

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
BKK CORPORATION)
)
To Review Cleanup and Abatement Order)
No. 84-4 and Cease and Desist Order)
No. 84-89 Issued by the California)
Regional Water Quality Control Board,)
Los Angeles Region. Our File No. A-364.)

ORDER NO. WQ 86-13

BY THE BOARD:

Petitioner, BKK Corporation (BKK), filed a timely petition to review Order No. 84-89 of the California Regional Water Quality Control Board, Los Angeles Region (Regional Board). Order No. 84-89 is a cease and desist order. As part of Order No. 84-89, the Regional Board also ratified Cleanup and Abatement Order No. 84-4, an order previously issued by the Executive Officer.¹ BKK seeks review of the cease and desist order and cleanup and abatement order, insofar as those orders concern issues relating to the "Miranda Seep," in the vicinity of BKK's West Covina landfill.²

I. BACKGROUND

In 1984, BKK was operating a Class I landfill in the San Jose Hills about three miles south of the civic center of the City of West Covina. The

¹ Order No. 84-89 also includes a referral to the Attorney General for enforcement. BKK's petition requested a stay of this referral. By letter dated January 29, 1985, BKK's request was denied.

² Order No. 84-89 and BKK's original petition deal with several other issues besides the Miranda Seep. Based upon its conclusion that the other issues had become moot, BKK later requested that the State Board limit its considerations to the issues raised in the petition related to the Miranda Seep.

landfill was subject to waste discharge requirements set by Regional Board Order No. 78-140, as amended by Order No. 84-41. The entire landfill covers 583 acres, but only 140 acres were used for Class I (hazardous waste) disposal operations. Portions of the remaining acreage were designated for disposal of nonhazardous waste, or were not permitted to accept waste. The facility currently is allowed to dispose of nonhazardous waste only.

During a July 13, 1984 field inspection, Regional Board staff sampled a seep located in a southerly-facing ravine, on BKK property but outside the landfill boundary, north of Miranda Street. The discharge from the seep, referred to in this order as the "Miranda Seep," was about one gallon per minute. The natural path of the discharge leads to a storm drain catch basin near the rear of private residences on Miranda Street, but the flow percolated into the ground before reaching the catch basin.

Laboratory analysis of the seep water indicated the presence of volatile chlorinated hydrocarbons. These results were confirmed by analysis of seep water sampled on July 25, 1984. The chlorinated hydrocarbons found in the samples included vinyl chloride, measured at forty parts per billion in both the July 13 seep water and the July 25 seep water.

Vinyl chloride presents a very serious health hazard. Waste containing more than 10 parts per million vinyl chloride is classified as hazardous. Title 22, Cal. Admin. Code §66696. The "action level" established by the Department of Health Services, based upon health risks of chemicals in drinking water, is two part per billion for vinyl chloride. Based upon vinyl chloride's carcinogenic effect, the Environmental Protection Agency recently established a recommended maximum contaminant level in drinking water of zero,

and proposed a binding maximum contaminant level in drinking water of one part per billion. 50 Fed. Reg. 46880 (November 11, 1985).

On July 27, after concluding that the chlorinated hydrocarbons in the seep water were as a result of BKK's operations, the Regional Board Executive Officer issued Cleanup and Abatement Order No. 84-4. This cleanup and abatement order, delivered to BKK the same day, required BKK to "clean up the condition of pollution, or threatened pollution," indicated by the presence of the Miranda Seep and the levels of chlorinated hydrocarbons found in the seep water. The cleanup and abatement order required submission of a work plan, including provision for pumping to eliminate seepage. The order required submission of the workplan by July 30, 1984, and full compliance by August 15, 1984.

BKK's workplan, completed on August 3, 1984, estimated that the cleanup project would be completed by August 31, 1984. But the first extraction well did not begin pumping until August 30, 1984. On September 24, 1984, an inspection by Regional Board staff found no surface flow from the seep, although the lower end of the stream bed was still muddy. In addition, analysis of water obtained on September 20, 1984 from the well used to stop the seep indicated that the water still contained elevated concentrations of vinyl chloride.

Following a hearing on October 15, 1984, the Regional Board issued a cease and desist order, Order No. 84-89. As part of the order, the Regional Board found that BKK had violated, or was in threatened violation of, several provisions of the waste discharge requirements for the site. The Regional Board also affirmed Cleanup and Abatement Order No. 84-4. The Regional Board found that a condition of pollution still existed, and provided that compliance

would be demonstrated when the vinyl chloride concentration was reduced to two parts per billion, or the polluted aquifer was dewatered.

