

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition
of the City of Santa Rosa to
Review Order No. 73-81 of the
California Regional Water
Quality Control Board, North
Coast Region

Order No. WQ 73-26

BY THE BOARD:

On October 3, 1973, the California Regional Water Quality Control Board, North Coast Region, adopted Order No. 73-81. Order No. 73-81 requires the City of Santa Rosa, West College Avenue Sewage Treatment Plant (petitioner), to cease and desist discharging wastes contrary to waste discharge requirements established by the regional board on October 25, 1972. The order contains a provision prohibiting additional discharges to the municipal sewer system.

On October 19, 1973, petitioner filed its petition with the State Board requesting review of Order 73-81 and specifically requested that the State Board "advance the effective date of its order denying connection rights to holders of a building permit from September 11, 1973 (date of notice) to October 3, 1973 (date of adoption of Order No. 73-81)." Petitioner's points and authorities in support of the petition were filed on November 16, 1973. It should be noted that the only question under review is the "effective date" of the prohibition on additional discharges to the sewer system. Petitioner does not request review of any other aspect of the order. After review of the record of the regional board proceeding and after consideration of the contentions of the petitioner, we have determined that the effective date of the prohibition on additional discharges to the sewer system specified in Order No. 73-81 is proper and that the relief requested by petitioner should be denied.

SUMMARY OF FACTS

The West College Avenue Sewage Treatment Plant is the City of Santa Rosa's principal sewage treatment facility. The plant location has served as a site for wastewater treatment and disposal for Santa Rosa since the 1920's. The present plant was built in 1951 and discharges into Santa Rosa Creek, a tributary of the Russian River.

There is a lengthy history of difficulty associated with discharges from the plant which is outlined in the staff report considered by the regional board but which need not be detailed in connection with the present petition. Current waste discharge requirements were adopted by the regional board on October 25, 1972, in Order No. 72-42. These waste discharge requirements provide, in part, as follows:

"A . DISCHARGE SPECIFICATIONS:

1. The discharge shall not contain constituents in excess of the following limits:

<u>Constituent</u>	<u>Units</u>	<u>Median</u>	<u>80 Per- centile</u>	<u>Maximum</u>
c. Nonfilterable Residue	mg/l	30	50	_____
d. Coliform Organisms	MPN/100 ml	2.2	4.8	_____
e. Total Chlorine Residual	mg/l	_____	_____	0.1

3. The mean daily dry weather flow shall not exceed 6.5 mgd.
4. The discharge shall not cause a pollution.
5. Neither the treatment nor the discharge of waste shall cause a nuisance.
6. The discharge shall not cause the dissolved oxygen at any point in Santa Rosa Creek to be less than 7.0 mg/l.
7. The discharge shall not cause visible evidence of any floatable material or oil and grease in the waters of Santa Rosa Creek.
8. The discharge shall not cause bottom deposits at any point in Santa Rosa Creek.

9. The discharge shall not significantly alter the color of the waters of Santa Rosa Creek.
10. The discharge shall not increase the turbidity of the waters of Santa Rosa Creek more than 20 percent above naturally occurring background levels.
11. The survival of test fishes in 96 hour static bioassays in undiluted effluent shall for any one determination equal or exceed 70 percent of the test fish. The average survival for any three or more consecutive determinations over a 21-day period shall equal or exceed 90 percent of the test fish.

B. PROVISIONS

3. On or before May 15, 1974, the City of Santa Rosa shall eliminate its discharge of waste to the Russian River or any tributary flowing to the Russian River during the period of May 15 through September 30 and all other periods when the flow of the Russian River as measured at Healdsburg (USGS Gage No. 11-4640.00) is less than 1000 cfs.
4. The City of Santa Rosa shall comply with Discharge Specifications 1(a,b,c,d) and 2 through 10 of this Order forthwith."

A hearing was held by the regional board on October 3, 1973. Based upon the evidence introduced at the hearing, the regional board found petitioner in violation of waste discharge requirements and ordered petitioner to cease and desist violation of the requirements in accordance with a time schedule. The Board further prohibited additional discharges to the sewer system by the following provision:

7. Additional discharges to the West College Avenue Sewage Treatment Plant sewer system by dischargers who did not discharge into the system prior to the issuance of this order are prohibited; provided the following are excluded from this provision:
 - (a) Projects under construction or with building permits already issued at the time the notice of the Cease and Desist hearing to consider the proposed prohibition or restriction was given unless special circumstances justify inclusion of such projects.

