

Butte County
 Superior Court
 APR 06 2009
 Shari Siskland Clerk
 By S. BEST Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF BUTTE

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TEHAMA MARKET, et al.,)	CASE NO. 141395
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Petitioners,)	
)	
vs.)	RULING ON PETITION
)	FOR WRIT OF MANDATE
CENTRAL VALLEY REGIONAL WATER)	
QUALITY CONTROL BOARD,)	
)	
Respondent.)	
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The petition of TEHAMA MARKET ASSOCIATES, LLC ("Tehama Market" or "Tehama") and ALBERT GARLAND ("Garland") for writ of mandate against the CENTRAL VALLEY REGIONAL WATER QUALITY CONTROL BOARD ("the Board" or "The State") came on for hearing on March 16, 2009. The court heard argument and took the matter under submission for a written ruling.

BACKGROUND

This petition for administrative mandamus under Code of Civ. Proc. §1094.5 was brought to challenge a fine imposed by the

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3 which implemented the waste water discharge requirements for
4 discharges of storm water run-off associated with construction
5 activity. Parties engaged in construction activity which results
6 in discharges of storm water to surface waters must file with the
7 Board a Notice of Intent (NOI) to obtain coverage under the
8 General Permit, and are required to implement best management
9 practices to prevent storm water pollution in accord with a Storm
10 Water Pollution Prevention Plan (SWPPP) which is also filed with
11 the Board. In 2003, Linkside Place LLC filed a SWPPP and an NOI,
12 with Garland's signature as project owner and manager. However
13 when the discharges occurred, Linkside Place was no longer the
14 owner of the property. By that time the parcel was owned by
15 Tehama Market, and there had been no new application for coverage
under the General Permit.

16 PROCEDURAL ISSUE

17 Request for Judicial Notice

18 Petitioners request judicial notice of a decision of the
19 Army Corps of Engineers regarding certain wetlands determinations
20 regarding the area of the Linkside Place parcel. The decision
21 was perhaps tangentially related to disputed issues in the
22 present case in that the Board, in the order challenged herein,
23 made reference to earlier proceedings in the same matter by the
24 Army Corps of Engineers. Nevertheless, the request for judicial
25 notice is denied because the order is not a part of the
26 administrative record herein. In addition, the court does not

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3 Judicial review of proceedings under Water Code §13323 is
4 governed by Code of Civ. Proc. §1094.5. The inquiry is limited
5 to whether the agency proceeded without, or in excess of,
6 jurisdiction, whether there was a fair trial, and whether there
7 was a prejudicial abuse of discretion. Code of Civ. Proc.
8 §1094.5(b). Abuse of discretion is established if the agency
9 failed to proceed in a manner required by law, if the order or
10 decision is unsupported by the findings, or if the findings are
11 unsupported by the evidence.

12 An order issued as a result of a quasi-adjudicatory
13 proceeding must include findings bridging the gap between the
14 evidence and the order. Topanga Assn. v. County of Los Angeles
15 (1974) 11 Cal.3d 506, 515. The findings must expose the method
16 of analysis with findings relevant to the conclusions and sub-
17 conclusion. Topanga. Conclusory statements merely citing or
18 quoting a statute or code section are insufficient. Topanga 11
19 Cal.3d at 517, n.16. If there are no findings, the agency's
20 error is prejudicial and the decision must be vacated and
21 remanded for the agency to make proper findings. Usher v County
22 of Monterey (1998) 65 Cal.App.4th 210, 220. Likewise if the
23 findings are insufficient to allow a fair review of the decision,
24 the defect may be corrected by a writ of mandate under Code of
25 Civ. Proc. §1094.5. Temescal Water Co. v. Department of Public
26 Works, 44 Cal. 2d 90, 102.

 In addition, the agency's decisions must be supported by

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3 Channel. Also, petitioners contend that the Board imposed
4 personal liability upon Albert Garland solely as a result of his
5 capacity as a manager or corporate officer, but lacked any
6 findings of tortious, fraudulent, or criminal conduct or of an
7 alter ego, or any evidence, substantial or otherwise, in support
8 thereof.

9 Discharge into Tributaries

10 Section 301 of the Clean Water Act prohibits the discharge
11 of a pollutant into navigable waters without a permit.
12 Petitioners do not dispute that discharge in the form of
13 sediment-laden stormwater flowed off the construction site, or
14 that the site is a point source, or that they had no permit to
15 discharge pollutants into waters of the United States. Rather,
16 petitioners contend that the Board erred in finding that the run-
17 off entered waters of the United States.

18 Waters of the United States includes tributaries to
19 navigable waters, even without proof that the pollution actually
20 reached what are traditionally considered navigable waters.

