

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
Ian Brown and Three Rivers Community)
Services District, For Review of)
Order No. 80-095, California Regional) Order No. WQ 81-3
Water Quality Control Board, Central)
Valley Region. Our File No. A-278.)

BY THE BOARD:

On June 26, 1980, the California Regional Water Quality Control Board, Central Valley Region (Regional Board) adopted Order No. 80-095, requiring property owners within the Three Rivers Community Service District (District) to cease and desist discharging wastes in violation of Regional Board Order No. 76-88. Order No. 76-88 revised and amended the applicable Water Quality Control Plan (Basin Plan) to impose a prohibition on discharges from subsurface disposal systems within the District. On July 25, 1980, the State Board received a petition for review of Orders Nos. 80-095 and 76-88 from Ian Brown and the Three Rivers Community Service District (petitioners).

The issuance of a cease and desist order by a Regional Board is subject to State Board review. In this instance, petitioners also essentially request the State Board to review the discharge prohibition in the Basin Plan on which the cease and desist order is based. This normally is not an appealable action. However, we have in other instances, when similar issues have been

raised involving the propriety of orders to prohibit subsurface disposal, reviewed the matter on our motion.^{1/}

I. BACKGROUND

Three Rivers is an unincorporated mountain community in Tulare County situated on the North, Middle and South Forks of the Kaweah River, approximately 22 miles east of the City of Visalia. The community is located along Highway 198, the gateway to the Mineral King recreational area.

In 1975, the Regional Board adopted a Water Quality Control Plan (Basin Plan) which provided that the Regional Board will consider the adoption of a ban on new septic tank systems and will require the elimination of existing systems in areas where the systems are failing or contaminating groundwater.

On March 26, 1976, the Regional Board found that systems were failing in the Three Rivers area. It further found that continued use of individual disposal systems or the installation of new systems will increase the threat to public health and cause a threatened degradation of the Kaweah River. The Regional Board adopted Order No. 76-88, amending the Basin Plan to prohibit discharge of waste in the area from leaching or percolation systems installed after the date of the order, and prohibiting discharge from any such systems in the area after January 1, 1980. The order provided that exemptions may be granted. The State Board approved this order May 21, 1976.

1. See In the Matter of Tahoe-Truckee Sanitation Agency, et al., Order No. 78-8; In the Matter of the Petitions of Minnelusa Canyon Association, et al., Order No. 79-35; and In the Matter of the Petition of Stuart Lessmueller, Order No. 80-14.

On June 26, 1980, the Regional Board, finding that wastes continue to be discharged in violation of the prohibition, issued Order No. 80-095. This order requires the Three Rivers Community Services District and property owners within the District to cease and desist discharging wastes in violation of Order No. 76-88, and establishes a timetable for the formation of an onsite wastewater management district and the pursuit of a plan to eliminate the discharge violations. Order No. 80-095 also extends the date for ultimate compliance with Order No. 76-88 from January 1, 1980 until July 15, 1982.

II. CONTENTIONS AND FINDINGS

1. Contention: The petitioners contend that the Regional Board Order No. 80-095 is not supported by substantial evidence. Specifically, petitioners assert that Order No. 80-095 is subject to the requirements of Water Code Sections 13280-13284.

Finding: Water Code Sections 13280-13284 became effective January 1, 1978. They list the circumstances under which determinations can be made to prohibit the discharge of waste from existing or new individual disposal systems or from community collection and disposal systems which utilize subsurface disposal. These sections apply to prohibitions adopted or prescribed on or after January 1, 1978. As discussed in State Board Order No. 78-8, it is a general rule of law that statutes operate prospectively, unless specific provision is made by the

Legislature for retroactive application.^{2/} In Order No. 78-8, we held that the inclusion of a prohibition to require termination of discharge at a future date is tantamount to specifying a time schedule for compliance with requirements, the application of which is undisturbed by the enactment of a later law which has not been explicitly made retroactive. Since Regional Board Order No. 76-88 was enacted prior to January 1, 1978, the standards set forth in Water Code Sections 13280-13284 did not apply.

