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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of the)
Department of Fish and Game for)
Review of Action of the California)
Regional Water Quality Control)
Board, Central Valley Region,)
Regarding Discharge of Wastewater)
by Pacific Mine to the North Fork)
of the Middle Fork of the American)
River. Our File No. A-237.)

Order No. WQ 80-1
ORDER NUNC PRO TUNC

BY THE BOARD:

This Board adopted Order No. WQ 80-1 in the above matter on January 24, 1980. It now appears that a clerical error was made in retyping Order No. WQ 80-1.

The draft order which was presented to the Board on January 24, 1980, provided, on lines 24 through 26 of page 5, as follows:

"Subsequent to this letter, Guntert discharged gravel and sand varying in amounts from approximately 123 to 2,004 cubic yards per day to the river on February 13, March 6 through March 12 and March 15." (emphasis added)

This draft order was retyped in final form, after adoption by this Board, and was sent to the petitioner, the discharger, and other interested parties. The final order, as retyped, provided, as follows; on page 6, lines 3 through 6:

"Subsequent to this letter, Guntert discharged gravel and sand varying in amounts from approximately 123 to 2,004 cubic yards per day to the river on February 13, March 6 and March 15." (emphasis added)

The record reflects an obvious clerical omission in that the words "through March 12" were omitted during the retyping of Order No. WQ 80-1.


This Board, on its own motion, hereby corrects lines 5 and 6, page 6, of Order No. WQ 80-1, to read as follows:

"cubic yards per day to the river on February 13, March 6 through March 12 and March 15."

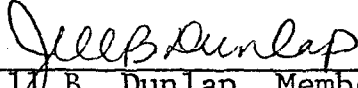
This Order Nunc Pro Tunc shall become a part of Order No. WQ 80-1, adopted by this Board on January 24, 1980, and shall be attached to that Order.


Dated: June 5, 1980


Carla M. Bard, Chairwoman


William J. Miller, Vice-Chairman


L. L. Mitchell, Member


Jill B. Dunlap, Member


F. K. Aljibury, Member

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Order No. WQ 80-1

BY THE BOARD:

On April 27, 1979, the California Regional Water Quality Control Board, Central Valley Region, (Regional Board) held a public hearing to determine whether civil and criminal monetary remedies should be sought from Guntert and Zimmerman, Construction Division, Inc., (Guntert) owners and operators of the Pacific Mine, also known as the Pacific Slab Mine, for the discharge of wastewater in violation of waste discharge requirements to the North Fork of the Middle Fork of the American River. The alleged violations occurred on nine days in February and March, 1979. At the conclusion of the hearing, the Regional Board adopted Cease and Desist Order No. 79-109 but declined to refer the matter to the Attorney General and to the District Attorney, respectively, for civil and criminal monetary remedies.^{1/}

On May 25, 1979, the State Board received a petition by the California Department of Fish and Game (Department) for review of the failure of the Regional Board to adopt a referral order.

1. See Water Code Sections 13385 and 13387.

On October 23, 1979, the Department was allowed to supplement its petition with a report entitled, "Further Studies of the Effects of the Pacific Slab Mine Discharge on Aquatic Life in the North Fork of the Middle Fork, American River, Placer County". Guntert was given an opportunity to comment on this report and did file a response dated November 20, 1979.

I. BACKGROUND

The Pacific Mine, located in Placer County, is the last remaining hydraulic gold mine in operation in California. It has been operated on an intermittent basis since the 1950's, and operation has been limited to the winter months when stream flows are normally high.

As the mine is presently operated, water which is diverted from Grouse Creek is discharged from a hydraulic monitor at a maximum rate of 12,000 gallons per minute into gravels from an ancient stream channel. This mixture flows through two sluice boxes, where the gold settles out, and then cascades down a steep canyon wall, entering the North Fork of the Middle Fork of the American River at an elevation of 1,500 feet below the source. The mine wastewater is laden with gravel, silt and fines.

Waste discharge requirements were first adopted for Pacific Mine in 1959. These requirements were superseded by requirements adopted by the Regional Board on November 11, 1974, in Order No. 74-508, NPDES CA0079570. The 1974 requirements prohibit the discharge of mine wash waters or mine wastes from April through December 1 and limit the average daily discharge

to 23 million gallons. Additionally, Order No. 74-508 provides, in part, as follows:

"C. Receiving Water Limitations:

* * *

3. The discharge shall not cause concentrations of any materials in the receiving waters which are deleterious to human, animal, aquatic, or plant life.
4. The discharge shall not cause esthetically undesirable discoloration of the receiving waters.