BKK petitions for review of the Regional Board's actions.

II. CONTENTIONS AND FINDINGS

1. Contention: BKK contends that failure to provide notice and an opportunity to challenge the proposed order before Cleanup and Abatement Order No. 84-4 was issued deprived BKK of due process of law.

Finding: BKK did not receive notice and an opportunity to challenge the cleanup and abatement order until after the Regional Board Executive Officer issued the order. The Porter-Cologne Water Quality Control Act (Porter-Cologne Act), Cal. Water Code §13000 et seq., does not require notice and an opportunity to be heard before issuance of a cleanup and abatement order. Due process is provided by an opportunity for a hearing after the order is issued.

The Legislature intended to provide a summary procedure, through issuance of cleanup and abatement orders under Section 13304 of the Water Code, by which threatened or continuing water quality problems could be remedied promptly:

"The Legislature specifically set up a process whereby a Regional Board Executive Officer could act expeditiously to correct water quality problems." State Water Resources Control Board Order No. WQ 85-10 at 5.

Requiring notice and an opportunity to be heard before issuance of a cleanup and abatement order would be inconsistent with this procedure. Hence the Porter-Cologne Act does not require a hearing before a cleanup and abatement order is issued. See Cal. Water Code §13304.

Article 3, Section 3.5 of the California Constitution would prohibit this Board from holding that the statutory procedures for issuance and review

of cleanup and abatement orders are unconstitutional. See State Water Resources Control Board Order No. 85-10 at 5. Moreover, a review of those procedures convinces us that the provisions of the Porter-Cologne Act are consistent with the constitutional requirement of procedural due process.

Once a cleanup and abatement order is issued, there is ample opportunity for the discharger to present its views and seek revision or rescission of the order. After reviewing a cleanup and abatement order issued by the Regional Board Executive Officer, the discharger may submit comments and request changes in the order. The Executive Officer may amend the order in response. The discharger may also request an opportunity to be heard by the Regional Board, which may amend or rescind the order. If the discharger is not satisfied with the decision of the Regional Board, or if the Regional Board fails to make a decision within sixty days of the discharger's request, the discharger may petition the State Board for review. Cal. Water Code §13320.³

State Board review ordinarily is based on the record before the Regional Board, but a hearing may be convened for the presentation of additional evidence which could not have been presented before the Regional Board or was improperly excluded by the Regional Board. See *id.* §13320(b); 23 Cal. Admin. Code §2050(b). The State Board's decision is subject to judicial review. Cal. Water Code §13330.

³ The Regional Board contends that this petition should have been filed within thirty days of issuance of Cleanup and Abatement Order No. 84-4. We do not agree. The Regional Board reviewed Cleanup and Abatement Order No. 84-4, and approved of the Executive Officer's decision, as part of Cease and Desist Order No. 84-89. Because BKK's petition was filed within thirty days of the Regional Board's issuance of Cease and Desist Order No. 84-89, it is timely for purposes of review of all issues decided by the Regional Board as part of the cease and desist order, including the decision not to amend or rescind Cleanup and Abatement Order No. 84-4.

These procedures are more than adequate to provide due process. The requirements of procedural due process are flexible. There are no fixed rules as to what procedures are required in a particular case. Procedural requirements depend upon a balancing of the interests involved. Saleeby v. State Bar, 39 Cal.3d 547, 565, 702 P.2d 525, 535, 216 Cal.Rptr. 367, 377 (1985). The Porter-Cologne Act recognizes a strong public interest in protecting the quality of the waters of the state. As part of the Porter-Cologne Act, the Legislature declares: "that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation." Cal. Water Code §13000. With respect to the private interest in activities involving discharge of waste, or which may create conditions of pollution or nuisance, the Porter-Cologne Act provides:

"No discharge of waste into the waters of the state, whether or not such discharge is made pursuant to waste discharge requirements, shall create a vested right to continue such discharge. All discharges of waste into waters of the state are privileges, not rights." Cal. Water Code §13263(g).

