

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
THE CITY OF SAN BERNARDINO)
)
For Review of Order No. 87-50 of the)
California Regional Water Quality)
Control Board, Santa Ana Region. Our)
File No. A-475.)

ORDER NO. WQ 87-7

BY THE BOARD:

On March 13, 1987, the California Regional Water Quality Control Board, Santa Ana Region (Regional Board) issued Order No. 87-50, a cease and desist order with a time schedule, to the City of San Bernardino (City or petitioner). The Order was based on the City's failure to comply with the time schedule contained in waste discharge requirements (requirements) which served as a National Pollutant Discharge Elimination System (NPDES) permit.

On April 10, 1987, the State Water Resources Control Board (State Board) received a petition from the City seeking review of the cease and desist order.

I. BACKGROUND

On July 12, 1985, the Regional Board issued requirements which regulate discharges of waste from the City's publicly owned treatment works (POTW) to the Santa Ana River. The requirements establish limitations which apply when river flow is continuous between the discharge point and the lower reaches of the River. In order to meet these limitations, the City will have

to provide tertiary treatment for any continuous flows. The City appealed issuance of the requirements to the State Board. On August 21, 1986, the State Board issued Order No. WQ 86-14, which upheld the requirements.¹ The bases of our Order were that the limitations will protect the beneficial uses contained in the Basin Plan, that the time schedule for meeting the limitation was required by the federal Clean Water Act, and that the requirements were not in violation of the constitutional provision regarding subvention of state mandated costs (Article 13B, Section 6 of the California Constitution). The State Board found, however, that the City could not meet the time schedule in the requirements, and remanded the matter to the Regional Board for issuance of an enforcement order with a time schedule which the discharger could meet.

In adopting the cease and desist order which is the subject of this petition, the Regional Board followed the State Board's instructions. Accordingly, to the extent that the City again raises issues previously addressed in Order No. WQ 86-14, these will not be considered anew. There was one issue, however, that this Board specifically did not address in the earlier Order, and we will do so here. That issue concerns the application of Revenue and Taxation Code Section 2209, which also deals with state mandated costs.

II. REQUEST FOR HEARING

In its petition, the City requests a hearing before this Board in order to present evidence that the cost of construction of a future tertiary

¹ The details of the requirements are discussed thoroughly in our previous Order and will not be repeated here.

treatment plant will trigger application of Revenue and Taxation Code Section 2209. Our regulations require that a petitioner requesting a hearing must include a statement that additional evidence is available that was not presented to the Regional Board or that was improperly excluded. (Title 23, California Administrative Code, Section 2050(b).) Where the evidence was not presented to the Regional Board, the petitioner must explain the reason and must also include a detailed statement of the nature of the evidence and the facts to be presented. (Id.)

The City's request for a hearing states that its consultant will present evidence "demonstrating that the cost of adding tertiary treatment to the existing facility of the City of San Bernardino is in excess of 20 percent of the cost of replacing the facility." The request does not include a detailed description of the evidence to be presented. In addition, the City claims that it did not present the evidence to the Regional Board because the State Board's remand left the Regional Board without discretion in issuing the order. While we did remand this matter to the Regional Board, the Regional Board was not precluded from accepting evidence on the anticipated construction costs. In fact, no such evidence was proffered to the Regional Board.

In adopting the cease and desist order, the Regional Board was required to hold a hearing. (Water Code Section 13301.) The State Board is not required to hold a hearing in its review of Regional Board actions, and the receipt of new evidence is discretionary. (Water Code Section 13320(b).) The evidence cited by the City should have been submitted to the Regional Board and will not be heard by this Board. In any event, because we interpret Revenue and Taxation Code Section 2209 as expressing intent only (see below), receipt of evidence regarding cost is unnecessary to our determination.

III. CONTENTION AND FINDING

Contention: The cease and desist order issued by the Regional Board is in contravention with Revenue and Taxation Code Section 2209.

Finding: In Order No. WQ 86-14, the State Board approved issuance of requirements by the Regional Board with effluent limitations which would require tertiary treatment of continuous flows from the POTW to the lower reaches of the Santa Ana River. It is not known at this time whether the City will receive federal funding for the construction costs of such a plant.² Pursuant to the State Board's direction in Order No. WQ 86-14, the Regional Board adopted the cease and desist order, which included a time schedule to provide the City with a reasonable amount of time to construct the tertiary treatment facilities. The City agrees that the time extension for full compliance with effluent limitations--until April 1991--is reasonable. However, the City contends that the cease and desist order contravenes Government Code Section 17516 and Revenue and Taxation Code Section 2209.