* * *

6. The discharge shall not cause bottom deposits in the receiving waters.
7. The discharge shall not cause floating or suspended materials in the receiving waters."

The record indicates that prior to the adoption of Order No. 74-508 on July 18, 1974, representatives of the Environmental Protection Agency, the Regional Board, and the Department conducted a field investigation of the receiving waters. They found that spawning gravels in the stream were abundant, well graded, and of the size utilized by resident trout. Aquatic insects within the gravels were also found to be abundant. Regional Board staff, therefore, concluded that the seasonal mining operation had not adversely impacted the stream. It was felt, however, that operation of the mine during the recreation season, or during any period of low stream flow, could have a devastating effect on fish and aquatic life. Accordingly, Order No. 74-508 limited the discharge to that portion of the year

during which past experience had demonstrated the stream and its beneficial uses would not be adversely affected.

Subsequent to adoption of Order No. 74-508, several conditions appear to have changed. Whereas from 1953 to 1969 the total quantity of wastes discharged to the river was 25,000 cubic yards, in 1978 the amount discharged was 19,000 cubic yards. In 1979 10,000 cubic yards were discharged. In 1978 the mine was in operation for 40 days, while in 1979 it was in operation for only approximately 17 days.

During the drought years from 1975 to 1977, the mine did not operate at all except for a short period of time in late 1975. In January 1976 the Department conducted an inspection of the North Fork of the Middle Fork of the American River below the point of discharge and determined that the activities in 1975 had adversely affected the biotic community in the river. Guntert was subsequently cited for violation of Fish and Game Code §5650(f).^{2/} The company pled no contest to the charges and was fined \$250.

In 1978 Regional Board staff received a complaint from a Fish and Game Warden in March regarding sedimentation in the

2. This section provides as follows:

"It is unlawful to deposit in, permit to pass into, or place where it can pass into the waters of this State any of the following:

* * *

(f) Any substance or material deleterious to fish, plant life, or bird life."

North Fork of the Middle Fork of the American River caused by the Pacific Mine discharge. Staff responded to the complaint with a telephone call to Guntert, but no further action was taken.

On January 19, 1979, in response to another complaint from the Fish and Game Warden, staff and Department personnel made an aerial surveillance flight over the point of discharge and observed excessive turbidity, as well as sedimentation, in the receiving waters. On the same date the discharger was contacted and informed of the apparent violations of waste discharge requirements. Guntert agreed to check into the problem and to come into compliance with requirements.

On January 31, 1979, Regional Board and Department staff met with representatives of Guntert to discuss concerns regarding the impact of the Pacific Mine discharge on the North Fork of the Middle Fork of the American River. These concerns included excessive turbidity, siltation, and sedimentation in the river. The discharger was informed that staff was considering possible enforcement action. Guntert agreed not to operate under current conditions or at least not until stream flows were high and turbid enough that the mine discharge would not detrimentally affect the river.

By a letter to Guntert dated February 9, 1979, Regional Board staff confirmed the results of the January 31 meeting and indicated that staff was concerned with past and threatened violations of Receiving Water Limitations C.3, C.4, C.6 and C.7 of Order No. 74-508. The letter requested that Guntert submit a

report by February 23, 1979, describing how the mine could be operated so as to not cause a violation of requirements.

Subsequent to this letter, Guntert discharged gravel and sand varying in amounts from approximately 123 to 2,004 cubic yards per day to the river on February 13, March 6, and March 15.^{3/}

*How March 13
See Mine
P10 4.12*

On March 12 the Fish and Game Warden again informed Regional Board staff that the Pacific Mine discharge had caused excessive turbidity in the receiving waters on March 9, 10 and 11. Staff also received a telephone call on March 12 from State Department of Parks and Recreation personnel in Auburn informing staff that numerous complaints had been received from visitors to the Auburn recreation area during the previous weekend regarding muddy conditions in the Middle Fork of the American River downstream from the mine discharge.

On March 13 a cleanup and abatement order was issued by the Regional Board Executive Officer directing Guntert to immediately implement corrective action to ensure compliance with Receiving Water Limitations C.3, C.4, C.6 and C.7 of Order No. 74-508 and to submit a mine operation procedural plan by March 27, 1979. Neither this plan nor the report requested by the Regional Board in the February 9 letter to Guntert were submitted.

3. This compares with approximately 185 cubic yards of sand and gravel discharged each day on January 16, 17 and 18. These discharges led to the complaint by the Fish and Game Warden and the aerial surveillance by Regional Board and Department on January 19.

