STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of COMMITTEE FOR A PROGRESSIVE GILROY For Review of Orders Nos. 84-97, 84-106 and 85-83 of the California Regional Water Quality Control Board, Central Coast Region. Our File No. A-367.	ORDER NO. WQ 85-6

BY THE BOARD:

On November 9, 1984, the California Regional Water Quality Control Board, Central Coast Region (Regional Board) adopted revised waste discharge requirements (requirements) in Order No. 84-97 and an amended cease and desist order in Order No. 84-106 for the Municipal Wastewater Facilities (treatment plant) operated by the Cities of Gilroy and Morgan Hill (Cities or dischargers). The amended requirements allowed an increase in the average daily dry-weather flow (ADWF) from 5.15 million gallons per day (mgd) to 5.3 mgd. The cease and desist order amended an earlier order to remove a prohibition against the City of Gilroy adding new dischargers to the treatment plant (connection ban).

On December 10, 1984, the State Water Resources Control Board (State Board) received a petition from the Committee for a Progressive Gilroy (petitioner) seeking review of the orders. The petition did not meet the regulatory requirements of the State Board, and was supplemented by a complete petition received on January 30, 1985.

On May 10, 1985, the Regional Board adopted further revised waste discharge requirements in Order No. 85-83. These requirements allowed an

increase in ADWF to the plant to 6.1 mgd. The Regional Board also refused to reinstate the connection ban against Gilroy or to implement a connection ban against Morgan Hill, as was requested by the petitioner. On April 16, 1985, the State Board received a request that it stay the Regional Board meeting scheduled for May 10; and on May 16, 1985, the State Board received a request that it stay the effect of the allowable increase in flow to 6.1 mgd and prohibit the Cities from issuing any land-use entitlements based thereon. By letter dated June 5, 1985, the State Board refused to hold a hearing on the stay requests.[1]

On May 20, 1985, the State Board received a petition from the petitioner seeking review of Order No. 85-83, and the Regional Board's refusal to reinstate the connection ban against Gilroy or to implement a connection ban against Morgan Hill. The two petitions will be consolidated for purpose of review by the State Board.

I. BACKGROUND

The Cities of Gilroy and Morgan Hill operate a sewage treatment plant for the treatment of domestic sewage from the two communities. The plant was initially permitted to accept flows of 6.1 mgd. In 1983, however, the discovery of serious violations of waste discharge requirements, including illegal discharges of sewage directly into Llagas Creek, resulted in amendment of requirements to restrict flows to 5.15 mgd and issuance of a connection ban against Gilroy.

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[1] The petitioner subsequently filed an action in the Santa Clara Superior Court seeking an injunction to stay the effect of Order No. 85-83. On June 14, 1985, the Court refused to grant injunctive relief. Case No. 576138.

Following the events in 1983, the Cities instituted changes in the design and operation of the plant. As a result, on November 9, 1984, the Regional Board adopted revised requirements allowing an increase in flows to 5.3 mgd, and amended the cease and desist order to remove the connection ban. Following monitoring of the plant through the winter of 1984-85 and development of a hydrologic balance,[2] the Regional Board, on May 10, 1985, allowed a further increase in flows to 6.1 mgd. On May 10, the Regional Board also refused the petitioner's requests that it reinstate the connection ban against Gilroy and place a similar ban against Morgan Hill.

II. CONTENTIONS AND FINDINGS

While the petitioner raised a number of contentions in its petitions, it has agreed in a letter dated June 17, 1985 that the State Board should address only the following issues in its review:

1. Did the Regional Board comply with the California Environmental Quality Act in adopting the waste discharge requirements?

2. Did the Regional Board act properly in amending the cease and desist order to rescind the connection ban against Gilroy, in refusing to reinstate the connection ban, and in refusing to issue a connection ban against Morgan Hill?

1. Contention: The Regional Board failed to comply with the California Environmental Quality Act in adopting the waste discharge requirements.

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[2] A hydrologic balance is a method of estimating waste treatment pond disposal capacity. The cumulative wastewater stored in the pond is projected, accounting for input by wastewater inflow and rainfall, and output by evaporation and percolation. The pond is judged adequate if pond storage capacity remains at the end of the rainfall year.

Finding: The California Environmental Quality Act (CEQA, Public Resources Code Sections 21000 et seq.) provides that a lead agency must prepare an Enviromental Impact Report (EIR) before it approves any project which may have a significant effect on the environment. (Public Resources Code §21100.) The petitioner contends that the Regional Board improperly failed to prepare an EIR prior to adopting waste discharge requirements which permitted increases in flow to the treatment plant.

