

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
NIPOMO COMMUNITY SERVICES DISTRICT)
for Review of Order No. 82-28, Waste)
Discharge Requirements by the)
California Regional Water Quality)
Control Board, Central Coast Region.)
Our File No. A-324.)

Order No. WQ 83-4

BY THE BOARD:

On December 10, 1982, the California Regional Water Quality Control Board, Central Coast Region (Regional Board), adopted Order No. 82-28, waste discharge requirements for Nipomo Community Services District. On January 10, 1983, Nipomo Community Services District (petitioner) filed a timely petition for review of Order No. 82-28.

I. BACKGROUND

Regional Board Order No. 82-28 establishes waste discharge requirements for a community subsurface disposal system. The system will serve a proposed 30-lot cluster-type development located on a six-acre parcel on the Nipomo Mesa adjacent to the U.S. 101 freeway in San Luis Obispo County. The petitioner, a public entity which provides sewage and water service within its service area, was named as the discharger since it will own, operate and maintain the subsurface disposal system.

Wastewater generated within the subdivision will be collected, treated in a community septic tank, and discharged to alternating leachfields. Design flow for the system is 15,000 gallons per day. Soil in the discharge area is sandy to a depth of 63 feet. Depth to usable groundwater is 114 feet.

Order No. 82-28 authorizes discharges from the system and contains various provisions to help ensure proper design, construction, and maintenance. Petitioner does not object to such provisions. Petitioner does object to the following discharge provision contained in Order No. 82-28:

"This discharge is prohibited when a community-wide sewage collection, treatment and disposal system becomes available."

The Nipomo area has historically had problems with subsurface disposal. These problems have occurred mainly in the older portion of the area and are attributable to such factors as unsuitable hydrogeologic conditions and poor design, construction, and maintenance practices. The Nipomo area generally consists of two distinctive soil features. East of U.S. 101 in the older, more developed portion of Nipomo, the soils are generally clay and therefore less suited to subsurface disposal systems. Conversely, the newer portion of Nipomo to the west of the freeway has highly permeable sandy soils. In 1978, the Regional Board amended its Basin Plan to include a prohibition against discharges from new individual disposal systems in portions of petitioner's service area. The Regional Board also adopted an exemption procedure to be used in two situations: (1) for new or existing individual

systems that would not individually or collectively result in pollution or nuisance or adversely affect water quality and (2) where a public agency provides assurances that systems will be adequately designed, constructed and maintained. Although these basin plan provisions apply only to individual subsurface disposal systems and not to community systems, in a similar situation we found that "the Regional Board policy regarding community subsurface disposal systems has always been to require even more detailed engineering justification than is normally required for individual systems".^{1/}

The petitioner is currently involved with a Clean Water Grant for a centralized sewage system. Previous attempts to secure voter approval for a centralized sewer system have not been successful. The petitioner believes that it is politically essential in building community support for a centralized sewer system to assure that the persons who pay for the system are the only ones who will benefit from it. The petitioner's approach has been that only problem on-site systems and close-by lots to be developed in the future will be connected. This approach will probably result in a higher cost to those who must connect.

II. CONTENTIONS AND FINDINGS

1. Contention: The petitioner urges that the Regional Board cannot properly approve a community subsurface disposal

1. State Board Order No. WQ 81-12, page 4.

system with a requirement that it must be connected when a sewer system becomes available in the future.

Finding: Water Code Sections 13280-13284 set forth the circumstances under which a Regional Board may prohibit the discharge of waste from existing or new individual or community subsurface disposal systems. Section 13280 provides that a prohibition must be supported by substantial evidence that such discharge "will result in violation of water quality objectives, will impair present or future beneficial uses of water, will cause pollution, nuisance, or contamination, or will unreasonably degrade the quality of any waters of the state".

In making any such determination, a Regional Board shall consider a variety of factors, as set forth in Water Code Section 13281, including evidence of any existing, prior or potential contamination. The Regional Board indicates in its response to the petition, that it had to consider water quality effects of complete buildout of the area at current zoning. It concluded that a large number of individual or small community systems would have an adverse effect on groundwater quality and that use of public sewers when available was the only equitable solution to all property owners.^{2/}

In our review of the record, we recognize that the experience with individual and community septic tank leachfield systems in the Nipomo area has been dismal. This poor record is

2. Regional Board Response, February 17, 1983, p. 1.

caused by one or more reasons such as poor design, construction and maintenance practices, unsuitable hydrogeologic conditions and the development of relatively small lots. We also note that the subject development is in an area where the zoning allows five residences or more per acre. We agree that should development go unchecked in the future, there is a potential for adverse cumulative effects. However, we cannot sustain the prohibition which automatically required connection to a future sewer system for the following reasons:

a. The prohibition is not supported by substantial evidence as required by Water Code Sections 13280-13284.

Under Section 13282, the Regional Boards must allow discharges from subsurface disposal systems if:

(1) Adequate protection of water quality protection of beneficial uses of water, and prevention of nuisance, pollution, and contamination can be attained by appropriate design, location, sizing, spacing, construction, and maintenance of individual disposal systems; and

(2) An authorized public agency provides satisfactory assurance to the regional board that such systems will be appropriately designed, located, sized, spaced, constructed and maintained.