By a letter dated March 15 to Regional Board staff, the discharger responded to the Regional Board's letter of February 9. Guntert indicated that the discharger knew of no detrimental effect on receiving waters caused by the Pacific Mine discharge, that the mine wastes did not have a deleterious impact on aquatic life, and that the stream serves as a conduit for conveyance of mine wastes to the designated downstream storage area.

On March 18, 1979, Department personnel investigated conditions in the North Fork of the Middle Fork of the American River above and below the Pacific Mine discharge point. The Department study concluded that severe habitat destruction had occurred below the discharge point. Gravel, sand and silt had filled shore areas and pools, thereby reducing habitat suitable for maintaining trout and aquatic insect populations. A comparison of benthos samples taken above and below the discharge point revealed, for example, that the volume of aquatic insects below the discharge was 90 percent less than the volume upstream, indicating a reduction in fish food organisms. The study concluded that it would take many years to restore the stream habitat, provided several large flood flows occur.

At the April 27 Regional Board meeting, the Board found that Guntert had violated Receiving Water Limitations C.3, C.4, C.6 and C.7 of Order No. 74-508; and Cease and Desist Order No. 79-109 directing compliance forthwith with those limitations was issued. Under the terms of Order No. 74-508, however,

Guntert was prohibited from mining after March 31; and Guntert had, apparently, already ceased operating for the 1978-79 season on March 15. In addition, Order No. 74-508 expired on October 1, 1979, prior to the start of the next mining season. Therefore, Guntert has no current permit which would authorize a discharge.

In the later summer of 1979, the Department conducted further studies of benthos fish and stream channel conditions in the North Fork of the Middle Fork of the American River. The study indicated that the 1979 spring runoff had not caused significant restoration of pool habitat. Thick gravel and sand deposits in pools and riffle areas remained downstream from the discharge point. Samples taken above and below the Pacific Mine discharge showed a minimum of 75 percent reduction from control levels in resident trout populations below the discharge. Reductions from control levels in aquatic insect populations downstream from the discharge ranged from 76 percent immediately below the discharge to 24 percent eight miles below the discharge.

II. CONTENTIONS

The Department contends that the Regional Board abused its discretion in failing to seek civil and criminal monetary remedies in this matter. The Department argues that civil monetary remedies are necessary in order to adequately compensate the State for the documented damage to the aquatic resources of the North Fork. Further, the Department contends that Guntert repeatedly and intentionally or negligently violated Order No. 74-508 and that criminal penalties are appropriate.

III. FINDINGS

A. Violation of Order No. 74-508

We find that there is sufficient uncontroverted evidence in the record to indicate that Guntert discharged waste in violation of Receiving Water Limitations C.3 and C.6 of Order No. 74-508 in February and March of 1979. Testimony by Department personnel at the April 27 Regional Board meeting, in addition to the report prepared by the Department regarding the March 18 investigation of the North Fork,^{4/} indicates that the Pacific Mine discharge caused both bottom deposits and concentrations of materials in the receiving waters which deleteriously affected aquatic life.^{5/}

Guntert contends that no violation of Order No. 74-508 occurred because the order permitted a daily effluent discharge of up to 23 million gallons, and the maximum discharge by Guntert during February and March was never more than 3.9 million gallons.

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4. The report is entitled, "Effects of the Pacific Slab Mine Discharge upon Aquatic Life in the North Fork of the Middle Fork, American River, Placer County", by Harry Rectenwald, Assistant Water Quality Biologist.
 5. Only hearsay evidence was introduced regarding alleged violations by Guntert of Receiving Water Limitations C.4 and C.7 of Order No. 74-508. This evidence is insufficient, in itself, to support a finding of violation.

We note that Cease and Desist Order No. 79-109 includes a finding that Guntert violated Receiving Water Limitations C.4 and C.7, in addition to C.3 and C.6. We do not find it necessary to direct the Regional Board to modify Order No. 79-109, however, because it mandated compliance with Order No. 74-508, which has expired; and we assume that Order No. 79-109 will, therefore, be rescinded.

In addition, Guntert maintains that the spring run-offs have always scoured the river of mine wastes.

These contentions must be rejected. Order No. 74-508 prohibited the discharge of more than 23 million gallons daily of effluent from Pacific Mine. This was solely an upper limit. Under Order No. 74-508, any wastes discharged from Pacific Mine had to comply with the terms of the order, including Receiving Water Limitations C.3 and C.6. Guntert's second contention -- that the spring run-offs always scour the river of all mine wastes -- is disproved by the Department's study conducted in the summer of 1979.