In 1977, a final EIR was approved by the Cities. The EIR considered construction of a plant with ADWF of 6.4 mgd. (Draft EIR, p. V-1.) In 1983, the City of Gilroy adopted a negative declaration for the purchase and development of 163 acres of additional land for sewage percolation ponds.

As early as 1981, the Regional Board adopted requirements allowing flows of 6.1 mgd for ADWF. (Order No. 81-02) Revised requirements, adopted in 1982, set flow limits at 6.1 mgd. (Order No. 82-14) In 1983, the Regional Board became aware of illegal discharges to Llagas Creek, and revised the requirements to limit the flow to 5.15 mgd. (Order No. 84-06) Following repairs to the system and improved management, the Regional Board adopted the requirements under consideration, first permitting flows of 5.3 mgd (Order No. 84-97) and then flows of 6.1 mgd (Order no. 85-83). In adopting these requirements, the Regional Board relied on the exemption from compliance with CEQA for existing facilities (Title 14, California Administrative Code, Section 15301).

The petitioner claims that the increases in allowable flow are not projects for which an EIR has previously been prepared, and that the project does not qualify as an existing facility. We disagree. As discussed above, an

EIR was prepared for the treatment plant, with an estimated flow of 6.4 mgd. In addition, a negative declaration was prepared for additional pond capacity, reflecting the disposal areas currently in use. These environmental documents clearly anticipated and analyzed the environmental impacts of the project which was approved by the Regional Board.

The regulations implementing CEQA make clear that a new EIR need not be prepared where an agency is approving an existing facility. (Title 14, Calif. Admin. Code §15301.) In fact, an EIR or negative declaration prepared by a lead agency (in this case, the Cities) is conclusively presumed to comply with CEQA for purposes of use by responsible agencies, such as the Regional Board. (Title 14, Calif. Admin. Code §15231.) The only exceptions to this rule are where the environmental document is determined to be invalid in court proceedings (§15231(a)) and where a subsequent EIR is necessary (§15231(b)). There has been no such court ruling in this case, and none of the criteria requiring preparation of a subsequent EIR has been met. (Title 14, Calif. Admin. Code §15162(a).)[3]

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[3] The conditions requiring preparation of a subsequent EIR generally cover situations in which changes occur either in the project or the surrounding environment, or new information becomes available, subsequent to the certification of the environmental documents:

> "(a) Where an EIR or negative declaration has been prepared, no additional EIR need be prepared unless:
> (1) Subsequent changes are proposed in the project which will require important revisions of the previous EIR or negative declaration due to the involvement of new significant environmental impacts not considered in a previous EIR or negative declaration on the project.
> (2) Substantial changes occur with respect to the circumstances under which the project is undertaken, such as a substantial deterioration in the air quality where the project will be located, which will require important
> (CONTINUED)

The petitioner claims that the increase in flow allowed by the requirements may have a significant effect on the environment, and constitutes a major addition to the facility. It is not necessary to consider, however, the magnitude of the increases from 5.15 mgd to 6.1 mgd, since the original EIR clearly considered even a larger flow than this--6.4 mgd. The exemption for existing facilities has been properly applied in this case.[4]

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[3] (FOOTNOTE CONTINUED)

> revisions in the previous EIR or negative declaration due to the involvement of new significant environmental impacts not covered in a previous EIR or negative declaration; or
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> (3) New information of substantial importance to the project becomes available, and
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> (A) The information was not known and could not have been known at the time the previous EIR was certified as complete or the negative declaration was adopted, and
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> (B) The new information shows any of the following:
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> 1. The project will have one or more significant effects not discussed previously in the EIR;
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> 2. Significant effects previously examined will be substantially more severe than shown in the EIR;
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> 3. Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, or
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> 4. Mitigation measures or alternatives which were not previously considered in the EIR would substantially lessen one or more significant effects on the environment."

In this case, there were no changes involving environmental impacts not considered in the EIR and negative declaration. Problems did occur at the plant resulting in enforcement actions, and the Regional Board subsequently restored the flow limitations which it had previously allowed, and which had been reviewed in the EIR.

[4] The Cities claim the waste discharge requirements are exempt from compliance with CEQA, citing Water Code Section 13389 and Pacific Water Conditioning Association, Inc. v. City Council (1977) 73 Cal.App.3d 546, 555. Section 13389 states that CEQA generally does not apply to waste discharge requirements adopted pursuant to the Federal Water Pollution Control Act (national pollutant discharge elimination system or NPDES). (See Water Code Section 13372.) In finding that the regional board did not have to comply with (CONTINUED)

2. Contention: The Regional Board improperly rescinded the connection ban against Gilroy and refused to reinstate the ban, and improperly refused to issue a connection ban against Morgan Hill.

