STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of SOUTHERN CALIFORNIA EDISON COMPANY For Review of Order No. 6-86-5 of the California Regional Water Quality Control Board, Lahontan Regional Board. Our File No. A-422.	ORDER NO. WQ 86-11

BY THE BOARD:

On January 9, 1986, the California Regional Water Quality Control Board, Lahontan Region (Regional Board) adopted Order No. 6-86-5, waste discharge requirements for Luz Solar Partners II and the Southern California Edison Company. On February 6, 1986, Southern California Edison Company (petitioner or Edison) filed a timely petition for review of this action. The petition was amended on March 7, 1986. Petitioner also requests a hearing in this matter.

BACKGROUND

Solar Electric Generating Systems I and II are solar power plants located approximately three miles east of the desert community of Daggett in San Bernardino County. The plants discharge cooling system blowdown wastes to evaporation ponds designed to dispose of an annual average of 0.114 mgd. The waste discharge requirements regulate the disposal of wastes to these ponds. The blowdown discharge has total filterable residue concentrations ranging from 1,500 to 3,000 mg/l and concentrations in the ponds should reach a maximum of 10,000 to 15,000 mg/l TFR. Additional chemical additives are present in the

wastewater. Accordingly, the blowdown discharge is classified as designated waste. The evaporation ponds are classified as Class II surface impoundments pursuant to Title 23, California Administrative Code, Chapter 3, Subchapter 15.

The facility and ponds are owned by Luz Solar Partners II and operated by Luz Engineering Corporation. The underlying land is owned by Southern California Edison.

II. CONTENTION AND FINDING

Contention: Petitioner raises only one issue. Petitioner contends that the waste discharge requirements should not name Southern California Edison Company as a discharger, with a continuing responsibility to ensure compliance with the applicable waste discharge requirements. Edison urges the waste discharge requirements be amended to state that the owners "recognize an ultimate responsibility for wastes discharged to the property."

Finding: Petitioner argues that it is merely the landowner and should not be held responsible for day-to-day compliance with the waste discharge requirements. Petitioner does indicate an ultimate responsibility for wastes discharged to the property. There is agreement that the Porter-Cologne Water Quality Control Act does not require that a landowner be named in waste discharge requirements issued to a lessee. Typically, however, the Regional Boards have named the landowner in such situations. We have upheld such actions in the past. There are several reasons to justify inclusion of a landowner in waste discharge requirements. The existence of nuisance conditions on the leased premises at the time the lease is made or renewed or the creation by the tenant of dangerous conditions on the premises of which the

landlord has actual knowledge or the ability to abate may serve as bases for imposing liability on the landlord. Additionally, inclusion of the landlord in requirements serves to put the landlord on notice of the tenant's activities and will help to insure access to the site. We most recently reaffirmed this approach of naming a landowner in Board Order No. WQ 86-2, In the Matter of the Petition of Zoecon Corporation and will now proceed to do so again.

Petitioner furnishes scant legal authority for its proposition that it should not be named in waste discharge requirements. Petitioner notes, as we have already stated, that the Porter-Cologne Act does not require that a landlord be named in waste discharge requirements. Petitioner further argues that when the Legislature intended to place liability on the property owners instead of the discharger, it has done so. Water Code Section 13305 is cited in the petition as an example. However, a review of other sections of the Porter-Cologne Water Quality Control Act lead us to conclude that landowners may be named. The very fact that the Porter-Cologne Act has been interpreted to authorize the inclusion of lessors in waste discharge requirements led to the adoption of Section 13270 in 1974. Section 13270 explicitly prohibits a Regional Board from requiring a report of waste discharge and from issuing requirements to any lessor public agency which leases land to another public agency or to any public utility regulated by the Public Utilities Commission, unless the lease from the lessor public agency contains restrictions which unreasonably limit the ability of the lessee to comply with waste discharge requirements. Obviously, the Legislature could have prohibited the Regional Boards from requiring a report of waste discharge and from issuance of requirements from all lessors, but chose not to do so.

Additionally, we note the series of memoranda and letters issued by the Office of the Chief Counsel on this issue.[1] These opinions have concluded that, under both the exceptions to the common law rule of landowner nonliability and the more recent California cases applying negligence principles, a landowner-lessor may be held jointly liable with a lessee for waste discharges occurring on the leased premises during the term of the lease.[2] Petitioner cites no authority for the proposition that the waste discharge requirements should be amended to delete a provision that the owner has a continuing responsibility for ensuring compliance with the waste discharge requirements, and to insert instead a more limited provision that the owners do recognize an ultimate responsibility for wastes discharged to the property.[3] We feel such an amendment to be inappropriate. We agree with the Regional Board that "ultimate responsibility for wastes" cannot be separated from a "continuing responsibility for ensuring compliance with applicable waste

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[1] See, e.g. letters dated February 24, 1976 and April 30, 1976 to attorneys for the U. S. Department of Agriculture; memo dated May 27, 1981 to Executive Officer, Region 9; memo dated September 10, 1981 to Executive Officer, Region 7; memo dated February 21, 1984 to Region 9, and memo dated June 25, 1984 to Executive Officer, Region 1.

