

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petitions of )  
SAVE SAN FRANCISCO BAY ASSOCIATION )  
AND )  
SAN FRANCISCO BAY CHAPTER, SIERRA CLUB )  
For a Stay and Review of San Francisco )  
Bay Regional Water Quality Control )  
Board Order No. 84-18, NPDES Permit )  
No. CA 0028754, Acme Fill Corporation. )  
Our File No. A-355. )

ORDER NO. WQ 84-9

BY THE BOARD:

On April 18, 1984, the California Regional Water Quality Control Board for the San Francisco Bay Region (Regional Board) adopted Order No. 84-18, a National Pollutant Discharge Elimination System (NPDES) permit for the discharge of solid waste to the Acme Sanitary Landfill. Acme Sanitary Landfill is operated by Acme Fill Corporation ("Acme" or "Discharger"). By petitions received May 17, 1984, and May 18, 1984, respectively, Save San Francisco Bay Association and the San Francisco Bay Chapter of the Sierra Club (collectively "Petitioners" unless separately designated) requested State Board review of the Regional Board's Order and a stay of the action of the Regional Board pending this review. Since this Order disposes of the issues raised in the petitions on their merits, there is no need for us to act on the stay request.

I. BACKGROUND

For many years, Acme has operated a landfill at the Acme Sanitary Landfill site in Contra Costa County. The site consists of 536 acres. On April 10, 1976, the Regional Board adopted waste discharge requirements

for the entire site. The Regional Board did not adopt an NPDES permit (for a discharge to surface waters) because at that time the issue of whether the area included wetlands was handled by the U. S. Army Corps of Engineers under Section 404 of the Federal Clean Water Act. In 1976 the Corps' regulations included solid waste as fill material. Under current law, however, sanitary landfill operations in wetland areas are covered by Section 402 of the Clean Water Act. The Regional Board administers the Section 402 (NPDES) permit program within its Region.

At the time of adoption of the Regional Board Order, Acme was actively using a total of 147 acres of its site for fill. Acme proposed to expand into an additional 97.6 acre area, and the low-lying (wetland) portion of this expansion area was the subject of the Regional Board's hearing and permit. Acme originally proposed to the Corps of Engineers a 200-acre expansion of its landfill operation. Subsequent to the comment period for the Environmental Impact Report/Environmental Impact Statement for the expansion and at the request of the Corps of Engineers' District Engineer based upon numerous objections, the proposed expansion was reduced to the 97.6-acre landfill and a 76.1-acre dredged material disposal site. The application was further amended to eliminate the request for the dredged material disposal site in response to objections from certain agencies including the Environmental Protection Agency and the United States Fish and Wildlife Service.

The permit issued by the Regional Board authorizes placement of solid waste on the approximately 36 acres which the Regional Board found to be wetlands out of the total 97.6-acre expansion area. The disposal of waste on the remainder of the site continues to be governed by the Regional Board Waste Discharge Requirements adopted in 1976 as discussed above.

The 97.6-acre parcel has not been subject to tidal influence for many years due to the construction of levees. Perimeter levees were constructed in

the early 1900s. In the 1960s the Corps of Engineers constructed additional flood control levees. Since the 1960s, all tidal flow has been excluded.

## II. CONTENTIONS AND FINDINGS

Petitioners' major contentions and our findings regarding each contention are set forth below:

1. Contention: There is no public need for a dump on this particular site for the time and of the size permitted by the Regional Board.

Findings: The question raised by the petitioners is whether there is a public need for any additional filling at this site in view of its wetland status and, if there is a need for some filling, whether the amount of filling permitted by the Regional Board is appropriate. As petitioners correctly point out, Water Code Section 13142.5 states:

"In addition to any other policies established pursuant to this division, the policies of the state with respect to water quality as it relates to the coastal marine environment are that:

(a) Waste water discharges shall be treated to protect present and future beneficial uses and, where feasible, to restore past beneficial uses of the receiving waters. Highest priority shall be given to improving or eliminating discharges that adversely affect any of the following:

(1) Wetlands, estuaries, and other biologically sensitive sites."