Where the state's interest is sufficiently compelling, the requirements of procedural due process may be satisfied by a hearing provided after issuance of an administrative order or other official action which impacts private interests. See Goldin v. Public Utilities Commission, 23 Cal.3d 638, 663, 592 P.2d 289, 305, 153 Cal.Rptr. 802, 818 (1979); Habrun v. State Department of Social Services, 145 Cal.App. 318, 321-22, 193 Cal.Rptr. 340, 342 (1983). In view of the strong public interest in protecting water quality, and the need for a procedure allowing for expeditious action to cleanup or abate water quality problems, we conclude that the state's interest

in prompt issuance of cleanup and abatement orders is sufficiently compelling to uphold the procedures provided for the Porter-Cologne Act.

2. Contention: BKK contends that there is insufficient evidence to find that a condition of "pollution," "contamination," or "nuisance" exists.

Finding: The presence of vinyl chloride at the levels observed in the Miranda Seep and in the aquifer which is the source of the seep constitutes a condition of "pollution" as defined in Section 13050 of the Water Code.⁴ The presence of vinyl chloride in the aquifer systems beneath the BKK landfill also threatens to cause pollution of alluvial aquifers in the San Gabriel Valley. There is evidence in the record that these aquifers are in hydraulic continuity with the aquifer system beneath the BKK landfill.⁵

The aquifer in the immediate vicinity of BKK landfill exhibits variable quality. Samples from the northernmost (upslope) monitoring well show relatively low salinity levels, ranging from 570 to 960 parts per million total dissolved solids. Other samples taken at the landfill exhibit higher salinity levels. For example, water from the Miranda Seep had 3,900 parts per million total dissolved solids. It is unclear whether the variable salinities in the aquifer in the vicinity of the landfill are due to naturally occurring conditions or to landfill operations.

The ground water in the alluvial aquifers of the San Gabriel Valley is of good quality and is beneficially used for drinking water. The nearest

⁴ "'Pollution' means an alteration of the quality of the waters of the state by waste to a degree which unreasonably affects (1) such waters for beneficial uses, or (2) facilities which serve such beneficial uses. 'Pollution' may include 'contamination'". Cal. Water Code §13050(e).

⁵ Because we find that conditions of pollution and threatened pollution exist, it is unnecessary to determine whether these conditions also constitute contamination or nuisance.

drinking water supply well, operated by Suburban Water Systems, is 1.5 miles west of the landfill. The evidence in the record supports the conclusion that these aquifers are in hydraulic continuity with the aquifer systems beneath the BKK landfill.

To support a finding that a condition of pollution exists, it is not necessary to establish that pollutants were observed in waters off of BKK's property. As this Board observed in another Order involving ground water pollution:

"Waters of the state are defined by Section 13050 [of the Water Code, subdivision (e)] to include all groundwaters within or under the surface area of the state. There is no question that the groundwaters under the . . . site are waters of the state. The ownership of property may give rise to rights to use of water. However, such usufructuary rights do not by any means divest the state of title to these waters. (See Water Code Sections 100, 101, and 102). Since groundwaters under . . . site are waters of the state, pollution or threat of pollution of those waters alone would suffice to sustain a cleanup and abatement order under Section 13304." State Water Resources Control Board Order No. 80-4 at 16-17 (footnotes omitted).

Similarly, it is not necessary to find that waters of the state are currently being put to beneficial use in order to support a finding of pollution:

"Petitioners argue that since the groundwaters under the . . . site are not presently used for domestic purposes, no beneficial use has been impaired, and therefore the Regional Board's finding of pollution cannot be sustained. This contention lacks merit. The Regional Board need not await actual harm to beneficial uses to find pollution due to substances whose mere presence in drinking water is considered a health hazard. Moreover, there is no requirement that the affected waters must presently be used as a domestic water supply source in order to receive protection." Id. at 17-18.

The record indicates that, but for pollutants added as a result of BKK's operations, at least portions of the ground water at the BKK site could

potentially be used for domestic water supply. BKK asserts that the water has concentrations of flouride and manganese in excess of drinking water standards, but that would not rule out the possibility of use after treatment or blending with other water supplies. Flouride and manganese are naturally occurring elements which may be present at low concentrations in water supplies without presenting a public health hazard.⁶ Vinyl chloride presents a far more serious public health hazard, and its presence has a far more serious impact on the potential for domestic use of a water supply than does the presence of flouride and manganese. We therefore conclude that the presence of vinyl chloride in the waters in the vicinity of the BKK landfill unreasonably affects the potential beneficial use of those waters. BKK's operations have created a condition of pollution.