- (b) Discharges from existing dwellings not connected to West College Avenue Sewage Treatment Plant which have methods of waste disposal which are causing more severe water quality problems than those caused by the treatment and disposal of waste at the West College Avenue Sewage Treatment Plant.
- (c) Discharges which, by reason of special circumstances, if not allowed to connect to the West College Avenue Sewage Treatment Plant would result in extreme public hardship or a public health hazard. This is not intended to mean that economic loss to a community as a whole or to any public agency or private person within the community is by itself cause for not prohibiting additional connections because such loss is the rule rather than the exception and cannot outweigh the need to prevent an increase in water quality impairment which is the basic reason for the prohibition.

CONTENTIONS AND FINDINGS

The contentions of the petitioner and our findings relative thereto are as follows:

1. Denial of Constitutional Rights and Validity of Section 2244.1(a). The petition alleges that the denial of connection rights to those dischargers who received a building permit after the date on which the petitioner received notice of the cease and desist hearing and before the date the cease and desist order was issued, as contained in paragraph 7 of Order 73-81, is unconstitutional in that it denies the discharger property without due process of law, represents an unreasonable, arbitrary and discriminatory classification of dischargers and denies the dischargers equal protection under the law.

Petitioner's points and authorities in support of the petition which were filed subsequent to the petition, do not make direct reference to the foregoing allegations. Instead, the petitioner first argues in its points and authorities that Section 2244.1(a) of Title 23, California Administrative Code is invalid because it is not a reasonable extension of Division 7 of the Water Code, particularly Section 13301. That section of the Water Code provides, in pertinent part, that in the event of an existing or threatened violation of existing waste discharge requirements in the operation of a community sewer system, cease and desist orders may restrict or prohibit the volume, type, or concentration of waste that might be added to such system by dischargers who did not discharge into the system prior to the issuance of the cease and desist order. Petitioner also refers to Water Code Section 13303 which provides that cease and desist orders shall become effective and final upon issuance thereof.

Section 2244.1(a) provides:

"Orders prohibiting or restricting additional discharges should expressly exclude projects under construction or with building permits already issued at the time the notice of the cease and desist hearing to consider the proposed prohibition or restriction was given unless special circumstances justify inclusion of such projects."

Petitioner construes this regulation as providing "that mere notice of a cease and desist hearing is sufficient to justify the non-issuance, or more precisely, the non-connection of homes built under the authority of a building permit issued after notice is given that a hearing to determine whether an order to cease and desist from

discharging additional effluent into the sewer system under review should issue, but before that same matter is determined at the hearing for which notice was given." (Points and Authorities, p. 3, ll. 20-27.)

Petitioner has missed the point of the regulation. The "non-connection of homes" is authorized by Water Code Section 13301 which applies by its terms to any additional discharge to a community sewer system after the issuance of a cease and desist order. This law makes no exception for homes built "under the authority of a building permit" whether issued before or after notice of the hearing. If it were not for Section 2244.1(a) the regional board might not have made any exceptions to the prohibition of additional discharges to the sewer system with the result that all new connections would have been prohibited after issuance of the order. Instead, Section 2244.1(a) directs the regional boards to soften the impact of the statute by excluding from the prohibition "projects under construction or with building permits already issued at the time the notice of the cease and desist hearing to consider the proposed prohibition or restriction was given unless special circumstances justify inclusion of such projects." This regulation was adopted in order to allow those persons who had made definite commitments in good faith to develop property to the extent of actually undertaking construction or securing the issuance of a building permit without knowledge of an impending prohibition on additional sewer connections, to escape being subjected to the order. The order issued by the regional board in this instance faithfully complied with the regulation. It is obvious that petitioner, as the beneficiary of this equitable direction to regional boards, has no cause for complaint.

Petitioner does not dispute finding No. VII of the order which reads, in part, "... after due notice to the discharger and all other affected persons, the regional board conducted a public hearing ...". Further, "Attachment A" to the Notice of Public Hearing relating to the prohibition on additional discharges, warns that "any building permit issued by the community whose discharge is the subject of the hearing, subsequent to receipt of this notice, should contain a notification that the permittee may not be allowed to connect to the community sewer system if the prohibition or restriction is adopted and is still in effect when connection is desired." Thus the discharger received adequate notice of hearing and the possible prohibition on additional discharges to the sewer system on September 11, 1973.