The San Francisco Bay Regional Water Quality Control Board Basin Plan adheres to this policy by stating at 2-8 "[t]he protection and preservation of the remaining marsh communities is essential for maintaining the ecological integrity of San Francisco Bay." As we recognized in our decision regarding the Newby Island solid waste disposal site (Order No. WQ 83-6), San Francisco Bay has already lost 80 percent of its intertidal marsh. Based upon all of the

above, it is appropriate for us to review whether the Regional Board in issuing Order No. 84-18 adequately considered the issue of public need.

The Regional Board's Order No. 84-18 permitted disposal of solid waste to all of the wetlands within the entire 97.6-acre expansion area. The Regional Board staff estimated, based upon the height of fill proposed by Acme that the 97.6 acres would provide 4 to 6 years of additional capacity. (Reporter's Transcript of the Regional Board's April 18, 1984, hearing (hereinafter "R.T."), page 4, lines 14-15.) The discharger estimated that its proposed 97.6-acre expansion, as approved by the Regional Board, would provide five years of additional capacity. Following adoption of the Regional Board's permit, the U. S. Army Corps of Engineers (hereinafter "Corps" or "Corps of Engineers") on May 18, 1984, received the results of a study regarding the need for the landfill and the capacity of the proposed 97.6-acre expansion site if filled to various different elevations.\* The Corps of Engineers' consultants concluded that the 97.6 acres if filled to the 75-foot height proposed by the discharger and approved by the Regional Board would have an expected useful life of 4.45 years (with a range from 3.78 to 5.30 years). The Corps of Engineers issued a permit on June 11, 1984, for those aspects of the landfill expansion which came within Corps' jurisdiction. The Corps' permits limited

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\* The Corps of Engineers' consultants' Report (George S. Nolte and Associates Report transmitted by letter dated May 18, 1984), the Corps of Engineers' Record of Decision prepared to explain the rationale for the permit issued by the Corps of Engineers for the landfill expansion and the actual permit issued by the Corps on June 11, 1984 were considered by this Board in resolving the instant petitions. These materials were not available at the time of the Regional Board's hearing and were not a part of the record of the Regional Board's action. All interested persons were notified that these materials would be considered by the State Board in resolving these petitions by letter dated July 6, 1984. The State Board received no objections to its proposal to consider this material.

the height of the landfill to 40 feet from the existing ground elevation (or 42 feet above mean sea level). According to the Record of Decision prepared by the Corps of Engineers, the main purposes of the height limitation were to ensure that there would be no sliding of the fill in case of earthquake and to reduce the possibility of leakage of leachate due to cracking of perimeter seals during significant seismic activity. According to the Corps' consultants' report, the expansion area with this 40-foot height would have an expected life of 2.8 years (with a range from 2.35 years to 3.50 years). In spite of the limitations placed upon the height of the landfill by the Corps of Engineers, the Regional Board's permit, standing alone, would permit continued filling at the Acme site for approximately 4-1/2 years.

The record before the Regional Board indicates that the Acme site receives about two-thirds of Contra Costa County's solid waste (about 1,500 tons per day.) Approximately 425,000 people are dependent upon the landfill (R.T. 28/19-23, also see the final EIR/EIS for the expansion and the Corps of Engineers' consultants' report at page 18). A letter from the discharger's consultant dated April 17, 1984, submitted by the discharger at the Regional Board's hearing, concluded that at the time of the Regional Board's hearing unless substantial quantities of waste were diverted to other sites the existing, fully permitted fill area had remaining capacity to accept waste for from 1-1/2 to 5 weeks. The Corps of Engineers' consultants concluded there were about 29 days of capacity remaining.

Petitioners contend that in spite of knowledge on the part of the discharger and Contra Costa County for some time that Acme was running out of approved landfill capacity nothing has been done to provide an alternative to continuing to expand the landfill at the current Acme site. Acme was granted an expedited approval for a 22-acre expansion by the Regional Board in 1981 on

the grounds that they were nearing their capacity. The expansion was approved by the Executive Officer of the Regional Board in accordance with the waste discharge requirements issued for the entire site in 1976. Whether or not the contention is true that Acme and the County are not properly moving toward an alternative to continued use of Acme's current site (the allegation was denied by Acme at the Regional Board's hearing (R.T. 94/17-95/5)) the fact remains that the existing landfill was very near capacity at the time the Regional Board took its action and that 425,000 people rely on it.