Of greater concern than pollution of ground waters at the BKK site is the threatened pollution of aquifers in the San Gabriel Valley which are currently being used for domestic water supply.⁷ There is evidence in the record that these aquifers are in hydraulic continuity with the aquifer system beneath the BKK landfill. Unless adequate measures are taken to prevent the

⁶ Department of Health Services drinking water standards set a maximum contaminant level for flouride of approximately 2,000 parts per billion, with an "optimum" level of approximately 1,000 parts per billion. 22 Cal. Admin. Code §64435. The drinking water standard for manganese is a secondary standard, based upon consumer acceptance rather than health hazards, of 50 parts per billion. Id. §64473.

⁷ The applicable water quality control plan lists municipal and domestic use as an existing beneficial use of the ground waters in the area, the San Gabriel Valley Subunit of the Los Angeles San Gabriel River Hydrologic Unit. State Water Resources Control Board and Regional Water Quality Control Board, Los Angeles Region (4), Water Quality Control Plan Report, Los Angeles River Basin (4B) at 1-2-11 (1975).

migration of vinyl chloride and other pollutants from the aquifer in the immediate vicinity of the BKK landfill -- by cleaning up the aquifer or by undertaking measures to prevent the natural transport of waters in the aquifer - - pollution of these San Gabriel Valley aquifers is threatened.

The Regional Board's findings in Order No. 84-89 and Cleanup and Abatement Order No. 84-4 that conditions of pollution and threatened pollution exist are supported by the record. The threatened pollution of aquifers in the San Gabriel Valley would provide sufficient basis for issuance of a cleanup and abatement order, independent of any finding of pollution in the immediate vicinity of the BKK landfill. See Cal. Water Code §13304.

We also conclude that there is another basis, independent of the Regional Boards' findings of pollution and threatened pollution, in support of issuance of the orders issued by the Regional Board. The orders were issued in response to violations of waste discharge requirements. Cease and desist orders are based upon a finding that a discharge is taking place or threatening to take place in violation of waste discharge requirements or discharge prohibitions. Cal. Water Code §13301. Cleanup and abatement orders may be based upon either: (1) a discharge in violation of waste discharge requirements or (2) a discharge or threatened discharge which creates or threatens to create a condition of pollution or nuisance. Id. §13304.

Thus, it may not be necessary to establish pollution or threatened pollution to support issuance of a cease and desist order or cleanup and abatement order. Where, by the express terms of the specific provision of the waste discharge requirements or discharge prohibition at issue, a condition of pollution or threatened pollution must be established in order to establish a violation of the waste discharge requirements or discharge prohibition,

evidence of pollution or threatened pollution is required. Pollution or threatened pollution must also be established to support a cleanup and abatement order where there is no finding of a violation of a cleanup and abatement order. Otherwise, no demonstration of pollution or threatened pollution is required.⁸

The Regional Board ratified Cleanup and Abatement Order No. 84-4 as part of Order N. 84-49. The Regional Board also found, in Order No. 84-49, that BKK was in violation of waste discharge requirements. Where the conditions of waste discharge requirements found to have been violated do not themselves require a demonstration of pollution or threatened pollution in order to establish a violation, the Regional Board's finding of violations of waste discharge requirements, supported by the record, provide a basis to uphold both Regional Board orders independent of the Regional Board's finding of pollution and threatened pollution.

3. Contention: BKK contends that it is not in violation of waste discharge requirements.

Finding: The discharge from the Miranda Seep contained chlorinated hydrocarbons, including vinyl chloride, above naturally occurring levels. At the time the seep was discovered, BKK was responding to a gas migration problem, that forced evacuation of homes adjacent to the landfill. The most

⁸ The legislative history of the Porter-Cologne Act indicates that prior law requiring proof of pollution or nuisance to enforce a cease and desist order, where violation of waste discharge requirements had been established, constituted a barrier to effective enforcement. The legislative history also indicates a legislative intent to correct the inadequacies in the enforcement provisions of the state's water quality law. See Final Report of the Study Panel to the California State Water Resources Control Board, Recommended Changes in Water Quality Control 19 (1969); 1969 Cal. Stats., Ch. 482, Section 36 (adopting report of the Study Panel as legislative history).

serious problem was the presence of vinyl chloride gas. Chemical analysis of the Miranda Seep indicated that the discharge did not contain many of the pollutants indicative of leachate, such as heavy metals and relatively nonvolatile organic compounds. An upslope monitoring well, MW-16, had exhibited high concentrations of vinyl chloride, at 1,000 to 2,500 parts per billion. These facts support the conclusion that vinyl chloride and other chlorinated hydrocarbons were discharged from the Miranda Seep as a result of subsurface gas migration and dissolution into the aquifer which is the source of the seep.