21 United States v. Ashland Oil 504 F.2d 1317, 1329 (6th Cir. 1974).

22 Intermittent or ephemeral streams which sometimes flow into
23 navigable waters are themselves waters of the United States
24 Headwaters v. Talent Irrigation District 243 F3d 526, 533-534.

25 Thus, if the ephemeral streams running off of the property were
26 tributary to the Feather River or the Thermalito Afterbay
Powerhouse Tail Channel, the discharges entered waters of the

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3 drainage swale that they walked feeding into Snake Creek (AR
4 Vol.6, p.933). In April 2004, Zaitz photographed the mouth of
5 Snake Creek where it discharges into the tailrace (AR Vol.6,
6 p.933; PP photo 17). Zaitz explained that Snake Creek is a
7 defined channel and that he observed pooled water at the junction
8 of Snake Creek and the tailrace arm at a prior site visit (AR
9 Vol.6, pp.931-932). Zaitz also received confirmation from David
10 Bird, the general manager of the Thermalito Irrigation District,
11 that the Snake Creek drained the pastureland north of the
12 construction (AR Vol.3, pp.331-334). This hearsay evidence
13 served to further confirm his findings, but was not the sole
14 basis for his finding. It is not disputed that the tailrace
15 flows into the Thermalito Afterbay, which is a water of the
16 United States.

17 The Court finds there was also substantial evidence to
18 support the finding that the ephemeral watercourse draining
19 stormwater from the southeastern side of the construction site is
20 water of the United States. Zaitz testified that he observed and
21 photographed sediment laden stormwater running off the
22 construction site to the south during his February 18 and 25 site
23 inspections (AR Vol.4, pp.611-613; Vol.6, pp.883-893).
24 Specifically, he observed the stormwater enter an ephemeral
25 drainage between the construction site and the NEXRAD road (AR
26 Vol.4, p.611). Zaitz observed the water flow through a culvert
under the NEXRAD road and continue south along the road (AR

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3 creeks that drain all of the Thermalito area and that the
4 drainage moved into the defunct Western Canal and into the
5 Feather River (AR Vol.6, pp.953-54, 964, 996). He also testified
6 that he reviewed maps that showed culverts or drainages across
7 the levee system in the Wildlife Area (AR Vol.6, p.957). Pedri
8 marked a drainage point on the USGS map with a red "D" (AR Vol.6,
9 pp.957-58). He also testified that it was his opinion as a
10 professional engineer and experienced surveyor that because of
11 the large area of Thermalito that drains into the Wildlife Area,
12 the water would have to have a way out to the Feather River or it
13 would flood much more than what is represented on the USGS map
14 (AR Vol..2, p.115), and there would have been much more water in
15 the Wildlife Area than the amount that he observed on the day of
16 their inspection (AR Vol.6, pp.962; 967-70, 1006). Also, because
17 the Wildlife Area is a wetland adjacent to and connected with a
18 navigable river, is itself a water of the United States. See
19 Rapanos v. United States, 547 US. 715, 782 (2006) [Kennedy, J.,
20 concurring].

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22 The Court finds, based on the foregoing, that there was
23 sufficient evidence to support Findings #2, #21(b) and #25A of
24 the Board decision, specifically, that run-off from the
25 construction site entered waters of the United States.

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Amount of penalty

Under Water Code 13385(a), the mandatory minimum liability
for violating the permit requirement is the economic benefit, if

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3 cost of planting vegetation to prevent run-off would have been
4 higher than average, at about \$4000 per acre. The Board also
5 argues that the minimum fine is not directly relevant because the
6 fine imposed was substantially above the minimum. The Court does
7 find there is substantial evidence in the record to support the
8 minimum fine as set out by the Board, and that this is relevant
9 because it sets the lower limit of the range for the lawful
10 penalty.

11 Petitioners argue that the Board would have to determine how
12 much water drained in each of the two different directions,
13 because one of them may have been a water of the United States,
14 and the other, not. The court has found substantial evidence
15 that the discharge flowed into waters of the United States two
16 different ways, north to the Afterbay, and south/southeast to the
17 Feather River. It is not necessary that the Board determine the
18 proportional amounts that flowed in each direction.

19 Petitioners argue that the Board did not have any real
20 evidence of petitioners' ability to pay. However, the general
21 principle is that the discharger bears the burden of proving that
22 its conduct warrants less than the maximum liability. State v.
23 City of SF (1979) 94 Cal.App.3d 522, 530. Here, the dischargers
24 submitted no evidence as to their ability or inability to pay.
25 Therefore, the Board was justified in finding, based on the size
26 and scope of the construction project, that the petitioners had
the ability to pay a fine of this size.