Finding: On July 15, 1983, the Regional Board adopted Cease and Desist Order No. 83-36. The order was based upon illegal discharges to Llagas Creek, ponded wastewater less than six feet above ground water, ponded wastewater with less than one foot of freeboard, excessive flow volumes, overflowing ponds, risk of public contact, odors and nuisance, and failure to operate and maintain the system properly. On November 18, 1983, pursuant to a stipulation in a court case between the City of Gilroy and a neighboring landowner, the Regional Board imposed a prohibition against new connections to the sewer system by Gilroy (amendment to Order No. 83-36). The connection ban was based on the Regional Board's findings that odors generated at the treatment plant were creating a nuisance, that there had been significant illegal discharges which were, through falsified or inaccurate reports, hidden from the Regional Board, and that an increase in wastewater discharged to the sewer system would result in more violations of requirements.[5]

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[4] (FOOTNOTE CONTINUED)

CEQA in adopting waste discharge requirements in the Pacific Water Conditioning case, the court was considering an NPDES permit. The waste discharge requirements at issue here were not an NPDES permit, and there is no comparable statutory language exempting non-NPDES waste discharge requirements from coverage by CEQA. We therefore find that the Regional Board was constrained to comply with CEQA.

[5] Prior to imposition of the Regional Board's connection ban, the City of Gilroy stipulated to a voluntary ban on new connections to the sewage system as a resolution to litigation in which it was a defendant. The stipulation required the ban remain in effect until the City installed an operating aeration system, acceptable to the Regional Board, the State Board and the Bay (CONTINUED)

The Regional Board found that necessary funding for plant improvements was dependent upon sale of redevelopment bonds by the City of Morgan Hill. The Regional Board concluded that imposition of a connection ban against Morgan Hill would be counterproductive to its intention to prevent impairment of water quality, and the ban was directed only against Gilroy.

On November 9, 1984, following receipt of testimony regarding improvements at the plant, the Regional Board voted to rescind the connection ban against Gilroy. On May 10, the Regional Board received further testimony regarding operation of the plant and refused the petitioner's request that it reinstate the connection ban against Gilroy, or implement a connection ban against Morgan Hill.

The regulation governing removal of connection bans is found in Title 23, California Administrative Code, Section 2244.3. That section provides:

> "(a) Prohibitions or restrictions on additional discharges shall not be removed until the violations of requirements which were the basis for imposing the prohibitions or restrictions have ceased and consistent compliance with those requirements has been achieved.
> (b) As an exception to (a), prohibitions or restrictions on additional discharges may be removed, at the discretion of the Board, if the Board finds (1) that consistent compliance with requirements can be achieved only by construction of a facility which will take a substantial period of time to complete, and (2) that the discharger has the capacity, authority, and financial resources to complete the corrective measures necessary to achieve compliance and is currently proceeding with such corrective measures, and (3) that the corrective measures necessary to achieve

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5 (FOOTNOTE CONTINUED)

Area Air Quality Management District. The Regional Board was not a party to this litigation, and the condition for removal of the voluntary connection ban did not apply to the Regional Board.

compliance with requirements will be completed and placed into operation by the discharger in the shortest practicable time, and (4) that all practicable interim repairs and improvements to the treatment process of the discharges which can be made have been made, and (5) that during the interim period of time until compliance with requirements can be fully achieved the treatment process of the discharges will be so managed, operated, maintained and repaired as to reduce to a minimum the violations which resulted in the imposition of the prohibitions or restrictions, and that such minimum violations for the interim period of time involved will not significantly impair water quality or beneficial uses.

(c) Prohibitions or restrictions, if removed under subsection (b) hereof, shall be reimposed if the Board finds that the discharger is in violation of any of the conditions of subsection (b) hereof praior to the time that consistent compliance with requirements has been achieved.

(d) Removal of the prohibition or restriction may be total or by volume, type, or concentration of waste as improvements to the treatment and disposal facilities are placed in operation."

In removing the connection ban, the Regional Board found that the violations which caused it to impose the ban had been remedied. The Regional Board did not make a specific finding that consistent compliance with those requirements had been achieved. Also, the Regional Board found that the City was still not in compliance with some aspects of the waste discharge requirements--specifically, dike stability work, inflow and infiltration work, progress on the aeration system and progress toward a long-term solution--and that the cease and desist order should therefore remain in effect. (Order No. 84-106, Finding 11.)

Although the Regional Board did not make a specific finding that consistent compliance with the requirements whose violations were the basis for the connection ban had been achieved, it is clear from reading the order that the Regional Board was satisfied that Gilroy had met the requirements of Section 2244.3. As is stated above, the violations of concern were odors at

the plant and the inability of the plant to handle increased flows. After reviewing the evidence before the Regional Board, this Board is in agreement that the violations of requirements which were the basis for the connection ban have ceased and that the discharger has achieved consistent compliance with those requirements.