While the constitutionality of Water Code Section 13301 regarding prohibitions on additional discharges has not been decided by the California Appellate Courts, the Superior Court for the City and County of San Francisco has upheld a similar prohibition. In three cases consolidated as Morshead, et al. v. California Regional Water Quality Control Board, Nos. 636885, 636884, and 636886, the court held that a prohibition against additional discharges to the sewer system does not violate due process or equal protection.

The recent case of U.S. v. Douglas County (U.S. District Court, District of Nevada), 5 ERC 1577 involved enforcement of water quality standards established by the State of Nevada for interstate waters pursuant to the Federal Water Pollution Control Act. The court issued a preliminary injunction which enjoined and restrained Douglas County, Nevada from issuing permits for the construction of any new buildings, residences and facilities in certain areas of Douglas County until facilities for the treatment and exportation of waste and sewage from the Lake Tahoe Basin have been completed and placed into operation. While this case does not specifically uphold a statutory connection ban, it imposes equitable relief which is somewhat similar in effect. The procedures followed in adoption of Order 73-81 and the order itself comply with due process fairness concepts set out in Goldberg v. Kelley, 397 U.S. 254, 90 Sup.Ct. 1011 as well as the other cases cited by petitioner. We find that the prohibition on additional discharges does not violate the due process or equal protection clauses of the U.S. or California constitutions.

2. Ex Post Facto Law and Retroactive Effect. The second contention stated in the petition is that paragraph 7 of the regional board's order is in the nature of an ex post facto law contrary to the United States and California Constitutions. The points and authorities state that the reference in the petition to ex post facto laws was erroneous and that the reference should be to retroactive laws. Other than citing authority for the proposition that a statute may not be interpreted retrospectively unless it is clearly indicated that such is the intention, petitioner fails to support or explain this contention. The order has no retroactive effect. It was adopted on October 3, 1973 and does not prevent connection to the sewer system prior to that date. The order does not apply to past conduct, except for exclusionary purposes, and is aimed only at future connections to petitioner's sewer system.

3. Claim That Order Interferes with City's Permit Authority. Petitioner contends that Order No. 73-81 interferes with the City's power to issue building permits and the attendant right thereto, connection to the sewer system prior to October 3, 1973. It should be noted that this order in no way affects issuance of building permits and does not affect connections prior to October 3, 1973. While the furnishing of sewage service may be a municipal affair, the power of the State to control pollution of waters is unassailable. U.S. v. 531.13 Acres of Land, 366 F. 2d 915, 918-919. Water Code Section 13301 clearly provides authority for the prohibition on additional discharges imposed in this order. Municipal corporations are organized and empowered

by the State and their powers may be so restricted by the State. San Francisco v. Canavan, 42 Cal. 541. Consequently, we find no unreasonable interference with the City's permit power.

4. Claim That Order and Administrative Code Provisions are Contrary to Water Code Provisions. Petitioner in its petition claims that the terms of the prohibition on additional discharges to the sewer system, and Section 2244.1(a) of Title 23, California Administrative Code, are contrary to Water Code Sections 13301 and 13303. This contention is closely related to the first point briefed in petitioner's points and authorities which has been previously discussed.

5. Claim That No Rush of Permit Applicants Occurred Between Notice and Hearing Dates. Petitioner claims that "the purported reason for imposition of the ban upon discharges effective as of the date of issuance of the notice to call a hearing to issue a Cease and Desist Order instead of as of the date of the entry of the Order to Cease and Desist is 'to prevent a rush of applicants for building permits before the hearing.'" Petitioner further claims that such rationale is not supported by the facts in that there was no rush of applicants for building permits between September 11, the date of the notice, and October 3, the date of the hearing. Here again, petitioner exhibits a failure to understand the effect of the regional board's order. Contrary to petitioner's statement, the order did not impose "a ban upon discharges effective as of the date of issuance of the notice"; additional discharges were prohibited as of the date of the order. Aside from this misconception, the fact that there was "no rush

for permits" in this matter does not change the purpose and intent of this order, nor does it invalidate the order as issued. A discharger who commenced construction or obtained a building permit on or after September 11, 1973, and who did not discharge to the sewer system by October 3, 1973, is prohibited from discharging to the sewer system unless granted an exclusion as provided in the order.