Suggestions by the petitioners that alternative disposal sites or alternative types of disposal, such as recycling, be implemented as an alternative or partial alternative to expansion were studied by the Corps of Engineers' consultants. They concluded: "[i]n the long term resource recovery can significantly reduce the need for landfill space" but that "within the expected 4.5-year life of the proposed landfill, the savings in landfill volume [from such things as recycling, energy conversion, incineration or composting] are expected to be minimal." The Corps also concluded that the use of existing landfill sites other than the Acme site would result in increases in the cost of solid waste disposal ranging from 11-43 percent. In addition, the Environmental Protection Agency in a letter to the Corps of Engineers, dated 19 January 1984, stated in supporting a limited expansion at the Acme site to allow time to select and prepare a new site:

"We considered the environmental consequences of implementing alternatives such as trucking the waste to existing, but more distant landfills which could contribute to increased air pollution and energy consumption."

Further, the discharger pointed out in its presentation to the Regional Board that interim measures by Acme to temporarily slow the filling of its site by diverting waste to other sites in the area pending final government rulings on

expansion had resulted in such things as: objections by Alameda County to the use of the Vasco Road site near Livermore without a County permit, objections by the mayor of the City of San Pablo to increased truck traffic going to the west county landfill in Contra Costa County, objections by the City of Richmond to use of "their" capacity in the west county landfill and objections by other users of that landfill to traffic jams involving trucks at the landfill site (R.T. 35/20-37/15).

For all of the above reasons we find that the action of the Regional Board in issuing Order No. 84-18 based upon public need was appropriate. However, we do have serious concerns that an active program be pursued by Acme and Contra Costa County to ensure that there will be no further need for expansion onto additional wetlands at the Acme site.

The Regional Board included in its Order 84-18 the following finding aimed at ensuring that development of an upland site to take the service area's solid waste proceed apace:

"21. The Board hereby finds that a public need currently exists for the filling of wetlands in Area #2A which cannot feasibly be met by the use of an upland disposal site. The Board further finds that the disposal capacity provided by its authorization for the filling of area #2A is sufficient to allow time for the responsible agencies of local government to locate or establish an alternative upland site for future solid waste disposal. In light of the above findings, it is the intent of this Board not to permit the filling of additional wetlands at the Acme site beyond that provided for in this Order."

Following adoption of Order No. 84-18 by the Regional Board, the Order was transmitted to the discharger by a letter dated May 3, 1984, from the Regional Board's Executive Officer. That letter contained the following comment and additional technical reporting requirement imposed by the Executive Officer:

"At the April 18, 1984 hearing the Regional Board expressed concern about the adequacy of planning for an upland landfill site to provide for the service area's future needs once this

expansion area is filled. You are hereby requested to file semi-annual reports on your progress towards obtaining and permitting an uplands [sic] disposal site with the intent of having the site available by 1989. Your first report is due 1 November 1984."

Despite the above statements of intent on the part of the Regional Board and requirements for reports from Acme, we remain concerned that the Regional Board, if faced with a similar "Hobson's choice" in the future, will be subject to tremendous pressure to allow further filling of wetlands. We are of the opinion that encouraging Acme to plan for and develop an alternative, upland site as the Regional Board Executive Officer has done through his imposition on Acme of the semi-annual reporting requirement, is a step in the right direction. On the other hand, as Acme's counsel pointed out in the Regional Board hearing, any expectations that Acme shoulder the major burden for development of an alternative site may be misplaced.

At the Regional Board's hearing, Acme's counsel was asked the following question and gave the following answer:

"Q: You had mentioned earlier for so long as anyone seems to know this parcel had been designated as a disposal site and I just wanted to know how far back that went. I'm sure, and your clients are aware, that there has been many environmental laws passed in the meantime and so I just wondered as the permitting process became longer and longer, whether alternative sites were considered and when the permitting processes were started.

"A: The answer to that is no, and since I have become involved I reflected upon the wisdom of that court [sic], some people have criticized Acme for not doing it and my conclusion is what Acme has done is totally rational and understandable. And let me explain that just briefly.

First of all, they do have the site that's been shown on those plans as expansion site. We all know there's permitting processes that should indicate that's the favored site in Contra Costa County for expansion. It's caused [sic] them somewhere in the neighborhood of \$500,000 to run this process and it's been estimated to start a new site would be close to a million dollars in out-front money with no guarantee of getting the site.

To think that a businessman as opposed to a governmental agency who had the site designated on governmental plans as an expansion site for future dump for Central Contra Costa County would somehow run out and spend another million dollars to run



along on a parallel track just in case is, I think, asking too much." (R.T. 42/27 - 43/18).

