § 130.2(e).

(e) Load or loading. An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading may be either man-caused (pollutant loading) or natural (natural background loading).

Petitioners claim that because sediment at the bottom of the lake bed has been deposited there, such sediment is not a component of the receiving waters but rather a distinct physical environment.

Therefore, they argue, the TMDLs must be expressed in 'mass per time' or toxicity; but here, they are expressed in terms of 'concentrations' (e.g., 22.7 micrograms of PCBs per kilogram of dry lake bed sediment) and that it is inappropriate to express load allocations for lake bed sediment in terms of 'concentrations' per kg of sediment since the lake bed sediment is not part of the receiving water, but, instead, is a distinct physical medium. Petitioners contend that the new rules must be expressed in terms of concentration per time or the rate at which the pollutants are being introduced into the water.

Based on the facts in this case, the Court finds that there is no reason why the lakebed sediment should be seen as a separate, distinct environment from the lake in which it sits. Federal regulation allows for TMDLs to be expressed in terms of *other measures*, including concentration per kg of lake-bed sediment.

See 40 CFR 130.2(i) Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background.

If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. **TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure.** If Best Management

Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

Importantly, the EPA has approved of Respondents' TMDL. (Administrative Record (AR), p. 3106; Respondents' Exhibit B [EPA Approval letter]; see *Communities for Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal. App. 4th 1089, 1104 [agency interpretation entitled to deference].)

The court finds that Respondents' proposed measure is more appropriate than Petitioners' proposed 'mass per time' standard, because McGrath Lake does not have any natural outlets; entering pollutants do not wash away and accumulated sediments continue to contaminate the water in this shallow lake. Any other sort of TMDL would not take the incoming contaminants into account. The present TMDL adequately addresses the process of 'desorption' of PCBs that leave the sediment and contaminate the water column [achieving an equilibrium between PCB levels in the sediment and PCB levels in the water column]. Calling it the 'Equilibrium Sediment Partitioning' the EPA recommends this approach. (40 CFR 131.11 [Water Quality Criteria, RJN, Exh A, section 3.5.4.]

The lake bed sediments themselves are not the pollutants, as Petitioners urge. No one has concern

over excess sediment. The real concerns are the unnaturally high levels of PCBs and pesticides attached to the lake bed sediment. The federal government has mandated that a TMDL be established for toxicity of hazardous organic compounds and pesticides in the McGrath Lake sediment. (Clean Water Act section 303(d); 33 USC § 1313(d)(2); AR, 42, 1627.) Respondents' TMDL is the most reasonable way of so remediating.

33 USC § 1313(d) and CWA § 303(d):
Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision.

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the water identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

Again, the EPA approved the McGrath Lake TMDL. (AR, 3106.) The EPA has authority to pursue development of the sediment criteria in lakes and waters of the US if the State fails to do so. (RJN, Exhibit A.)

Respondents conducted a public hearing, taking in peer review comments about expressing TMDLs in terms of concentration per kg of lake-bed deposit, basing their recommendations on the scientific literature and the link between pollutants in the lake bed and that in the water column. (AR, 658-69, 1424.)

In reply, Petitioners argue that there is no evidence that the EPA ever considered the lakebed sediments to be considered part of the 'receiving waters.' This argument is unpersuasive. There is no dispute that the EPA deemed McGrath Lake a body of water dangerously contaminated with high levels

of PCBs and pesticides, and that it approved that state agencies' TMDLs and Basin Plan Amendment, setting TMDLs at 'concentration per kg of sediment.'

Simply put, the lake-bed sediment is part of the lake; the appropriate state agencies under the authority of the Clean Water Act have the authority to set load allocations or TMDLs for the lake. Petitioner's argument that the lake-bed sediment is not part of the lake is unpersuasive. There is no authority supporting the contrary.

There is no evidence that Respondents violated 40 CFR § 130.2; setting the TMDL at concentration per kg of sediment is an 'appropriate measure.' Here, Respondents used certain guidelines from NOAA (federal agency) re: lake bed sediment load allocations. (Reply, p. 2-3.) On its face, this is not arbitrary or capricious: using the guidelines from a federal agency that is in charge of setting such guidelines.