Revenue and Taxation Code Section 2209 was added in 1974 (Stats. 1974, Ch. 457, page 1079), as an amendment to the Property Tax Relief Act of 1972. The Act required reimbursement for costs mandated by the State (Stats. 1973, Ch. 358, page 780.) The 1972 law generally required that costs mandated by the

² It is also not known whether the City will construct its own advanced treatment facility. The record reflects that the Santa Ana Watershed Project Authority may construct a regional tertiary facility which would treat the City's wastes.

state be reimbursed by the state to local agencies which are required to incur the costs.³

"Costs mandated by the state" are defined to include "executive orders" issued after January 1, 1973 which either mandate a new program, or implement or interpret a statute and thereby increase program levels above levels required prior to January 1, 1973. (Rev. & Tax. Code Section 2207(b) and (c).) Section 2209 is also included within the definitions article of the Property Tax Relief Act, and defines "executive order":

"'Executive order' means any order, plan, requirement, rule or regulation issued:

- (a) By the Governor, or
- (b) By any officer or official serving at the pleasure of the Governor, or
- (c) By any agency, department, board or commission of state government; provided that the term "executive order" shall not include any order, plan, requirement, rule or regulation issued by the State Water Resources Control Board or by any regional water quality control board pursuant to Division 7 (commencing with Section 13000) of the Water Code.

"It is the intent of the Legislature that the State Water Resources Control Board and regional water quality control boards will not adopt enforcement orders against publicly owned dischargers which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available.

"'Major' means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of cost of replacing the facility."⁴

³ The Act also included procedures for reimbursement; however, those provisions have been repealed. (Rev. & Tax. Code Sections 2250 and following.) New procedures are found in the Government Code.

⁴ As was stated above, the Legislature repealed the procedural provisions of the Property Tax Relief Act, and instead adopted new procedural provisions in

(CONTINUED)

The purpose of Section 2209(c) is to create an exception to the requirement that state-mandated costs be reimbursed to local agencies for orders, plans, requirements, rules and regulations issued by the State Board or by Regional Boards pursuant to the Porter-Cologne Water Quality Control Act (Water Code Section 13000 et seq.).⁵ This is accomplished by removing such orders, plans, requirements, rules and regulations from the definition of "executive orders" which do constitute costs mandated by the State. It is thus clear that cease and desist orders issued by Regional Boards are not subject to the procedures contained in Government Code Section 17500 et seq., and are not subject to reimbursement by the State.⁶

Following the exception of Regional Board and State Board orders from the definition of "executive order", the Legislature inserted this statement of legislative intent:

"It is the intent of the Legislature that the State Water Resources Control Board and regional water quality control boards will not adopt enforcement orders against publicly owned

⁴ (FOOTNOTE CONTINUED)

Government Code Section 17500 et seq. (See Government Code Section 17500.) Government Code Section 17516, which defines "executive order", is almost identical to Revenue and Taxation Code Section 2209.

⁵ Section 13263 of the Water Code authorizes Regional Boards to issue waste discharge requirements, and Section 13301 authorizes the issuance of cease and desist orders.

⁶ Even if cease and desist orders were subject to the law regarding reimbursement of state mandates, the order issued by the Regional Board would not be invalidated. Rather, the County would have to comply with the order, and seek reimbursement through the procedures set forth in the Government Code. (County of Contra Costa v. State (1986) 176 Cal.App.3d 1215, 222 Cal.Rptr. 750.)

dischargers which mandate major waste water treatment facility construction costs unless federal financial assistance and state financial assistance pursuant to the Clean Water Bond Act of 1970 and 1974, is simultaneously made available. 'Major' means either a new treatment facility or an addition to an existing facility, the cost of which is in excess of 20 percent of the cost of replacing the facility."

It is this statement of legislative intent that the City claims was contravened by adoption of the cease and desist order. Whether or not the Regional Board followed the Legislature's intent may be subject to discussion,⁷ but the Legislature nowhere states that orders which do not comply are invalid. It must also be noted that both of the bond acts cited in the statement of legislative intent have long since lapsed, having been replaced by the California Clean Water Bond Laws of 1976, of 1984 and of 1986. No treatment plant construction projects will be funded by the earlier bond acts, and the City's reading of the section as prohibitory would invalidate many enforcement orders for funded projects.