Acme's counsel later pointed out that Acme has been exploring and has under option an upland site but that there may be some problems with it. Nevertheless his testimony does point up what would be a reasonable expectation; that is, that the owner of a current site can be expected to favor and press for continued use of that site if economically advantageous to that owner.

In our view, responsibility for development of alternatives to continued use of the Acme site rests squarely with Contra Costa County. Government Code Section 66730 states, in pertinent part, that "it is the intent of the Legislature that the primary responsibility for adequate solid waste management and planning shall rest with local government". It should be noted that the same title of the Government Code contains Section 66732(d) which states that no provision of that title is "a limitation on the exercise by the State Water Resources Control Board or the California regional water quality control boards of any of their powers and duties pursuant to Division 7 (commencing with Section 13000) of the Water Code." Government Code Section 66780.1 requires each county to prepare a "solid waste management plan ... for all waste disposal within the county and for all waste originating therein which is to be disposed of outside of the county."

Reading all of the above code sections together, it is clear that the County has responsibility for solid waste planning and that this planning must take into account the requirements of the Regional Board and the State Board. The County's representative at the Regional Board's hearing testified (R.T. 54/7-11) that Contra Costa County's current Solid Waste Management Plan assumes that the full 200-acre-site of which the 97.6-acre expansion area permitted by

the Regional Board is a part will be used as landfill. Finding number 21 of the Regional Board's Order 84-18, set forth above, makes it quite clear that the Regional Board does not intend to allow further expansion at this site. It is the responsibility of Contra Costa County to see that it has plans for solid waste management that will meet the needs of its residents as well as the requirements of the Regional Board. Since the permit granted to Acme by the Corps of Engineers will allow continued filling at the Acme site for no more than three years (until June 11, 1987, pursuant to Special Condition Number 2) and the Corps of Engineers' consultants have calculated the expected life of the approved 97.6-acre expansion site as 2.8 years, there is a need for immediate and sustained action on the part of the County to find alternatives to any further expansion onto additional wetlands at the Acme site.

Included in materials submitted by the Regional Board in response to the instant petitions was a copy of a letter sent by the Executive Officer of the Regional Board to the County Board of Supervisors on May 23, 1984. The letter is similar to the letter sent to Acme and quoted, above, and requires the County to report semi-annually to the Regional Board regarding progress toward obtaining and permitting an upland disposal site with the intent of having the site available by 1989. The first report is due in November 1984.

The action of the Regional Board's Executive Officer in requiring both Acme and the County to demonstrate that they are actively engaged in efforts aimed at finding an alternative to further filling of wetlands at the Acme site by the time the currently approved site has been filled was appropriate and proper. However, since these letters were sent, the Corps of Engineers has issued its permit which limits the life of the 97.6-acre expansion site to no more than 3 years. We are unable to determine from the record before us whether this limitation was appropriate and proper. However, since it has been

imposed and has not been challenged it appears that the planning processes should be aimed at finding an upland site and preparing it for use by June 1987 rather than 1989 as specified in the Regional Board Executive Officer's letter.

Therefore, our order adopted pursuant to the instant petitions requires Acme and Contra Costa County to submit to the Regional Board technical reports pursuant to Water Code Sections 13267 and 13225(c), respectively, which set forth a schedule for and report progress toward finding and preparing for use an upland site by June 1987.

2. Contention: The Regional Board did not adequately consider the need for protection of wetlands and did not take into account the long-term opposition of the United States Fish and Wildlife Service to the expansion of the Acme landfill.

Findings: Petitioners contend that while thoroughly considering the question of need for expansion, the Regional Board completely overlooked the very important consideration of wetland protection and enhancement. The record reflects that the Regional Board took testimony on the issue of need for the expansion of the landfill not because they overlooked their obligation to consider wetlands protection and enhancement but specifically because they were well informed about the presence of wetlands in the expansion area and their obligation to protect wetlands wherever reasonably possible. Regional Board members had been informed by copy of a memorandum from their attorney to the Executive Officer of the Board dated April 6, 1984, that there was a strong public policy in favor of protecting wetlands. The memo discussed the decision of this Board in the Newby Island landfill case. (State Board Order No. WQ 83-6) which recognized the responsibilities of the State and Regional Boards to protect wetlands as well as the policies in Water Code Section 13142.5 and

in the Regional Board's own Basin Plan, both quoted in the discussion of Contention 1, above. The memorandum further informed them that before they could adopt any permit authorizing fill in the wetlands area they would have to have "[t]estimony in the record that a substantial public need exists to fill this area at this time" and that it would be mandatory for the Board to make a finding in order to allow filling that there exists a public need to fill the wetlands. The Board included such a finding in its Order No. 84-18. That finding reads as follows:

"21. The Board hereby finds that a public need currently exists for the filling of wetlands in Area #2A which cannot feasibly be met by the use of an upland disposal site. The Board further finds that the disposal capacity provided by its authorization for the filling of area #2A is sufficient to allow time for the responsible agencies of local government to locate or establish an alternative upland site for future solid waste disposal. In light of the above findings, it is the intent of this Board not to permit the filling of additional wetlands at the Acme site beyond that provided for in this Order."

The record reflects that Regional Board members also received in their agenda materials a memorandum dated April 12, 1984, to their Executive Officer from the staff member working on the Acme case which states, in part, as follows:

"... public need is a relevant consideration in a wetland fill decision. This concept implies that wetland fill should be allowed only for an activity that could not be accomplished in non-wetland areas and where there is a strong showing of public need."

It appears that the Board was well aware that it was dealing with a wetland situation, and that it has special responsibilities with regard to wetlands. Petitioners' contention that the Board did not adequately consider the need to protect wetlands is not well-founded.

The petitioners further contend that in making its decision the Regional Board failed to take into account the long-term position of the United

States Fish and Wildlife Service as expressed in its comments contained in the Environmental Impact Statement/Report for the project, dated June 1983, in opposition to the expansion at Acme.

Petitioners fail to take note of a memo included in the Regional Board's files from the United States Fish and Wildlife Service (Service) to the Corps of Engineers, dated February 17, 1984 (i.e., subsequent to the comments in the EIR/EIS). The letter was sent in response to a public notice of a hearing to be held by the Corps of Engineers regarding Acme's permit application to the Corps. The letter reiterates that the Service has, since 1977, opposed expansion at the Acme site because of its wetland attributes. However, the letter goes on to state that the Service recognizes "it may be in the public interest to allow some refuse disposal in the proposed fill area while a suitable upland alternative is being developed." The letter goes on to say that this should only be done if (1) there is mitigation of all loss of wildlife habitat and (2) it can be insured that water quality will be adequately protected. The record in this case reflects that these two criteria have been met. First, the entire Regional Board Order is focused on protection of water quality and petitioners have not contended that water quality will not be adequately protected. Second, to compensate for the loss of the 36 acres of wetland which the Regional Board's Order allowed to be filled, the Order required the discharger to deed a 58-acre parcel in the Suisun Marsh area to the California Department of Fish and Game and to dedicate funds to support certain actions to enhance the value of that parcel as wetlands. The Regional Board's file includes a letter from the California Department of Fish and Game to the Regional Board's Executive Officer, dated March 14, 1984. The letter compares the wetland qualities of the Acme site and the proposed mitigation area and states that, with the improvements Acme agreed to support to enhance

the wetland values on the mitigation lands there would be "no net loss of wetlands resulting from Acme's proposed area of expansion."

### III. CONCLUSIONS

1. The action of the Regional Board in adopting Order No. 84-18 was appropriate and proper.

2. Contra Costa County is the primary agency responsible for solid waste management planning in the area served by the Acme facility. The Regional Board Executive Officer's letters to Acme and the County require reports periodically concerning actions the two entities are taking to ensure that an adequate non-wetland area is developed for a landfill by 1989. However, because the Corps of Engineer's permit for the expanded facility expires in June 1987, Acme and the County should focus their planning on securing an upland site by June 1987.

### IV. ORDER

1. The discharger and Contra Costs County are required to submit to the Regional Board Executive Officer periodic reports showing progress toward developing an upland alternative to the Acme site by June 1987.

2. The petition and request for stay are hereby dismissed.

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 November 27, 1984.

AYE: Carole A. Onorato  
Warren D. Noteware  
Kenneth W. Willis  
Edwin H. "Ted" Finster

NO:

ABSENT: Darlene E. Ruiz

ABSTAIN:



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Michael A. Campos  
Executive Director