

March 15, 2001

REPORT TO THE HONORABLE MAYOR
AND CITY COUNCIL

CITY OF SAN DIEGO V. BROWNER (WHITMAN)
NINTH CIRCUIT APPEAL NO. 00-56561

BACKGROUND

As you may remember, the City of San Diego pursued a declaratory relief action in the U.S. District Court to clarify what standards are to be imposed on the City's reapplication of its 301(h) waiver of secondary treatment standards under the Ocean Pollution Reduction Act of 1994 [OPRA]. Such a clarification was necessary because the U.S. Environmental Protection Agency in a February 17, 2000, letter to then-Mayor Golding asserted that the threshold requirements of OPRA applied to all reapplications, and the City asserted that its reapplication should be evaluated under the standard 301(h) regulations, just like all other applicant cities.

On June 19, 2000, the Honorable Rudi M. Brewster granted the City's request for a preliminary injunction and stayed any waiver reapplication until a trial on the merits could be had. The EPA appealed Judge Brewster's ruling, contending that he lacked subject matter jurisdiction over the matter. After briefing, oral arguments were heard in the Ninth Circuit Court of Appeals on February 8, 2001.

NINTH CIRCUIT RULING

The Ninth Circuit has reversed Judge Brewster's injunction, holding that the EPA letter of February 17, 2000, stating the EPA's views on continuing application of OPRA, did not constitute "final agency action." The essence of the court's holding reads:

The EPA's letter does not satisfy the first of the *Bennett v. Spear* requirements for final agency action — that the action mark the "consummation" of the agency's decisionmaking process." *Id.* The EPA's decision-making process on the City's application for renewal of its section 301(h) modified permit will not even begin until the City files its application. If and when the City is aggrieved by the EPA's decision regarding its application, the City's recourse is to appeal to the Environmental Appeals Board ("EAB"), as a prerequisite to review by this court. *See* 33 U.S.C. 1369(b)(1); 40 C.F.R. 124.19(e) ("A petition to the Environmental Appeals Board under paragraph (a) of this section is, under 5 U.S.C. 704, a prerequisite to the seeking of

judicial review of the final agency action.”)

It is the EAB's decision that will constitute the “consummation of the agency's decision-making process.”

Slip Opinion at page 2 (full opinion attached)

As is evident from the above, the court's ruling is based solely on the February 17, 2000, letter not rising to the level of “finality” to support jurisdiction. No ruling or implication was made on the issue of the proper application of the elements of OPRA. Further, the court was sensitive to the time needed to file a 301(h) renewal application and stayed issuance of its remand for thirty days. Slip Opinion at page 4.

Further consequences of the opinion and the decisions needed to submit the City's 301(h) renewal application will be discussed with you in closed session in the near future.

Respectfully submitted,

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City Attorney

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Attachment
RC-2001-10