

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition  
of the Clean Water Action Project  
for Review of the Action of the  
California Regional Water Quality  
Control Board, North Coast Region,  
Regarding Construction of a Dam  
on Grapewine Creek, Mendocino  
County, by Kenneth D. and Ladella  
Baer and Fredrick and Royce  
Robertson. Our File No. A-169.

Order No. WQ 78-20

BY THE BOARD:

On December 2, 1976, January 27, 1977 and February 24, 1977, the California Regional Water Quality Control Board, North Coast Region (Regional Board) held an enforcement hearing regarding construction of an earthfill dam on Grapewine Creek, Mendocino County, by Kenneth D. and Ladella I. Baer and Fredrick and Royce Robertson (dischargers). On February 24, 1977, the Regional Board adopted a motion not to seek injunctive relief and civil monetary remedies pursuant to Water Code Sections 13350 and 13385 against the dischargers.

On March 25, 1977, the Clean Water Action Project (petitioner) filed a petition for review with the State Board alleging that the Regional Board action is inappropriate.

BACKGROUND

In May, 1976, the above-mentioned dischargers constructed an earthfill dam on Grapewine Creek, a tributary of Rattlesnake Creek, Mendocino County. The dam is

approximately 250 feet long, 41 feet high and impounds an estimated 14.85 acre-feet of water. The dam was formed by the placement of an estimated 15,000 - 20,000 cubic yards of clay and rock fragments obtained from excavation in the immediate vicinity of the dam. The dam was initially constructed without permit approval by the Department of Fish and Game, filing of a water right application, consultation with the Division of Dam Safety of the Department of Water Resources or any professional engineering assistance or application for waste discharge requirements. In October, 1976, the Regional Board was notified of this matter by the Department of Fish and Game and asked to investigate. Subsequent to Regional Board inspection, Cleanup and Abatement Order No. 76-228 was issued by the Regional Board Executive Officer to the dischargers on November 3, 1976, ordering them to clean up the effects of deposition of soil into Grapewine Creek, install adequate drainage facilities, and install culverts on access roads to handle heavy winter rainfall and flows into the creek. This order was revised on December 3, 1976.

The Division of Dam Safety has concluded that this dam is not within its jurisdiction as its authority does not apply to reservoirs which impound less than 15 acre-feet of water.

On August 30, 1976, the dischargers filed an Application to Appropriate Unappropriated Water with the State Board, Division of Water Rights. A protest was filed by the Department of Fish and Game which is yet unresolved. As a result of the fact that unprotested permit applications have been given highest priority in the Board's program for eliminating the backlog of water right applications, and the fact that this application has been protested, the environmental effects of this project have not yet been evaluated pursuant to the California Environmental Quality Act (CEQA).

Subsequent to the Regional Board decision on February 24, 1977, not to seek injunctive relief or civil monetary remedies, the Regional Board adopted Cleanup and Abatement Order No. 77-123 on July 11, 1977. Order No. 77-123 rescinds Order No. 76-228 (the earlier Cleanup and Abatement Order) and imposes clean up responsibilities, discharge prohibitions, turbidity limits, temperature increase limits and flow requirements. Regional Board comments in response to this petition dated September 7, 1978, indicate that, while no significant degradation of water quality occurred as a result of this project during the 1976-77 dry winter period, discharges have occurred from this site during the 1977-78 winter season which may violate Order No. 77-123.

#### CONTENTIONS AND FINDINGS

The petitioner contends that the Regional Board's failure to seek civil monetary remedies and injunctive relief allows adverse effects upon beneficial uses and therefore violates State Board Resolution No. 68-16 (Statement of Policy with Respect to Maintaining High Quality Waters in California), the nondegradation policy.

The nondegradation policy provides, in part:

"Whenever the existing quality of water is better than the quality established in policies as of the date on which such policies become effective, such existing high quality will be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies."

This policy is incorporated into the Water Quality Control Plan, North Coast Basin (Basin Plan) adopted by the Regional Board on March 20, 1975, and amended on March 25, 1976.