Petitioners argue that Respondents never calculated the ' K_d coefficient,' or a constant measuring the ratio of concentration of a pollutant in the lakebed sediment compared to concentrations of that pollutant in the lake water at equilibrium. This constant can only be determined by experiment, monitoring and testing.

Both parties are in agreement that further monitoring and testing will be done in the Phase 2 monitoring under the Basin Plan Amendment. But for now, there is no requirement that this ' K_d

coefficient' be used in setting the TMDLs. And there is no prejudice to Petitioners from Respondents' use of NOAA guidelines rather than creating their own guidelines via experimentation, monitoring, and testing.

It is agreed by all that there are high levels of PCBs and pesticides in the sediment, and that those pollutants need to be either removed or decontaminated. Whether the TMDL should be less or greater than 22.7 micrograms per kg of sediment, any variation in the level of micrograms per kg of sediment would not be significant for our overall purpose; cleaning up McGrath Lake, including cleaning up both the water and bottom sediment.

Note that upon Phase 2 monitoring under the Basin Plan Amendment, along with further monitoring and testing, amendments' to the Basin Plan Amendment can be made.

Second issue: Respondents did not violate CEQA

Petitioners contend that when Respondents prepared their 'Substitute Environmental Document (SED)', they failed to include an analysis of the reasonably foreseeable environmental impacts of the methods of the methods of compliance, including a reasonable range of environmental, economic, and technical factors with respect to dredging (one of the three possible actions to clean up McGrath Lake). PRC sections 21159(a)(1),(c), and 14 CCR section 15187(d).

PRC §21159. (a) An agency listed in Section 21159.4 shall perform, at the time of the adoption of a rule or regulation requiring the installation of pollution control equipment, or a performance standard or treatment requirement, including a rule or regulation that requires the installation of pollution control equipment or a performance standard or treatment requirement pursuant to the California Global Warming Solutions Act of 2006 (Division 25.5 (commencing with Section 38500) of the Health and Safety Code), an environmental analysis of the reasonably foreseeable methods of compliance. In the preparation of this analysis, the agency may utilize numerical ranges or averages where specific data is not available; however, the agency shall not be required to engage in speculation or conjecture. The environmental analysis shall, at a minimum, include all of the following:

(1) An analysis of the reasonably foreseeable environmental impacts of the methods of compliance.

14 CCR § 15187(d) The environmental analysis shall take into account a reasonable range of environmental, economic, and technical factors, population and geographic areas, and specific sites. The agency may utilize numerical ranges and averages where specific data is not available, but is not required to, nor should it, engage in speculation or conjecture.

In sum, Petitioners argue that prejudicial abuse of discretion occurred in the Respondent's failure to include relevant information in their rulings, thereby precluding informed decision-making and informed public participation. (*Kings County v Hanford* (1990) 221 Cal.App.3d 692, 711.) Petitioners claim that there was no environmental impact study done on dredging, despite the fact that dredging would require disposal of dredged material, including traffic, energy, noise, and air quality impacts, as well as impacts to the landfill (8600 truckloads full of dredged material which would need to be disposed of at Class I hazardous waste landfills, the closest one being 135 miles away.) Economic costs for disposing of dredged material at a Class I site would cost more than \$ 19 million.

Petitioners' further argue that 'tiering' [doing Tier 1 and Tier 2 reviews] does not excuse Respondents from ignoring the impact of dredging in their SED. Although this was only a 'first tier' review, Respondents were still required to analyze all reasonable foreseeable environmental effects from the new TMDL rules (Basin Plan Amendment). They must use their best efforts in so analyzing.

Their argument is unpersuasive. According to the record in this case, appropriate state agencies did consider adequate environmental and economic factors in deciding on the TMDL. Such a CEQA review need not be exhaustive: only that it be adequate, complete, and in good faith. (CCR § 15151; *River Valley Preservation v. Metro Transit Board* (1995) 37 Cal.App.4th 154.) The state agencies used

Tier 1 analysis substitute environmental documents (SED) in stating their goal-specific TMDL. Further specificity, such as specific methods in remediating, will be later developed in a Tier 2 review. (AR 1632.)

Third issue: Respondents did not violate CA Water Code section 13360

Water Code section 13360(a) prohibits the state agencies from specifying a particular manner of compliance with its requirement or order.