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3 failed to prevent the violation. See United States v.
4 Northeastern Pharm. & Chem. Co., 810 F.2d 726, 745 (1986); Liquid
5 Chemical Corp. Dept. of Health Services (1991) 227 Cal.App.3d
6 1682, 1705-1707. The responsible corporate officer doctrine
7 applies not only in cases of fraud, criminal conduct or where
8 there is evidence of alter ego, but in cases of civil liability
9 as well. U.S. v. Hodges X-Ray (6th Cir. 1985) 759 F.2d 557, 561;
10 Liquid Chemical Corp v. DHS (1991) 227 Cal.App.3d 1682, 1705-
11 1707.

12 In Franklin v. Birmingham Hide & Tallow Co., 1999 U.S. Dist.
13 LEXIS 22489, 45, the court upheld a cause of action for civil
14 liability against an officer based on allegations that, "as the
15 president and CEO ..., [he] was and is responsible for its day-
16 to-day operations and had ultimate authority to determine
17 production levels ... and what steps were to be taken to comply
18 with its NPDES permit. The complaint further asserts that his
19 decisions directly facilitated the alleged violations because he
20 allowed production levels to exceed the capacity of BH&T's
21 wastewater treatment system." Compliance with the CWA is a
22 matter of strict liability, in the sense that a defendant's
23 intentions or good faith efforts to comply do not excuse a
24 violation. Ability to control the facility, coupled with
25 knowledge of the violation, is sufficient to impose personal
26 liability under the CWA. Dept. of Ecology v. Lundgren (Wash.
1999) 971 P.2d 948, 952-953. It is sufficient if the officer

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3 counter this evidence.

4 The court finds that the findings and the evidence are
5 sufficient to support the Board's determination of personal
6 liability on the part of Mr. Garland.

7 Second Cause of Action - Statute of Limitations

8 Petitioners contend that the decision of the Board must be
9 reversed because the Board failed to comply with the three year
10 statute of limitations at Code of Civ. Proc. §338(i).

11 Under Code of Civ. Proc. §338(i), the statute of limitations
12 for any action commenced under the Porter-Cologne Water Quality
13 Control Act (Water Code 13000 et seq.), is 3 years following the
14 discovery by the Regional Board of the facts constituting grounds
15 for the action. Staff inspected the project on February 8 and
16 25, 2004, but did not issue the operative complaint, ACLC T5-
2007-0500, until April 20, 2007.

17 The Court finds that the 3 year statute of limitations of
18 Code of Civ. Proc. §338(i) is inapplicable; it applies only to
19 lawsuits, not to administrative proceedings. City of Oakland v.
20 PERS (2002) 95 Cal.App.4th 29, 48.

21 Petitioners also argue that, under Water Code §13323, an
22 administrative civil liability complaint issued for enforcing
23 Porter-Cologne must be heard within 90 days of notice. In this
24 case, the Regional Board issued four different complaints for the
25 same conduct, rescinding the first three. Petitioners argue that
26 the Board lacked the statutory authority for such an action. In

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3 assert a laches defense: (1) delay in asserting a right or a
4 claim; (2) the delay was not reasonable or excusable; and (3)
5 prejudice to the party against whom laches is asserted. Maqic
6 Kitchen v. Good Things (2007) 153 Cal.App.4th 1114, 1165-1166.
7 Unclean hands can defeat a claim of laches. Maqic Kitchen v.
8 Good Things, 153 Cal.App.4th at 1165-1166.

9 In the present case, the Board found that laches was not
10 available as a defense because of unclean hands and/or estoppel,
11 and therefore did not fully consider the laches defense. Finding
12 #28 is that "discharger, though its counsel, was responsible for
13 a substantial portion of the delay, by requesting extensions of
14 time and taking inconsistent positions regarding the central
15 issue of permit coverage." The Board contends that Garland
16 failed to file a notice of termination of permit coverage when
17 the property was sold to Tehama Market, as required by the
18 General Permit, failed to obtain new permit coverage, and
19 represented himself to staff during the relevant time period as
20 an agent for Linkside Place LLP. The Board claims it did not
21 discover petitioner's identity for 18 months after the violations
22 occurred, and then only through a third party. Fact #10 is that
23 "the property had changed ownership several times since obtaining
24 coverage under the General Permit", and that "extensive research
25 by staff ... determined that Linkside Place, LLC was not a
26 discharger", but that "Tehama Market, LLC was the discharger".

The court finds that there is insufficient evidence to

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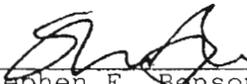
Therefore, with respect to laches and unclean hands, the court finds that Findings #10 and #28 of the Board Decision are not supported by the evidence, and that these findings do not support the decision of the Board.

Conclusion

The petition for peremptory writ of mandate is granted. The Court finds that there was insufficient evidence to support findings #10 and #28, in which the Board found that, based on unclean hands and/or estoppel, laches was not available as a defense to the complaint.

The matter is remanded to the Board to vacate its decision, and for further proceedings consistent with this decision.

April 6, 2009
Date



Stephen E. Benson
Superior Court Judge