The record also supports the conclusion that the probable source of the vinyl chloride gas was the Class I disposal area. It is highly unlikely that vinyl chloride gas would be found at the quantities and concentrations observed unless the gas had come from areas where Class I wastes had been disposed of.

With respect to the Class I disposal area, the waste discharge requirements provide, in part: "B-3. Wastes shall be deposited only in class I areas and shall be prevented from escaping therefrom." The migration of vinyl chloride gas and dissolution into the aquifer is in violation of this requirement.

With respect to all areas of the landfill, the waste discharge requirements require:

"C-4. The migration of gases from the disposal site shall be controlled as necessary to prevent water pollution or nuisance.

.

"C-12. Wastes deposited at this site shall be confined thereto, and shall not be permitted to flow off the site or to enter downstream drainage ditches or water courses."

The migration of gases, which caused conditions of pollution and threatened pollution, constitutes a violation of requirement C-4. The discharge from the Miranda Seep, containing vinyl chloride and other chlorinated hydrocarbons, constitutes a violation of requirement C-12, requiring that the wastes be confined to the landfill site and not permitted to enter downstream drainage ditches or water courses.

In summary, BKK was in violation of requirements B-3, C-4 and C-12 of its waste discharge requirements. Because these three requirements were violated, it is not necessary to determine whether any other conditions of the waste discharge requirements were violated.⁹

4. Contention: BKK contends that establishing cleanup levels at the level set by Department of Health Services action levels is unreasonable.

Finding: Order No. 84-89 establishes a cleanup level of 2 parts per billion vinyl chloride for the aquifer for the immediate vicinity of the BKK landfill. Order No. 84-89 provides that, unless the aquifer is dewatered, compliance with Cleanup and Abatement Order No. 84-4 requires that vinyl chloride concentrations in the ground water be reduced to this level.

As explained in a recent State Board order involving ground water cleanup levels, "action levels" are health-based criteria developed by the Department of Health Services, based on potential health effects when chemicals are found in drinking water. State Water Resources Control Board Order No. 86-8 at 7-8. Action levels are not adopted as regulations, and are not binding on the Regional Boards, but they may be used as evidence of what level of ground

⁹ The Regional Board found BKK to be in violation of nine provisions of the waste discharge requirements. Some of the requirements cited as being violated apparently involve issues other than the Miranda Seep.

water cleanup may be appropriate to protect present and potential beneficial uses.¹⁰

The Regional Board did not treat the Department of Health Services' action levels as binding standards, but relied on these action levels as an indication as to what level of cleanup would reasonably be required to abate conditions of pollution and threatened pollution. As discussed earlier, the presence of vinyl chloride in the ground water at BKK site threatens to pollute other aquifers which are currently used for domestic water supplies. The Environmental Protection Agency has established a recommended maximum contaminant level for vinyl chloride of zero parts per billion. On the record before us, requiring cleanup to a level of two parts per billion vinyl chloride was reasonable.¹¹

¹⁰ Similarly, the Environmental Protection Agency's Water Quality Criteria Documents are not adopted as regulations, and are not binding on the states, but may be used as information and guidance in deciding what water quality objectives are appropriate. See 40 C.F.R. §131.11(b)(2). See generally 28 Ops.Cal.Atty.Gen. 227, 233 (1956); 2 K. Davis Administrative Law Treatise §7.5 (2d Ed. 1979). A summary of the Water Quality Criteria Document for vinyl chloride states in part:

"For the maximum protection of human health from the potential carcinogenic effects due to exposure of vinyl chloride . . . the ambient water concentration should be zero However, zero level may not be attainable. Therefore, the levels which may result in incremental increase of cancer . . . are estimated" 45 Fed. Reg. 79318, 79341 (Nov. 28, 1980).

The level of vinyl chloride estimated to create an excess lifetime cancer risk of 10^{-6} is 2.0 $\mu\text{g}/\text{l}$ (two parts per billion). Id.