Petitioner states that fisheries and aquatic habitat will be degraded by this project but did not submit any data to support this claim. Review of the record indicates that possible adverse effects on beneficial uses from this project include elimination of approximately one and three-quarter miles of steelhead spawning and nursery area through siltation and blockage of migration, reduction of downstream spawning habitat due to siltation, and increased turbidity and suspended sediment loading. The hearing record discloses that the following mitigation measures were sought by the Board as a part of its Cleanup and Abatement Orders Nos. 76-228 and 77-123 and completed by the dischargers: the downstream face of the dam was regraded to reduce the steep slope; lower portions of the dam face have been riprapped; fill areas have been seeded; a new spillway structure with a concrete apron was completed; and additional culverts and drainage facilities were installed along the access roadway.

The petitioner further contends that the Regional Board has failed to enforce Basin Plan prohibitions. Although petitioner does not specify the particular prohibitions involved, we presume that it refers to the Basin Plan prohibition of discharge of soil, silt or earthen material from construction activities in quantities deleterious to beneficial uses.

Regarding the above contentions, it should be noted that the action under review involves the failure of the Regional Board to seek judicial remedies and not the setting of limitations on waste discharge or approval or disapproval of the project. Consideration of waste discharge requirements and/or prohibitions for this project by the Regional Board should occur only after the environmental assessment and EIR or negative declaration have been completed pursuant to CEQA. At that time, the Regional Board should assess the water quality-related environmental effects, the non-degradation policy and all other Basin Plan provisions and prohibitions. However, enforcement actions by regulatory agencies are categorically exempt from CEQA pursuant to the Resources Agency's Guidelines for Implementation of CEQA (Title 14, California Administrative Code, Chapter 3, Section 15121). Therefore, the Regional Board could legally adopt its cleanup and abatement orders prior to CEQA compliance.

A Regional Board is vested with considerable discretion in deciding whether or not to seek judicial remedies pursuant to Water Code Sections 13350 and 13385. As stated above, mitigation measures were undertaken by the dischargers and waste discharge requirements will be considered by the Regional Board at a future date. The record also discloses that the Department of Fish and Game is pursuing its remedies and an Application to Appropriate Unappropriated Water is in process.

The Regional Board has issued cleanup and abatement orders for this project. The latest order, Order No. 77-123, contains limitations and time schedules regarding waste discharge from this project. Thus, the Regional Board was, at the time of the hearing, and currently is, involved with formal administrative enforcement action.

Based upon the above evidence, and especially the pursuit by the Regional Board of administrative enforcement action, we find that failure of the Regional Board to seek civil monetary remedies and injunctive relief was not an abuse of discretion and was appropriate and proper. We further find that as waste discharged from this project has considerable potential to degrade water quality and related beneficial uses, the Regional Board should closely monitor this project, should strictly enforce Cleanup and Abatement Order No. 77-123 and should take any other action necessary to assure compliance.

Finally, as we noted above, the Department of Fish and Game has filed a protest to the discharger's application for a water right permit. The Division of Water Rights' files regarding that application indicate that the Department has made an offer to drop its protest if the dischargers will commit to mitigation measures for loss of the steelhead habitat involved. These measures would include releases of water during certain seasons of the year as well as annual restocking of steelhead. Negotiations over the Department's proposal have been lengthy. If an appropriate agreement cannot be reached within 30 days from the date of this order, the Regional Board should reconsider referral to the Attorney General for appropriate action to achieve protection of the steelhead population in the area including consideration of the possibility of requesting the Attorney General to seek an injunction requiring removal of the dam.

CONCLUSION

The failure of the Regional Board to seek injunctive relief and civil monetary penalties to date was appropriate and proper. However, if a settlement of the Department of Fish and Game's protest to the discharger's water right application cannot be reached within 30 days from the date of this order, the Regional Board should consider further enforcement action pursuant to our findings above.

ORDER

IT IS HEREBY ORDERED that the petition is denied except that the Regional Board is directed to take action consistent with our Conclusion, above, if a settlement of the Department of Fish and Game's water right protest is not reached in accordance with our Findings, above.

Dated: December 21, 1978

/s/ John E. Bryson  
John E. Bryson, Chairman

/s/ W. Don Maughan  
W. Don Maughan, Vice Chairman

/s/ William J. Miller  
William J. Miller, Member

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