B. Willful or Negligent Violation

We also conclude that the record supports a finding that Guntert either willfully or negligently violated the terms of Order No. 74-508.^{6/} With respect to the former, the record indicates that Guntert was informed by Regional Board staff, at both the January 31 meeting and in the letter dated February 9, of staff's concerns regarding past and threatened violations of the terms of Order No. 74-508. The discharger's response, in Guntert's letter dated March 15, was essentially that the company

6. It should be noted that Water Code §13385, which provides for civil monetary remedies, imposes strict liability for the violation of waste discharge requirements. No finding of willful or negligent conduct is required under this section. The imposition of criminal penalties, however, under Water Code §13387 does require such a finding. However, a discussion of these issues is considered appropriate since it bears on the question of whether we should exercise our discretion to direct a referral of the matter to the Attorney General.

disagreed with the Regional Board. Guntert continued to conduct the mining operations in February and March and to discharge even greater amounts of sand and gravel than in January into the North Fork, without making any significant changes in the operation. Further, Guntert failed to submit the procedural plans requested by the Regional Board, describing how the mine could be operated so as not to violate requirements. We find that this evidence is sufficient to support a finding of a willful violation by Guntert of Order No. 74-508.

The record also indicates that Guntert, at the very least, negligently violated the terms of Order No. 74-508. Company representatives testified at the April 27 hearing that, as a result of the January 31 meeting, the foreman at Pacific Mine was advised to cut back operations until he could be assured that river flows were high enough to flush the mine tailings downstream. The foreman, accordingly, modified operations based upon his judgment of whether river flows were sufficiently high. This determination was made by looking with binoculars down into the canyon at the North Fork, approximately 1,500 to 1,800 feet below the mine. This was the only modification made by Guntert in its operations.

We are of the opinion that Guntert, in failing to take any additional precautions, did not exercise reasonable or ordinary care under the circumstances. In light of the fact that the Regional Board had expressed serious concerns regarding the effects of the mine discharge on the North Fork, the company's

reliance solely on the foreman's observations, an inexact method for determining compliance at best, appears to be negligent. At the least, Guntert could have made direct visual observations of the river to determine whether there were bottom deposits on the stream. The company could also have obtained the services of a biologist, as suggested by the Regional Board, to determine whether and to what extent modifications in the mining operations were necessary.

C. Referral

After reviewing the evidence in the record, including the hearing transcript, we have found that Guntert willfully or negligently violated Receiving Water Limitations C.3 and C.6 of Order No. 74-508 during February and March of 1979. Evidence in the record indicates that damage to the aquatic resources of the North Fork of the Middle Fork of the American River has occurred, and, further, that it could be years before the river cleanses itself of the mine wastes. We, therefore, find that the failure of the Regional Board to refer this matter to the Attorney General, at the least, for civil monetary remedies was inappropriate and improper. On the other hand, our review of the record does not cause us to reverse the Regional Board's lack of referral under Water Code §13387.

We do agree with Guntert's contention that statements contained in the submittal relating to the propriety of any new permit are not properly before use. We have not considered such statement.

IV. CONSIDERATION OF THE LATEST DEPARTMENT STUDY

By letter dated November 20, 1978, Guntert submits that the Department study conducted after the adoption of Cease and Desist Order No. 79-109 should not be considered. We disagree.

Guntert argues that the study is irrelevant to the issue it feels is now before the State Board -- whether sufficient evidence was before the Regional Board to warrant referral to the Attorney General. Such a portrayal of the issue would unduly limit the State Board's scope of review in such matters. Water Code §13320 clearly indicates that we are to exercise an independent review of Regional Board actions and that we can consider any relevant evidence necessary to effectuate and implement the policies of the State's water quality laws. We have concluded that consideration of the Department's October 1979 submittal is appropriate.

V. CONCLUSIONS

After review of the record and for the reasons expressed in this order, we have reached the following conclusions:

1. That Guntert discharged waste in violation of Receiving Water Limitations C.3 and C.6 of Order No. 74-508 in February and March, 1979.
2. That Guntert willfully or negligently violated Receiving Water Limitations C.3 and C.6 of Order No. 74-508 in February and March, 1979.
3. That the action of the Regional Board in failing to refer the matter to the Attorney General for civil monetary remedies was inappropriate and improper.

VI. ORDER

IT IS HEREBY ORDERED that the Regional Board Executive Officer take all necessary action to refer this matter to the Attorney General for civil monetary remedies and for such other relief as may be appropriate, under Water Code Section 13385.

Dated: January 24, 1980

/s/ Carla M. Bard
Carla M. Bard, Chairwoman

/s/ William J. Miller
William J. Miller, Vice-Chairman

/s/ L. L. Mitchell
L. L. Mitchell, Member

/s/ Jill B. Dunlap
Jill B. Dunlap, Member

/s/ F. K. Aljibury
F. K. Aljibury, Member