6. Claim For Modification Based on Wet Weather Flow.

Petitioner claims that allowing connections to parties who obtained building permits between the date of notice and the date of hearing will not violate the terms and spirit of the order in that the rainy season is rapidly approaching and certain waste discharge requirements will not be applicable. Petitioner further claims that corrective measures will be implemented by dry weather time in 1974. The purpose of a prohibition on additional discharges is to prevent an increase in violation or likelihood of violation of waste discharge requirements and thereby prevent an increase in unreasonable impairment of water quality or nuisance. Section 2244(a), Title 23, California Administrative Code. Prohibitions on additional discharges should be included in a cease and desist order if the further addition in volume, type or concentration of waste entering the system would cause an increase in violation or increase the likelihood of violation of waste discharge requirements. Section 2244(b), Title 23, California Administrative Code. The regional board made findings to the above effect in findings III, IV and V of Order 73-81. The regional board found actual violation of ten requirements and threatened violation of three requirements. The prohibition on additional discharges is to prevent increased violation of all the waste discharge requirements, not just the two that petitioner cites.

7. Procedures for Enactment of Administrative Regulations.

In its points and authorities petitioner states "There is a proscribed (sic) procedure for the enactment of an administrative regulation to give it the force and effect of a law." (Points and Authorities p. 5, l. 2.) Petitioner then sets forth a number of legal truisms, but fails to explain how they pertain to the action under review or point out any defect in the procedure by which Section 2244.1(a) was enacted. In the absence of such explanation, no meaningful discussion is possible.

8. Claim that a Building Permit is a Vested Right and Provisions of Health and Safety Code. Petitioner contends that a building permit once issued constitutes a vested right, but petitioner fails to cite any authority except for the principle that upon issuance of a building permit and after the landowner incurs expenses thereon the rights arising under the permit cannot be arbitrarily revoked or withdrawn. (Points and Authorities p. 6, ll. 23-26.) This principle is indisputable but has no relevance to the instant proceeding. Petitioner also cites Health and Safety Code Section 5009 as requiring that improvements constructed within a specified distance of sewer systems shall be connected to the sewer system. Actually, this section applies only to "buildings inhabited or used by human beings" and has no application to or effect upon an order prohibiting additional discharges to a sewer system from buildings not yet constructed. Similarly, petitioner cites Health and Safety Code Section 5463 which applies only to dwelling houses already constructed. Finally, under this same heading petitioner says: "...it is inconceivable that a party to whom a building permit was issued before a hearing was

held to determine the builder's right to connect to the municipal sewer system would anticipate or could reasonably be expected to be denied the right to connect to the sewer system." When making this statement, petitioner ignores the fact that the notice of hearing which was sent to the City was accompanied by a statement that any building permit issued subsequent to receipt of the notice should contain a notification that the permittee may not be allowed to connect to the sewer system if the prohibition is adopted and is still in effect when connection is desired. If petitioner heeded this advice, the concern expressed in its points and authorities would be ill-founded. Only if petitioner chose to ignore this advice would persons who secured building permits between the time the notice was received and the hearing was held have been misled to their prejudice.

9. Due Process. On page 8 of the points and authorities petitioner alleges that withholding of connection rights prior to argument on the merits as to whether such an order should be entered after notice and hearing constitutes an unconstitutional denial of due process. Here again, petitioner assumes, contrary to the fact, that any connection rights were withheld prior to adoption of the order.

Petitioner does not submit new facts which were not considered by the regional board nor does it dispute the board's findings. Based upon these findings and the record in this matter, we find that to exclude persons from the prohibition on additional discharges, who obtained building permits between September 11 and October 3, 1973 and did not discharge to the sewer system by October 3, 1973, would be contrary to the legislative purpose reflected in Water Code Section 13301 and would be inappropriate and improper.

Conclusions

After review of the record, and consideration of all the contentions of the petitioner and for the reasons discussed in this order, the State Board concludes that the action of the regional board in adopting Order No. 73-81 was appropriate and proper.

NOW THEREFORE IT IS ORDERED that the petition for review of Order No. 73-81 is denied.

Dated: DEC 6 1973

W W Adams
W. W. Adams, Chairman

Ronald B. Robie
Ronald B. Robie, Vice Chairman

Roy E. Dodson
Roy E. Dodson, Member

Mrs. Carl H. Auer
Mrs. Carl H. (Jean) Auer, Member

W Don Maughan
W. Don Maughan, Member