On November 9, 1984, the Cities presented a hydrologic balance to the Regional Board, in order to justify a proposed increase in flows to the plant. At the time, the dischargers were requesting an increase in flow to 5.6 mgd, but the influent flows at the time were only 4.3 mgd. While we question the ability of the hydrologic balance to justify an increase to 5.6 mgd, or even the 5.3 mgd which the Regional Board allowed,[6] this Board is satisfied that the balance strongly demonstrated that the plant could handle flows of 4.3. mgd.

The concerns this Board had with the hydrologic balance presented in November, 1984 are twofold. First, there was insufficient reliable data since the records from periods prior to 1984 were inaccurate and sometimes falsified. Second, the operating procedures implemented in 1984 constituted a departure from the conventional method of continual storage and percolation. Instead, the discharges instituted a procedure of intermittently flooding certain ponds while renovating the bottoms of other ponds. With the conventional method, a hydrologic balance is based upon the minimum expected or observed percolation rate, and results in a conservative estimate because all

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[6] While it appears the Regional Board may have been premature in granting an increase to 5.3 mgd in November 1984 (Order 84-97), the hydrologic balance used to justify the May, 1985 increase to 6.1 mgd utilized a larger, more accurate data base to make projections, and the Regional Board used conservative estimates for capacity. The flow increase to 6.1 mgd is therefore justified.

ponds will rarely reach this rate at the same time. The method proposed by the dischargers attempts to predict pond performance more accurately, and therefore must rely on data from throughout seasonal cycles and pond renovations. In essence, there was not a sufficient safety margin built into the hydrologic balance to justify a large increase in flows. The calculations can be viewed, however, as providing documentation that the dischargers could dispose of 4.3 mgd (the flow at the time the connection ban was removed) with an estimated 30 percent safety factor.

At the May, 1985 Regional Board meeting, the dischargers submitted a new hydrologic balance including data obtained since November.[7] Maximum pond percolation rates and seasonal variations were based on two wet weather seasons and several renovation cycles. Also, the calculation method was conservative. This Board is fully convinced that the Cities have demonstrated consistent compliance with the requirements concerning discharge to the ponds.

We are also convinced the Cities have demonstrated consistent compliance with the requirement prohibiting odors. Prior to March 1984, oxygen was supplied to the primary ponds with a Hinde aeration system. The system was not effective at the plant, and the evidence is clear that odors were generated by the ponds. In March, the dischargers installed a modular surface aeration system, which resulted in sufficient aeration capacity to oxidize all odor-causing sulfides. Since that time, there have been no odor complaints

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[7] Significantly, in testimony at the May meeting, the petitioner withdrew its contention that the plant could not handle the increased flows, and instead agreed that the plant had sufficient percolation capacity to receive 6.1 mgd.

attributable to the domestic pond system.[8] Even with additional flows, there should be no odors, since this type of system allows for additional aerators or increasing power to aerators. While an odor-control system for the headworks of the treatment facility was not installed at the time of the November meeting, it was installed on July 10, 1985. The Cities have demonstrated consistent compliance with the prohibition against odors.

The petitioner also contends that the Regional Board should have issued a connection ban against the City of Morgan Hill. In November, 1983, when the Regional Board first issued the connection ban against Gilroy (amended Order No. 83-36), it made specific findings regarding its decision not to issue a similar prohibition against Morgan Hill. The time for review of that action has long since passed (Water Code Section 13320), and this contention is not properly before this Board. It is obvious from the above discussion, however, that we do not believe a connection ban is necessary for either City at this point.

III. CONCLUSIONS

After review of the record and consideration of the contentions of the petitioner, we conclude as follows:

1. The Regional Board complied with the California Environmental Quality Act in adopting waste discharge requirements.

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[8] The Cities also operate an adjoining food process treatment plant, which has continued to cause odors. While it is admittedly difficult to distinguish between odors from the two facilities, our review of the flows and the odor-control systems convinces us that odors generated since March, 1984 are from the food process plant.

2. The Regional Board acted properly in rescinding the connection ban against Gilroy, in refusing to reinstate the ban and in refusing to issue a connection ban against Morgan Hill.

IV. ORDER

IT IS HEREBY ORDERED that the petition in this matter is denied.

V. CERTIFICATION

The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on August 22, 1985.

Aye: Raymond V. Stone
Darlene E. Ruiz
Edwin H. Finster
Eliseo M. Samaniego

No: None

Absent: None

Abstain: None

for Walt Pettit
Michael A. Campos
Executive Director