WC § 13360. (a) No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify the design, location, type of construction, or particular manner in which compliance may be had with that requirement, order, or decree, and the person so ordered shall be permitted to comply with the order in any lawfully manner. However, the restrictions of this section shall not apply to waste discharge requirements or orders or decrees with respect to any of the following:

(1) Discharge of solid waste to disposal sites other than evaporation ponds from which there is no drainage or seepage which requires the installation of riprap, the construction of walls and dikes, the installation of surface and underground drainage facilities to prevent runoff from entering the disposal area or leakage to

underground or surface waters, or other reasonable requirements to achieve the above or similar purposes.

(2) Discharges of waste or fluid to an injection well, except any well which is regulated by the Division of Oil and Gas in the Department of Conservation pursuant to Division 3 (commencing with Section 3000) of the Public Resources Code and Subpart F of Part 147 of Title 40 of the Code of Federal Regulations and is in compliance with that division and Subpart A (commencing with Section 146.1) of Subchapter D of Chapter 1 of Title 40 of the Code of Federal Regulations.

Petitioners argue that by setting a 14 year timeline to meet the new TMDLs, the state agencies are in violation of the statute, because the new rule effectively requires dredging due to the 14-year constraint, thus violating section 13360(a). Petitioners' conclusions are based on their contention that the other two proposed remedies, in-situ capping [pouring new lake-bed sediment over the old-contaminated lake-bed sediment], and natural attenuation [leaving the lake to clean/neutralize the toxins itself] are infeasible. In-situ capping is not possible due to the shallow depth of the lake (only 2 feet). And natural attenuation would take much longer than 14 years to complete: earliest would be 25 years. Dredging is the only possible choice. In fact, at public hearings, it was commented by decision makers that the preferred choice was dredging. Since

the TMDL effectively requires dredging, it is in violation of 13360(a). (But in *Tahoe-Sierra Preservation Council* (1989) 210 Cal.App.3d 1421, 1438, the Court allowed a waste discharge requirement where there was only one manner of compliance; section 13360 allowed for the party subject to a waste discharge requirement to elect between available strategies in complying with that method.

This argument takes an extremely narrow view of what the new TMDLs seek to do. The new load allocations set a broad goal-specific plan for remediating the polluted lakebed sediment. It does not restrict Petitioners' abilities to comply with the TMDL. Dredging is not mandated by the plan; but if dredging is the most reasonable method, it will vary depending on the need: from an estimated 53,000 cubic yards to 155,000 cubic yards. Only after the actual extent of dredging is determined can the parties analyze the environmental and economic impacts of dredging. This is more suited in a Tier 2 review rather than the present Tier 1 review.

The state agencies did consider air, noise, and traffic impacts of dredging in the SED. (AR, 1683-86, 1714, 1721, and 1545-48.) The state agencies concluded that the numbers of trucks and traffic over a 9-day period of dredging would not create a significant impact on traffic over State Highway 126 and Interstate 5 or 101.

Re: the issue of using Class I landfills instead of Class III landfills, that issue was not raised at the

public hearings. Nevertheless, that issue will be adjudicated when lakebed sediment is officially monitored for PCB and pesticide levels. The state agencies will make that determination in a specific Tier 2 review.

The record reflects that economic factors were discussed and heard in the public hearings. Petitioners' concerns were voiced at the meeting (AR, 1618-1623.) The cost of dredging was estimated to be around \$3 to 11 million, depending on the extent of dredging. Costs would be higher if the soil exhibited higher levels of contamination. There is no legal requirement that a precise cost amount be given; instead, the state agencies made an informed decision. (AR, 1622-23.) Petitioners' own estimate of \$19 million is still within the range and demonstrate the maximum costs of dredging the full \$ 155,000 cubic yard of sediment. Most likely, actual costs will be lower.

The state agencies also demonstrate cooperation to work with Petitioners on the project: defraying costs by obtaining grants to pay for the dredging. (AR, 1508, 1509, 1541.)

The state agencies concluded that the benefits of the new TMDLS for the purpose of cleaning McGrath Lake outweighed any potential environmental impacts from dredging. These overriding considerations included the improved water quality in the region over the long term, and that any adverse environmental impacts from dredging would be limited to the short term and could

be mitigated through design and scheduling. (AR 1743.) And if the state agencies did not implement the TMDLs, the federal government via EPA would. (AR, 1744.)