¹¹ BKK contends that no applicable water quality objectives have been adopted pursuant to Water Code Section 13241. This assertion is incorrect. The applicable water quality control plan establishes a general objective requiring that there be no adverse change in water quality unless it is demonstrated that the change is consistent with the maximum benefit of the people of the state and will not unreasonably affect present and anticipated beneficial uses. See

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5. Contention: BKK contends that the schedule established by the Regional Board for completion of cleanup operations was unreasonable.

Finding: The time allowed by the Regional Board for BKK to achieve full compliance with Cleanup and Abatement Order No. 84-4 and Cease and Desist Order No. 84-89 was unreasonably brief.

Of necessity, cleanup and abatement orders often must be issued based upon limited information as to what measures are necessary to correct the problem, and how long correction will take. To assure that cleanup and abatement begins promptly, the Executive Officer issues the order based upon the information available at the time, rather than waiting for further investigation by the Board staff or the discharger that would provide more detailed information concerning how long it would take to comply. Based upon the information available to the Executive Officer at the time, we cannot fault the Executive Officer for the schedule originally included in Cleanup and Abatement Order No. 84-4.

11 (FOOTNOTE CONTINUED)

State Water Resources Control Board and Regional Water Quality Control Board, Los Angeles Region (4), Water Quality Control Plan Report, Los Angeles River Basin (4B) at 1-4-5, SA-1 (1975). It has not been demonstrated that allowing higher vinyl chloride concentrations than allowable under Order No. 84-89 would be consistent with the maximum benefit of the people of the state.

We also note that while water quality objectives may be adopted as part of water quality control plans or state policy for water quality control, see Cal. Water Code §§13242, 13170, 13241, these are not the exclusive means for setting water quality objectives. Site-specific objectives may be established as part of individual permitting and enforcement actions. See *id.* §§13263, 13304. Setting cleanup levels amounts to establishment of site-specific objectives. Establishing these objectives as part of individual permitting and enforcement actions, instead of through quasi-legislative plans and policies, does not constitute a denial of due process. See National Labor Relations Board v. Bell Aerospace Co., 416 U.S. 267, 290-95, 94 S. Ct. 1757, 1770-72 (1974).

Once a cleanup and abatement order is issued, however, the Executive Officer, and the Regional Board itself, must maintain the flexibility to revise the order as further information, including information and arguments submitted by the discharger, become available.

In this case, the cleanup and abatement order established an intermediate deadline for completion of a workplan. It may be anticipated that, in many cases, the Regional Board will have a great deal more information available to it after review of a workplan submitted by the discharger. Where this information demonstrates that the original compliance schedule is inappropriate, it should be revised.

Even after the workplan is submitted, further developments may require further revisions to the compliance schedule. If the discharger were held rigidly to the schedule proposed in the original workplan, without possibility of amendment, some dischargers might be discouraged from proposing tight schedules for completion of operations out of fear that unanticipated delays could result in civil monetary remedies if the dates proposed in the workplan are not met.¹² As a result, cleanup operations would take longer. The same public policies that demand that the Executive Officer have authority

¹² Civil monetary remedies may be imposed for violations of schedules set by cleanup and abatement orders. Cal. Water Code §§13350, 13385. Where liability is imposed based upon a discharge in violation of waste discharge requirements or other regulatory requirements, failure to comply with the schedule set by a cleanup and abatement order issued in response to the discharge may increase the amount of liability. Id.

As part of Order No. 84-89, the Regional Board adopted a referral to the Attorney General for enforcement, including imposition of civil monetary remedies. Because the deadline for compliance set by the cleanup and abatement order may affect the amount of liability, issues relating to the reasonableness of the schedule of compliance are not moot, even where they concern aspects of cleanup, such as stopping the seepage, which may already have been completed.

to issue cleanup and abatement orders without a prior hearing, to assure prompt cleanup, also require flexibility to change the cleanup and abatement order as further information becomes available.

In this case, the Regional Board adhered to the cleanup schedule set when the cleanup and abatement order was first issued, in the face of further information demonstrating that the schedule was unrealistic.

In considering what would constitute a realistic cleanup schedule, two aspects of the cleanup should be considered separately:

- (1) stopping the seepage at the Miranda Seep; and
- (2) abating the condition of pollution and threatened pollution arising from the presence of vinyl chloride in the aquifer that fed the Miranda Seep.