In adopting Order No. 82-28, the Regional Board found only that use of individual or small community systems in the area of the discharge represent a potential threat to water quality and public health. The Regional Board did not find that this

project itself would cause a water quality problem. Rather, the Board looked to possible future cumulative effects from unbuilt projects. Additionally, the record does not support with substantial evidence a determination that this project will itself cause problems. If it had, the Regional Board should not have, and in all likelihood, would not have issued the waste discharge requirements. In fact, Order No. 82-28 contains several provisions to assure water quality protection, including Provision C.1:

"The proposed collection, treatment and disposal system must be designed by a registered professional engineer and constructed as a permanent system."

As noted before, the Basin Plan contains a specific prohibition against discharge from individual disposal systems in the Nipomo area, with exemption criteria when use of such systems will not adversely affect water quality. Additionally, while the current Basin Plan prohibitions refer only to individual disposal systems, the Regional Board has noted previously that its policy regarding community subsurface disposal systems is to require even more detailed engineering justification than is normally required for individual systems. We note also, that just prior to adopting Order No. 82-28, the Board adopted an amendment to the Basin Plan. While this amendment was not effective at the time the Regional Board adopted the subject waste discharge requirements (as it had not been approved by the State Board), it does contain a new exemption criteria for prohibition areas. This proposed exemption provides, in pertinent part, that:

"The Board may grant an exemption to prohibition areas for: 1) engineered new on-site disposal systems where sufficient justification is provided; 2) new on site disposal systems after presentation of geologic and hydrologic evidence by the proposed discharger that such system(s) will not individually or collectively result in pollution or nuisance; and 3) existing on-site systems if it finds that the continued operation of such system(s) in a particular area will not, individually or collectively, directly or indirectly, affect water quality adversely....

"Individual, alternative, and community systems shall not be approved for any area where it appears that the total discharge of leachate to the geological system, under full developed conditions, will cause: 1) damage to public or private property; 2) ground or surface water degradation; 3) nuisance conditions; or, 4) a public health hazard."

Thus, if the project posed potential future problems, as the Regional Board suggested, the Regional Board should have implemented its own policy and refused to adopt waste discharge requirements (provided, of course, that the evidentiary support required by Water Code Sections 13280-13284 was present).

Whether or not a subsurface disposal system should be prohibited should be evaluated in its own merits, independently of whether a sewer system becomes available. If a proposed project will cause water quality problems, it should be prohibited at the time.

However, if a subsurface discharge is authorized, it can always be reevaluated based on future circumstances. Since a discharger never acquires a vested right to continue a discharge (Water Code Section 13263(g)), the Regional Board may reevaluate the effect of the discharge at any time, and modify the requirements

accordingly. A trigger for such a future evaluation may be established when requirements are initially issued. For example, in a neighboring development, the Regional Board adopted requirements for a subsurface disposal which call for such evaluation rather than mandatory connection to the sewer system. In those cases, the Board provided that:

"A determination of whether this discharge shall be prohibited when community-wide treatment and disposal facilities are made available shall be made at such time as the District system is constructed and water quality monitoring data can be reviewed for this project." 3/

b. Water Code Section 13360 prohibits a Regional Board from specifying means of compliance.

As discussed above, Water Code Sections 13280-13284 act to prevent a Regional Board from prohibiting subsurface disposal without substantial evidence of a water quality problem. Additionally, Water Code Section 13360 serves to limit how a Regional Board may regulate. If a subsurface disposal system is properly functioning, and not otherwise in violation of waste discharge requirements, a Regional Board cannot specify that a discharger connect to a sewer system. As the Regional Board urges, a Basin Plan can properly establish a preference for a sewer system. However, a Regional Board cannot without violating Section 13360 require an area or a project to be connected to a sewer. A Regional Board may only properly prohibit subsurface discharge in an area, if the requirements of Water Code Sections 13280-13284 are satisfied.

3. See Regional Board Orders Nos. 80-15 and 82-33. While these orders may be reflective of the Regional Board's desire to facilitate low income housing, the legal and water quality considerations should be the same as in the instant case.

III. CONCLUSIONS

1. The Regional Board did not have the requisite substantial evidence under Water Code Sections 13280-13284 to prohibit the subsurface discharge at such time as sewers are available. Accordingly, under Water Code Section 13360, the Regional Board may not require an existing discharger to connect to a future sewer system. However, if the Regional Board can demonstrate, at the time the sewer system is available, that water quality reasons require a prohibition against continued discharges, then such a prohibition may be adopted.

IV. ORDER

IT IS HEREBY ORDERED that Regional Board Order No. 82-28 is modified as follows:

1. Finding No. 13 is deleted.
2. The existing Discharge Prohibition A.2 is deleted and in its place is substituted the following provision:

"A determination of whether this discharge shall be prohibited when community-wide treatment and disposal facilities are made available shall be made at such time as the District system is constructed and water quality monitoring data can be reviewed for this project."

Dated: June 16, 1983

/s/ Carole A. Onorato
Carole A. Onorato, Chairwoman

/s/ F. K. Aljibury
F. K. Aljibury, Member

/s/ Warren D. Noteware
Warren D. Noteware, Member

/s/ Kenneth W. Willis
Kenneth W. Willis, Member