The statement cited by the City is explicitly one of legislative intent and is not a substantive prohibition. While the Legislature expressed its desire that the State not take enforcement action if funding is not available for major construction projects, it made no effort to prohibit the State from issuing such orders, and it did not limit the exception to the definition of "executive orders" to make such costs reimbursable. It is obvious that if the Legislature wished to limit the exception to grant-funded

⁷ As was noted above, the City did not, in two evidentiary hearings before the Regional Board, introduce evidence regarding construction costs. There is also no evidence in the record regarding any efforts by the City to obtain funding.

projects it could have done so easily. Statutes are not to be construed to create exceptions not specifically made by the Legislature. (Cal.Jur. III, Statutes, page 506.)

Moreover, the legislative intent of Revenue and Taxation Code Section 2209 (and subsequently Government Code Section 17516) indicates a clear intent by the Legislature that "mandates issued by the State Water Resources Control Board or regional water quality control boards are specifically excluded."⁸ The Legislature specifically recognized that "without [the exception of Section 2209], the State would have to pay the entire cost of improving and bringing up to standard those local sewage and water treatment plants which have not been brought up to standard."⁹

Finally, if the petitioner were correct that Revenue and Taxation Code Section 2209 could be read to prohibit the State from requiring compliance with the provisions contained in its water quality control plans--which, in the case of the Santa Ana Regional Board requires advanced treatment for continuous flows in the Santa Ana River--under that reading the State would not be able to enforce the Clean Water Act and would risk losing authority to implement to NPDES program. As was discussed in Order No. WQ 86-14, at page 15, Section 301(b)(1)(C) of the Clean Water Act [33 U.S.C. Section 1311(b)(1)(C)] requires that existing POTW's meet state-adopted water quality standards. States which

⁸ Enrolled Bill Report for AB 1579, Department of Finance, page 2 (July 4, 1974).

⁹ Report of Senate Committee on Revenue and Taxation, Analyses of Bill for Hearing, page 581 (March 6, 1974.)

administer the NPDES program must not adopt standards or prohibitions less stringent than those in the Clean Water Act. (Clean Water Act Section 510; 33 U.S.C. Section 1370.) Thus, the Regional Board was mandated by federal law to require compliance with its Basin Plan, and not to enforce the standards contained therein would risk state authority to implement the NPDES.

