

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COUNTY OF LOS ANGELES et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA STATE WATER
RESOURCES CONTROL BOARD et al.,

Defendants and Respondents.

B184034

(Los Angeles County
Super. Ct. No. BS080792)

ORDER MODIFYING OPINION

[CHANGE IN JUDGMENT]

The published portion of the opinion filed on October 5, 2006 is modified as follows.

1. On page 1, delete:

“Affirmed in part; reversed in part with directions.”

In its place, insert:

“Affirmed.”

2. After the first paragraph of page 2, insert the following sentence:

“We affirm the judgment in its entirety.”

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of part IV (G)-(L).

3. Delete in its entirety the second paragraph on page 2 beginning with “We agree with plaintiffs”

4. Delete: the second paragraph on page 21, beginning with “We agree that Water Code”; all of page 22 including the footnote; and all of pages 23 through 25. In its place, insert:

“Chapter 3 of the California Environmental Quality Act was originally adopted in 1970. (Stats. 1970, ch. 1433, § 1, pp. 2781-2782.) The original chapter 3 of the California Environmental Quality Act required all state agencies, boards, and commissions, that proposed a project which would have a significant effect on the environment to prepare a “detailed statement” setting forth the environmental effect of the contemplated undertaking.¹ (See *Russian Hill Improvement Assn. v. Board of Permit Appeals* (1974) 44 Cal.App.3d 158, 166; *City of Orange v. Valenti* (1974) 37 Cal.App.3d 240, 246.) Water Code section 13389 was adopted as urgency legislation to comply with certain provisions of the Clean Water Act provisions establishing the National Pollution Discharge Elimination System. (Stats. 1972, ch. 1256, § 3, p. 2490.) Expressly for that purpose, the California Legislature enacted chapter 5.5, the “Water Quality” division, which includes Water Code section 13389. (Wat. Code, § 13370²; *City of Brentwood v.*

¹ Public Resources Code section 21100 as enacted in 1970 stated: “All state agencies, boards, and commissions shall include in any report on any project they propose to carry out which could have a significant effect on the environment of the state, a detailed statement by the responsible state official setting forth the following: [¶] (a) The environmental impact of the proposed action. [¶] (b) Any adverse environmental effects which cannot be avoided if the proposal is implemented. [¶] (c) Mitigation measures proposed to minimize the impact. [¶] (d) Alternatives to the proposed action. [¶] (e) The relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity. [¶] (f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented.” (Stats. 1970, ch. 1433, § 1, pp. 2781-2782.)

² Water Code section 13370 states: “The Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 et seq.), as amended, provides for permit systems to regulate the

Central Valley Regional Water Quality Control Bd. (2004) 123 Cal.App.4th 714, 723; *Sierra Club v. Union Oil Co. of California* (9th Cir.1987) 813 F.2d 1480, 1483.) When Water Code section 13389 became effective on December 19, 1972, chapter 2.6 of the California Environmental Quality Act had just been enacted, also as urgency legislation, and it consisted of Public Resources Code sections 21080 through 21090. The new chapter 2.6 of the California Environmental Quality Act became effective on December 5, 1972. (Stats. 1972, ch. 1154, § 19, p. 2280.) Chapter 3 of the California Environmental Quality Act was also amended effective December 5, 1972, and it which applied to all environmental assessments by state agencies, boards, and commissions. Former Public Resource Code section 21100, the core provision of the 1972 version of the California Environmental Quality Act as it related to state agencies, boards, and commissions, stated: “All state agencies, boards, and commissions shall prepare, or cause to be prepared . . . and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment.” (Stats. 1972, ch. 1154, § 2.5, p. 2274; see *Desert Environment Conservation Assn. v. Public Utilities Com.* (1973) 8 Cal.3d 739, 742; *San Francisco Ecology Center v. City and County of San Francisco* (1975) 48 Cal.App.3d 584, 594, fn. 8.) Beyond question, the Legislature intended that chapter 3 of the California

discharge of pollutants and dredged or fill material to the navigable waters of the United States and to regulate the use and disposal of sewage sludge. [¶] (b) The Federal Water Pollution Control Act, as amended, provides that permits may be issued by states which are authorized to implement the provisions of that act. [¶] (c) It is in the interest of the people of the state, in order to avoid direct regulation by the federal government of persons already subject to regulation under state law pursuant to this division, to enact this chapter in order to authorize the state to implement the provisions of the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto, and federal regulations and guidelines issued pursuant thereto, provided, that the state board shall request federal funding under the Federal Water Pollution Control Act for the purpose of carrying out its responsibilities under this program.”

Environmental Quality Act not apply to National Pollution Discharge Elimination System permits—in that respect Water Code section 13389 is entirely clear.

But on December 19, 1972, when Water Code section 13389 was enacted, chapter 2.6 of the California Environmental Quality Act, which contains generalized requirements for the preparation of environmental impact reports for discretionary projects, had just been adopted effective December 5, 1972. Chapter 2.6 of the California Environmental Quality Act applies to discretionary projects proposed by public agencies. (Former Pub. Resources Code, § 21080.) Pursuant to new chapter 2.6 of the California Environmental Quality Act, all public agencies were required to adopt by ordinance, resolution, or the like procedures for preparation of environmental impact reports. (Former Pub. Resources Code, § 21082.) The Office of Planning and Research was directed to adopt proposed guidelines for the preparation of environmental impact reports including a listing of projects determined not to have a significant impact on the environment. (Former Pub. Resources Code, §§ 21083-21088.) Finally, chapter 2.6, as adopted in 1972, allowed a public agency to charge fees for the preparation an environmental impact report and defined public and private developments pursuant to a redevelopment plan as a single project. (Former Pub. Resources Code, §§ 21089-21090.)