While the prohibition was adopted before the enactment of these statutory provisions, Water Code Section 13240 provides that basin plans be periodically reviewed and may be revised. When such a review takes place, areas of prohibition must be reevaluated in accord with Sections 13280-13284. The question thus presented is whether the circumstances involved in this case call for a review of the Basin Plan provision.

In two previous instances dealing with petitions requesting State Board review of a Regional Board failure to grant an exemption from a discharge prohibition, we looked to the legislative intent behind the adoption of Sections 13280-13284. In the Minnelusa Canyon Association petition (Order No. 79-35), we determined that we should give effect to those sections, even though an underlying prohibition was adopted before January 1, 1978. In the Lessmueller

2. In the Matter of the Tahoe-Truckee Sanitation Agency, et al., at page 18, citing DiGenova v. State Board of Education (1962), 37 Cal.2d 167; City of Sausalito v. County of Marin (1970) 12 Cal.App.3d 550; Gordon H. Ball, Inc. v. State of California (1972), 26 Cal.App.3d 162; Sutherland, Statutes and Statutory Construction, 4th Ed. 1973, Section 41.04.

petition (Order No. 80-14), we used the substantial evidence test set forth by Section 13280 to uphold a proposed amendment to a basin plan adopted before 1978 which would have revised the effective date of a prohibition.

Petitioners here are not requesting an exemption but are basically challenging an enforcement action based on a basin plan prohibition. To effecuate the legislative intent behind Sections 13280-13284, these sections should be considered when action is taken to enforce a prohibition against subsurface disposal even when the underlying prohibition was adopted prior to January 1, 1978. In situations, such as here, where an opportunity is presented to reevaluate a pre-1978 decision to prohibit subsurface disposal, such reevaluation should take place. Therefore, we remand this issue to the Regional Board and direct the Regional Board to review the Basin Plan prohibition in accord with the provisions of Sections 13280-13284. In conducting this review, the Regional Board must consider all relevant evidence to fulfill the intent of Section 13281. This includes the factors set forth in Section 13241 (beneficial uses, the hydrographic unit involved, and economic considerations) and the factors set forth in Section 13281 (failure rates, adverse impacts reasonably expected, possible contamination, existing and planned land use, dwelling density, population growth, etc.). Of course, other factors may be relevant and should be considered in the discretion of the Regional Board.

Notwithstanding our conclusion that the prohibition should be reevaluated, the 1976 Basin Plan amendment remains in effect

unless and until it is modified after appropriate review. The cease and desist order should also remain in effect unless a review of the Basin Plan prohibition indicates that the underlying prohibition is inappropriate. To do otherwise would result in a retroactive application of Sections 13280-13284.

During the period that the Basin Plan prohibition is under review, we are concerned with the propriety or fairness of an action to refer violations of the prohibition or the cease and desist order to the Attorney General. Accordingly, we direct that any such action by the Regional Board shall not be effective until considered by the State Board.

We also note that the cease and desist order attempts to extend the January 1, 1980 date for compliance with the prohibition. Where a basin plan contains a prohibition requiring termination of a discharge on a certain date, any modifications to such date should be made through amendment to the Basin Plan. Thus, the Regional Board's review of the prohibition should include a reexamination of the date of compliance if it is determined that a prohibition is still appropriate.

2. Contention: Petitioners assert that since all property owners within the Three Rivers Community Service District did not receive individual notice, there was improper notice of the hearing at which the order was adopted.

Finding: Water Code Section 13244 provides that a Regional Board may not prohibit any waste discharge without giving notice of the hearing by publication three times in the affected county.

The Regional Board published notice of the June 26, 1980 hearing in the Visalia Times Delta newspaper on June 13, 14 and 16, 1980, and sent notice by certified mail to the Three Rivers Community Services District. Additionally, other articles appeared in the Visalia Times Delta concerning the upcoming meeting on June 25 and 26, 1980. An article on the meeting also appeared on the front page of the Three Rivers Current, a local newspaper in the Three Rivers Community on June 18, 1980.