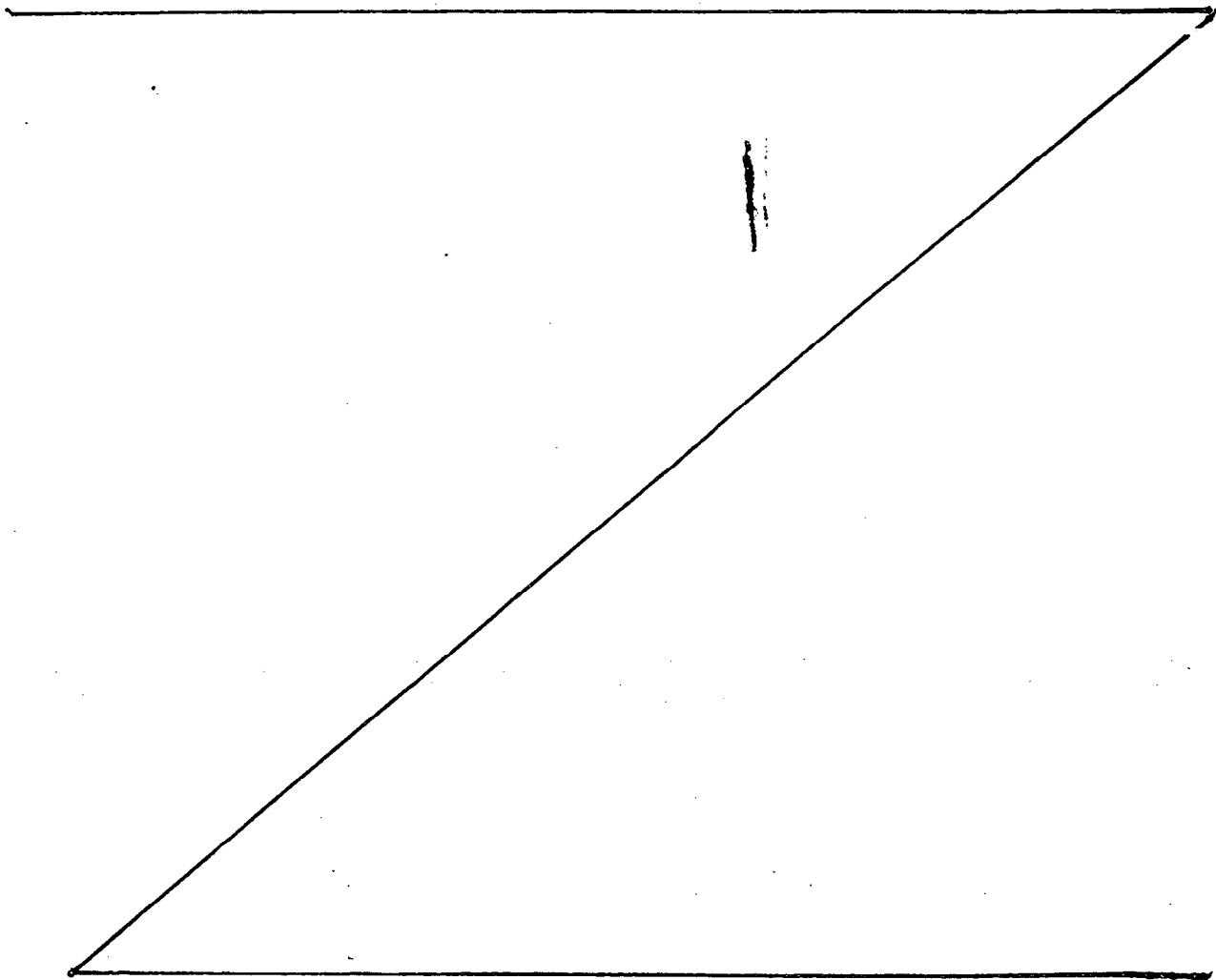
program.¹⁰ The Legislature has clearly stated its intent to have the State Board and regional boards implement the NPDES program (Water Code Section 13370.) If Section 2209 were read to restrict the regional boards from issuing required enforcement orders, and thereby jeopardize retention of the NPDES program, the Legislature's intent would be thwarted. As the legislative intent expressed in Revenue and Taxation Code Section 2209 and in Water Code Section 13370 may stand in opposition, they must be harmonized so that both may stand. (Cal.Jur.III, Statutes, page 485.) This may be done by giving literal effect to both statutes. The water Code presents the substantive requirements of the program regulating water pollution. It establishes standards and procedures

¹⁰ In our prior order, we concluded that the requirements issued by the Regional Board were not in violation of Article 13B, Section 6 of the California Constitution, which also concerns subvention of funds to local governments for state-mandated costs. One basis of this conclusion was that the requirements were federally mandated. The City again claims that the costs of constructing a tertiary treatment plant are not federally mandated, and cites a recent decision in Division of Occupational Safety and Health v. State Board of Control (1987) 189 Cal.App.3d 794, 234 Cal.Rptr. 661, to support its position. The finding in that case, that the OSHA regulation was not a federal mandate, is not binding here. First, the court in the OSHA case ruled that the state regulation was not reimbursable, and therefore the finding that there was no federal mandate was dicta. Second, the federal law involved in the OSHA case did not apply to local agencies. It was only through the adoption of a similar state law that local agencies became subject to the requirements. Unlike the federal Occupational Safety and Health Act, the Clean Water Act explicitly applies to local agencies which operate POTWs.

for implementation of the program. Section 2209 simply states the Legislature's desire that POTWs subject to enforcement actions obtain grant funds. This is not prohibitory, but precatory. There is no indication that Section 2209 is meant to change the substantive requirements of the Water Code, or to prohibit the regional boards from fulfilling their responsibilities under the Clean Water Act.

III. CONCLUSION

The cease and desist order was properly adopted by the Regional Board. The order does not contravene Revenue and Taxation Code Section 2209.



IV. ORDER

The petition is denied.

CERTIFICATION

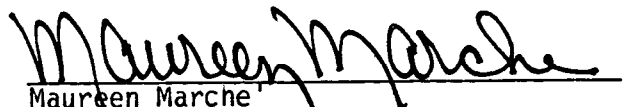
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on August 20, 1987.

AYE: W. Don Maughan
 Darlene E. Ruiz
 Eliseo M. Samaniego

NO: None

ABSENT: Edwin H. Finster
 Danny Walsh

ABSTAIN: None


Maureen Marche
Administrative Assistant to the Board

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