It can be argued that even though chapter 3 with its environmental impact preparation requirement for state agencies, boards, and commissions was not to apply to National Pollution Discharge Elimination System permits, the discretionary projects requirements in chapter 2.6 of the California Environmental Quality Act mandated environmental review. Hence, the argument would be that the Legislature in enacting Water Code section 13389 did not intend to obviate the duty pursuant to chapter 2.6 of the California Environmental Quality Act to prepare an environmental impact report. We are unpersuaded by this analysis. Former Public Resources Code section 20180, subdivision (a), the core provision relating to discretionary projects, stated: “(a) Except as otherwise provided in this division, this division shall apply to discretionary projects proposed to be carried out or approved by public agencies including, but not limited to,

the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits and the approval of tentative subdivision maps (except where such a project is exempt from the preparation of an environmental impact report pursuant to Section 21166).” (Stats. 1972, ch. 1154, § 2.3, p. 2272; see *People v. County of Kern* (1974) 39 Cal.App.3d 830, 839; *Friends of Lake Arrowhead v. Board of Supervisors* (1974) 38 Cal.App.3d 497, 510.) As can be noted, Public Resources Code section 21080, subdivision (a) established that a discretionary project was subject to the environmental impact requirement. But the requirement that a state agency, board, and commission prepare an environmental report was found in Public Resources Code section 21110 which was, and is now, located in chapter 3 of the California Environmental Quality Act. The obligation imposed on a state agency, board, and commission to prepare an environmental impact report existed in chapter 3 before the adoption of Water Code section 13389 and it remained there after the 1972 amendments to the California Environmental Quality Act. No doubt, since 1972 when the Legislature adopted Water Code section 13389 and the then new chapter 2.6, the California Environmental Quality Act has been repeatedly amended. But defendants cite no evidence the Legislature ever intended to: impose a duty on regional boards to prepare environmental impact reports; require regional boards to engage in any other form of environmental review specified in the California Environmental Quality Act; or to otherwise modify Water Code section 13389.

Defendants rely on the analysis of our colleague Presiding Justice Judith D. McConnell of Division One of the Fourth Appellate District in *City of Arcadia v. State Water Resources Control Bd.*, *supra*, 135 Cal.App.4th at pages 1420-1430 that regional board basin plans are subject to limited California Environmental Quality Act review. The *City of Arcadia* decision does not involve the issuance of a National Pollution Discharge Elimination System permit. Rather, it involves the development of a basin plan. (*Ibid.*) We agree with the Attorney General that a basin plan is subject to limited environmental review pursuant to Public Resources Code section 21080.5. Public

Resources Code section 21080.5, subdivision (a) vests the Secretary of the Resources Agency with the authority to require limited environmental review: “(a) Except as provided in Section 21158.1, when the regulatory program of a state agency requires a plan or other written documentation containing environmental information and complying with paragraph (3) of subdivision (d) to be submitted in support of an activity listed in subdivision (b), the plan or other written documentation may be submitted in lieu of the environmental impact report required by this division if the Secretary of the Resources Agency has certified the regulatory program pursuant to this section.” The secretary’s authority extends to requiring limited environmental review when an agency adopts “standards, rules, regulations, or plans for use” in a regulatory program. (Pub. Resources Code, § 21080.5, subd. (b)(2).) The secretary has certified the regional boards’ basin plan program as requiring limited environmental review. (*City of Arcadia v. State Water Resources Control Bd.*, *supra*, 135 Cal.App.4th at p. 1422; Cal. Code Regs. tit.14, § 15251, subd. (g).³) The resources secretary has never identified the National Pollution Discharge Elimination System permit system as a Public Resources Code section 21080.5 certified program. Thus, *City of Arcadia* does not require California Environmental Quality Act review prior to the issuance of a National Pollution Discharge Elimination System permit.

[The portions of the opinion that follow, parts IV (G)-(L) are deleted from publication.

See *post* at part V, where publication is to resume.]”

³ California Code of Regulations, title 14, section 15251, subdivision (g) states: “The following programs of state regulatory agencies have been certified by the Secretary for Resources as meeting the requirements of Section 21080.5: [¶] . . . (g)

5. On page 46, delete the first four sentences under DISPOSITION. In their place, insert:

“The judgment is affirmed. “

The unpublished portion of the opinion filed October 5, 2006, is modified as follows:

1. On page 29, line 3, delete: “is permitted” and insert in its place “may not”
2. On page 29, line 5, delete: “136” and insert in its place “135”

Renumber all subsequent footnotes affected by the insertion of the new footnotes.

TURNER, P. J.

ARMSTRONG, J.

KRIEGLER, J.

The Water Quality Control (Basin)/208 Planning Program of the State Water Resources Control Board and the Regional Water Quality Control Boards.”