Petitioners were given 14 years to implement the Basin Plan Amendment. The state agencies deemed this time period reasonable.

There is no violation of Water Code § 13360, because the new TMDLs do not mandate or specify any particular method to remediate McGrath Lake. It identifies possible alternative methods to reduce the influx of pollutants. (AR 1607-09, 164, 44.) It could be a combination of dredging, attenuation, and/or capping. There is flexibility to Petitioners to comply within a 14-year period.

Petitioners are free to devise any reasonable remediation methodology. Further testing and monitoring must still be completed: so it is premature of Petitioners to conclude that the only viable method is substantial dredging of the lake. One peer reviewer even said that contamination levels may be going down. (AR 1268-1269.)

But even if dredging was required, it still does not violate section 13360, because where the circumstances dictate the method of clean-up, there is no section 13360 violation. (See *Pacific Water v. City of Riverside* (1977) 73 Cal.App.3d 546.) The circumstances in this case could change depending on the actual levels of contaminants in the lake bed sediment. And Petitioners are still free to determine

the extent of dredging and how best to accomplish it. Nothing is specifically mandated by the TMDLs.

Note that it would be absurd if the state agencies could not require polluters to remediate polluted areas, no matter how severe the pollution. In this case, the state agencies are doing simply that: requesting polluters to clean up their pollution.

Conclusion

Giving due deference to federal regulations allowing for TMDLs to be expressed in either mass per time or "*other appropriate measures*" (40 CFR 130.2(i)) and the state agencies' right for further interpretations and rulings, the court concludes that the petition for writ of mandate should be denied.

IV. RULING

The petition for writ of mandate is **denied**.

Clerk to give notice.

Dated: May 16, 2013

s/Frederick H. Bysshe
Frederick H. Bysshe
Judge of the Superior
Court

APPENDIX E

In the Court of Appeal of the State of California
Second Appellate District

Division 6

CHARLES J. CONWAY, et al., Appellants,

v.

STATE WATER RESOURCES CONTROL BOARD, et
al., Respondent.

B252688

Ventura County No. 56-2011-399391-CU-WM-VTA

THE COURT:

Petition for rehearing is denied.

APPENDIX F

33 U.S.C. § 1313(d)

§ 1313. Water quality standards and implementation plans

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision.

(1) (A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 301(b)(1)(A) and section 301(b)(1)(B) [33 USCS § 1311(b)(1)(A), (B)] are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 301 [33 USCS § 1311] are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this

subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

- (D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection

and propagation in the identified waters or parts thereof.

- (2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 304(a)(2)(D) [33 USCS § 1314(a)(2)(D)], for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.
- (3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not

identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 304(a)(2) [33 USCS § 1314(a)(2)] as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish and wildlife.

(4) Limitations on revision of certain effluent limitations.

(A) Standard not attained. For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained. For waters identified under paragraph (1)(A) where the quality

of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

APPENDIX G

40 C.F.R. § 130.2

§ 130.2 Definitions

- (a) The Act. The Clean Water Act, as amended, 33 U.S.C. 1251 et seq.
- (b) Indian Tribe. Any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.
- (c) Pollution. The man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.
- (d) Water quality standards (WQS). Provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.
- (e) Load or loading. An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading may be either man-caused (pollutant loading) or natural (natural background loading).

(f) Loading capacity. The greatest amount of loading that a water can receive without violating water quality standards.

(g) Load allocation (LA). The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.

(h) Wasteload allocation (WLA). The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.

(i) Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the

TMDL process provides for nonpoint source control tradeoffs.

(j) Water quality limited segment. Any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.

(k) Water quality management (WQM) plan. A State or areawide waste treatment management plan developed and updated in accordance with the provisions of sections 205(j), 208 and 303 of the Act and this regulation.

(l) Areawide agency. An agency designated under section 208 of the Act, which has responsibilities for WQM planning within a specified area of a State.

(m) Best Management Practice (BMP). Methods, measures or practices selected by an agency to meet its nonpoint source control needs. BMPs include but are not limited to structural and nonstructural controls and operation and maintenance procedures. BMPs can be applied before, during and after pollution-producing activities to reduce or eliminate the introduction of pollutants into receiving waters.

(n) Designated management agency (DMA). An agency identified by a WQM plan and designated by the Governor to implement specific control recommendations.