The first aspect of cleanup could be accomplished relatively soon, although not as soon as required by Cleanup and Abatement Order No. 84-4. Full cleanup of the aquifer would take much longer.

a. Seepage Control

The canyon area where the Miranda Seep is located is steep, and lacks roads. Access problems created difficulties both in gathering information necessary to prepare a workplan and in carrying out operations to stop the seepage.

Cleanup and Abatement Order No. 84-4, delivered on July 27, 1984 required submission of a workplan by July 30, and full compliance by August 15, 1984. BKK mailed the workplan on August 3, 1984. The workplan proposed to provide for pumping wells to eliminate the seep, with an estimated date for completion of August 31, 1984. The Regional Board accepted the workplan on August 10, with the added condition that gas probes be installed near the

proposed extraction wells, but retained the original August 15 deadline for full compliance. Based upon our review of the information available to the Regional Board at that time, including the workplan submitted by BKK, we find insufficient evidence to support the Regional Board's decision not to extend the August 15 deadline for full compliance.¹³

Subsequent events indicate that even BKK's proposed August 31 completion date was overly optimistic. Well drilling proved difficult and time consuming. Pumping at the first well did not begin until August 30. On August 31, BKK informed the Regional Board of the difficulties encountered, and reasserted its claim that the August 15 compliance date set by Cleanup and Abatement Order No. 84-4 was unreasonable.

BKK encountered further difficulties in its efforts to drill a second well. By pumping water from the first well, BKK lowered the water table to the point where there was no surface flow from the seep. Regional Board staff inspected the area on September 25, 1984, and observed that there was no surface flow from the seep.

Based upon the additional information which became available as part of BKK's efforts to stop the seepage, and BKK's request for additional time, the Regional Board should have reassessed the reasonableness of the August 15

¹³ The Regional Board contends that BKK failed to achieve compliance with the August 15 deadline because resources that should have been used to correct the seepage problem were diverted to respond to the gas migration problem that had caused evacuation of homes near the landfill. But the August 31 completion date estimated in the workplan is not based upon the need to devote resources to other problems. Rather, the estimate is based on the proposed work to be done, and the assessment that access would be extremely difficult and working conditions would be hazardous. Aside from its claim that BKK diverted resources away from the Miranda Seep problem, the Regional Board does not cite any evidence that it was reasonable to expect cleanup to be completed in less time than estimated in BKK's workplan.

compliance date originally set for stopping the seepage. The cleanup and abatement order should have been amended to provide a reasonable time, beyond the August 31 completion date previously estimated by BKK, to achieve full compliance.¹⁴

b. Aquifer Cleanup

Order No. 84-89 provides that full compliance with Cleanup and Abatement Order No. 84-4 will be established when the concentration of vinyl chloride in the ground water pumped by the well used to control the Miranda Seep is reduced to two parts per billion, or when the aquifer is completely dewatered.

The record provides relatively little evidence upon which to base a decision on what would constitute a reasonable time for compliance with the requirement of cleaning up the aquifer. Cleanup and Abatement Order No. 84-4 required a workplan for stopping seepage; it did not require a workplan for cleanup of the aquifer. It is clear, however, that cleanup or dewatering of the aquifer would require considerably more time than lowering the water table to the point where the seepage stopped.

The Regional Board therefore should have established a longer schedule for cleanup of the aquifer than for stopping the seepage. Requiring

¹⁴ With one exception, BKK's efforts to stop the seepage appear to have been reasonable. A 3/4 horsepower pump that failed on August 30, 1984 was not replaced until September 11, 1984, an unreasonably long delay.

A Regional Board is not required to amend a cleanup and abatement order simply because the compliance date has not been achieved, especially where there have been unreasonable delays in achieving compliance. In this case, however, most of the difficulties which delayed compliance by BKK involved circumstances which indicated that the compliance date originally set by the cleanup and abatement order could no longer be considered reasonable. A new, reasonable compliance date should have been established.

an additional workplan to set forth efforts to complete cleanup of the aquifer after efforts to stop the seepage were completed would also have been desirable.¹⁵

The cleanup and abatement order should be revised to provide different compliance dates for stopping the seepage and cleaning up the aquifer, and to establish a reasonable time for compliance with each of these requirements. These revisions may best be made by the Regional Board (or the Executive Officer), taking into account any new information which may have been developed since this petition was filed, or which may be developed as part of preparation of revisions to the cleanup and abatement order.¹⁶ Accordingly, we remand Order No. 84-89 and Cleanup and Abatement Order No. 84-4 to the Regional Board.¹⁷

¹⁵ To ensure that the aquifer is cleaned up as soon as possible, the cleanup and abatement order should have been more specific about cleanup of the aquifer. Indeed, it was not clear until the Regional Board issued Order No. 84-89 that the Regional Board expected cleanup and abatement of conditions of pollution or threatened pollution, as required by Order No. 84-4, to include cleanup of the aquifer. The Regional Board approved a workplan which was directed towards stopping the seepage, not cleanup of the aquifer. This uncertainty, as to whether cleanup of the aquifer was expected, supports our conclusion that it was unreasonable to expect cleanup of the aquifer on the same schedule as stopping the seepage.