[2] Case law in support of this conclusion is substantial. See Becker v. IRM Corp. (1985) 38 Cal.3d 454, 213 Cal.Rptr. 212, citing with approval discussion in 3 Witkin, Summary of California Law (8th Ed.) Section 453A, Brennan v. Cockrell Investments (1973), 35 Cal.3d 796, 111 Cal.Rptr. 122. See also Uccello v. Laudenslayer (1975) 44 Cal.App.3d 504, 118 Cal.Rptr. 741, Levy-Zentner Co. v. Southern Pacific Transportation Co. (1977) 74 Cal.3d 762, 794; 142 Cal.Rptr. 1, 21; Stoiber v. Honeychuck (1980) 101 Cal.3d 903, 162 Cal.Rptr. 194 Rosales v. Stewart (1980) 113 Cal.3d 162, 169 Cal.Rptr. 660, and Swanberg v. O'Mectin (1984) 157 Cal.App.3d 325, 203 Cal.Rptr. 701.

[3] Petitioner does attempt to argue that it is not a "discharger" as defined in the federal Water Pollution Control Act. The Water Code Section 13373 incorporation of the federal definition of this term is limited on its face to Chapter 5.5 of the Porter-Cologne Act, and as such, is inapposite in the current situation which does not involve an National Pollutant Discharge Elimination System (NPDES) permit.

discharge requirements". Indeed, many of the more current cases cited in footnote No. 2 support the general proposition that a landowner has an ongoing duty to make sure the premises are kept in a reasonably safe condition. A landlord "has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." Swanberg v. O'Mectin (1984) 157 Cal.App.3d 325, 331, 203 Cal.Rptr. 701, 704, citing 4 Witkin Summary of Cal. Law (8th Ed. 1974) Torts §592, p. 2860.

Petitioner is concerned that it is held responsible for day-to-day compliance with the waste discharge requirements. The implication is that the petitioner will have to be as involved in the operation of the facility as the lessee. We disagree. The waste discharge requirements clearly place the responsibility for day-to-day compliance on the lessee. For example, the lessee alone is responsible for monitoring (Prov. 11.1), notification of unauthorized discharges (Prov. 11.2), closure requirements (Prov. 11.5), and submittal of construction plans (Prov. 11.6). As the Regional Board notes, petitioner has not asserted an inability to periodically inspect the premises, a reasonable method to fulfill its responsibilities under the waste discharge requirements.

Accordingly, we find that the Regional Board acted properly and responsibly in naming the landowner in the waste discharge requirements.

III. REQUEST FOR HEARING

Request: Petitioners have requested a hearing to present evidence of (1) legal issues and (2) factual evidence regarding operation of the facility.

Finding: The request for a hearing is denied. Our regulations (Title 23, California Administrative Code, Section 2050(b)) regarding hearings for the purpose of presenting additional evidence require that a request for a hearing shall be supported by a statement that additional evidence is available that was not presented to the Regional Board or that evidence was improperly excluded. If evidence was not presented to the Regional Board, the reason shall be explained.

Petitioners allege that there is evidence not presented to the Regional Board "due to the rapid manner in which the Board closed discussion on the matter, perceived by Edison representatives at the hearing as a decision on the part of the Board not to hear any additional argument on the subject." Our review of the record in this matter shows that petitioner had ample and numerous opportunities to present evidence to the Regional Board. Edison submitted written comments in a letter dated December 4, 1985 to the Regional Board requesting changes in the tentative waste discharge requirements identical to the changes requested in the petition before us. Edison representatives met with Regional Board staff to discuss the tentative order on December 10, 1985. Edison representatives were also present and spoke at the January 9, 1986 Regional Board meeting. While petitioner may "perceive" that the Regional Board had decided not to receive additional evidence, the record shows otherwise. When ample opportunity was available to present evidence at the Regional Board level, we can and will decline to reopen the matter. We further note, as regarding legal argument, that petitioner again has had more than ample opportunity to present such material. As explicitly set forth in

our regulations, legal arguments shall be presented as a statement of points and authorities as part of the petition (Title 23, California Administrative Code, Section 2050(a)(7)).

IV. SUMMARY AND CONCLUSIONS

1. The petitioner is properly named in waste discharge requirements.

2. Since petitioner had ample opportunity to present additional evidence earlier, a hearing in this matter is inappropriate.

V. ORDER

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

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 July 17, 1986.

Aye: W. Don Maughan
Darlene E. Ruiz

Eliseo M. Samaniego
Danny Walsh

No: None

Absent: E. H. Finster

Abstain: None

James L. Easton
Executive Director