The petitioners contend that all property owners within the Three Rivers Community Services District were additionally entitled to individual notice. The petitioner based this claim on a characterization of the Regional Board's action as "adjudicatory", and a series of cases. In Horn v. County of Ventura (1979) 24 Cal.3d 612, 156 Cal.Rptr. 718, (cited by Petitioners), the California Supreme Court dealt with the question of whether a landowner was entitled to notice of the County's approval of a tentative subdivision map splitting an adjacent parcel into four lots. The Court found the County's regulations for posting of notice of the hearing at central public buildings and mailing of notice to those who specifically request it to be inadequate to notify those significantly affected by a proposed action. The Court did note that the extent of the administrative burden is to be considered in determining what is appropriate notice. The Court was primarily concerned that notice be reasonably calculated to afford affected persons the realistic opportunity to protect their interest (at 725).

This concern that those landowners affected have an opportunity to be heard is also reflected in another case cited by petitioners (Kennedy v. City of Hayward (1980), 105 Cal.App. 3d 953, 165 Cal.Rptr. 132). Kennedy, again, dealt with a situation where an adjacent landowner did not receive notice of an impending lot split until after it was approved although a Homeowner's Association did receive notice. The Court cited Horn and emphasized the importance of affected landowners being aware of pending governmental actions. However, in both cases, the Court specifically refrained from spelling out the exact means by which the notice must be given.

In Morshead v. California Regional Water Quality Control Board (1975) Cal.App. 3d 446, 119 Cal.Rptr. 586, not cited by petitioners, a Regional Board issued a cease and desist order against several sanitary districts prohibiting further discharges and imposing a connection ban. Plaintiffs, identified as taxpayers, property owners, developers and associations of builders, contended they were denied due process as they did not receive proper notice of the impending cease and desist order. The Court held that the general notice published in the paper, together with notices sent to all individuals and agencies who had indicated an interest in the proceeding, was proper notice.

While mailing notice to affected landowners is certainly appropriate when an action affects only a comparative few, we feel that in this case the administrative burden of individual mailing to over 600 landowners is extreme. We feel that the

Regional Board was able to fulfill the intent of the Court as described in Horn, Kennedy and Morshead by other means. Extensive newspaper notice and coverage was given. The petitioners were given individual notice. The hearing was held in the evening in the community of Three Rivers to permit as many people as possible to participate in the proceeding. The Regional Board record indicates that the meeting was well attended and that there was active participation by area landowners. We conclude that the Regional Board's actions in publishing notice in the local newspaper and mailing notice to the Community Service District were reasonably calculated and did serve to let the community know of the impending hearing. Accordingly, we reject petitioners contention as to the inadequacy of the notice.

3. Contention: Petitioners allege that the Regional Board failed to comply with the requirements of the California Environmental Quality Act (CEQA).

Finding: Title 23, California Administrative Code Section 2714(h)(2) provides that actions taken by a regulatory agency, such as the State or Regional Board, adopting an order enforcing a general rule, standard or objective, are exempt from the provisions of CEQA. A categorical exclusion of this sort for issuance of cease and desist orders by a Regional Board was upheld in Pacific Water Conditioning Association, Inc., v. City Council of the City of Riverside (1977) 73 Cal.App. 3d 546, 140 Cal.Rptr. 812.

We find that the Regional Board complied with all applicable California Environmental Quality Act requirements.

III. CONCLUSIONS

1. While the requirements of Sections 13280-13284 do not apply to Basin Plan prohibitions adopted before January 1, 1978, we direct the Regional Board to review the Basin Plan prohibition for the Three Rivers area in accord with those sections. Order No. 80-095 should remain in effect at least until such review is completed. Any referral to the Attorney General of an enforcement action shall not be effective until reviewed by the State Board.

2. The Regional Board gave sufficient notice to property owners within the Three Rivers Community Service District prior to the adoption of the cease and desist order.

3. The Regional Board's action in adopting the cease and desist order was proper under the California Environmental Quality Act.

IV. ORDER

IT IS HEREBY ORDERED that the Regional Board review the Basin Plan prohibition in accord with the factors discussed in this order.

DATED: FEB 19 1981

/s/ Carla M. Bard

Carla M. Bard, Chairwoman

/s/ L. L. Mitchell

L. L. Mitchell, Member

/s/ Jill B. Dunlap

Jill B. Dunlap, Member

/s/ F. K. Aljibury

F. K. Aljibury, Member

1954-1955