¹⁶ Comments submitted by homeowners' associations in response to BKK's petitions request additional monitoring. They request monitoring of runoff in the Miranda Seep area, and monitoring of other seeps in the vicinity of the BKK landfill. These comments should be considered by the Regional Board in determining what monitoring requirements are appropriate in connection with the revised cleanup and abatement and cease and desist orders.

¹⁷ BKK also objects to a provision of Order No. 84-89 which states that the order does not extend the compliance dates or excuse violations of any requirements established by other regulatory authority with jurisdiction over the BKK site. This provision merely restates existing law that orders of the State and Regional Boards are not a limitation on the powers of other governmental authorities to establish and enforce further conditions,

(CONTINUED)

At the workshop session on this order, BKK requested a hearing to receive additional evidence, not part of the administrative record upon which this order is based. BKK requested an opportunity to present relevant evidence on the issue of whether there is a condition of pollution, or threat of pollution, either to the aquifer underlying the BKK site or the San Gabriel Valley aquifer. BKK also requested an opportunity to present evidence on the issue of whether the Regional Board's requirement limiting vinyl chloride concentrations to two parts per billion, or dewatering the polluted aquifer, is unreasonable. BKK's petition for review of the Regional Board's action did not request a hearing on this additional evidence, see 22 Cal. Admin. Code §2050(b). At the workshop session, the Regional Board Executive Officer stated that the Regional Board would consider new orders as required by this decision within the new few months. He agreed that the new evidence could be considered at that time. We believe the Regional Board is a more appropriate forum for the presentation of new evidence. We therefore decline to honor BKK's request to present additional evidence. See id. §2066(b). This order is based upon the record before the Regional Board. See id. §2064. Additional evidence may be presented to the Regional Board when it prepares revisions to the cleanup and abatement order. Evidence may be presented in support of revisions to the cleanup and abatement order with respect to the specific remedial actions to be carried out, the schedule for compliance, or any other changes which may be justified by the additional evidence.

17 (FOOTNOTE CONTINUED)

another agency might set more stringent requirements does not establish that a Regional Board order is unreasonable.

III. SUMMARY AND CONCLUSIONS

1. The Executive Officer of the Regional Board is not required to provide notice and an opportunity to be heard before issuing a cleanup and abatement order.

2. The presence of vinyl chloride in the aquifer in the immediate vicinity of the BKK landfill constitutes conditions of pollution and threatened pollution. The waters where vinyl chloride has been observed are polluted. We also conclude, based upon the evidence in the record, that other waters in hydraulic continuity with these polluted waters are threatened with pollution.

3. These conditions of pollution and threatened pollution have resulted from violations of BKK's waste discharge requirements.

4. Based upon the evidence before the Regional Board, the Regional Board's requirement that vinyl chloride concentrations be reduced to two parts per billion, or that the polluted aquifer be dewatered, is appropriate and proper.

5. The schedule for compliance with cleanup requirements was unreasonably short. Separate schedules should be established for stopping seepage and for cleanup of the aquifer, and reasonable times should be provided for each.

IV. ORDER

IT IS HEREBY ORDERED that the California Regional Water Quality Control Board, Los Angeles Region, shall amend Order No. 84-89 and Cleanup and Abatement Order No. 84-4 to establish separate schedules for stopping seepage and for ground water cleanup, and shall provide reasonable times for each task. Cleanup and Abatement Order No. 84-4 may be amended by the Executive Officer.

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

CERTIFICATION

The undersigned, Administrative Assistant to the 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 21, 1986.

AYE: W. Don Maughan, Chairman
Darlene E. Ruiz, Vice Chairwoman
Edwin H. Finster, Member
Eliseo M. Samaniego, Member
Danny Walsh, Member

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marche
Administrative Assistant to the Board

