

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of )  
HARRY K. ZAPPE )  
To Review Resolution No. 6-87-146 )  
of the California Regional Water )  
Quality Control Board, Lahontan )  
Region. Our File No. A-513. )  
\_\_\_\_\_ )

ORDER NO. WQ 88- 11

BY THE BOARD:

On November 13, 1987, the California Regional Water Quality Control Board, Lahontan Region (Lahontan Regional Board), adopted Resolution No. 6-87-146 "Denying an Application to Discharge Waste Pursuant to Board Order No. 6-77-111" to Harry K. Zappe (petitioner). On December 10, 1987, the State Water Resources Control Board (State Board or Board) received a timely petition for review of Resolution No. 6-87-146.

I. BACKGROUND

On May 8, 1975, the Lahontan Regional Board adopted a water quality control plan (basin plan) for the South Lahontan Basin. The basin plan included two prohibitions on the discharge of waste from individual, onsite leaching systems in the Alta Vista, Mesa Vista, and Mustang Mesa areas. This area, referred to collectively as the Mesa area, is located approximately eight miles northwest of Bishop in Inyo County. The first

prohibition precluded the discharge of waste from leaching or percolation systems installed after May 15, 1975. The second prohibited the discharge of waste from all individual leaching disposal systems after January 1, 1985. The basin plan authorized the Executive Officer of the Lahontan Regional Board to grant exemptions to both prohibitions provided that the discharger presented geologic and hydrologic evidence which sufficiently demonstrated that use of the leaching system would not, individually or collectively, result in a pollution or nuisance. To obtain an exemption to the first prohibition, the discharger was also required to submit an acceptable engineering design. Subsequent to adoption of the basin plan, the Lahontan Regional Board Executive Officer developed design and location criteria for leaching disposal systems installed after May 5, 1975. These criteria, contained in a letter dated April 7, 1976, were used to evaluate requests for an exemption from the first basin plan prohibition.

On September 8, 1977, the Lahontan Regional Board adopted Order No. 6-77-111 granting exemptions to the prohibition against installation of new systems after May 15, 1975 to 40 lots in the Mesa area. The order conditioned the grant of an exemption on compliance with a number of provisions, including the following:

1. The discharge of waste at the 40 lots was prohibited after January 1, 1985, a date which coincided with the

discharge prohibition date contained in the second basin plan prohibition.

2. The discharge could not cause a pollution.

3. The discharger had to comply with the criteria contained in the April 7 letter. The basis for Order No. 6-77-111 was the Lahontan Regional Board's determination that the discharge of waste from specially designed onsite leaching or percolation systems on the 40 lots would be temporary and would cease as of January 1, 1985, when a long-term solution to wastewater disposal in the Mesa area would presumably be implemented.

On October 10, 1986, the Lahontan Regional Board adopted Resolution No. 86-10 amending the basin plan to extend the applicable deadline in the second prohibition from January 1, 1985 to January 1, 1989. This action was taken because the Mesa Community Service District (Mesa CSD), the sewerage authority for the affected area, had been unable to obtain grant funding to construct a sewer system by January 1, 1985. Grant funds were expected to be available, however, by October 1, 1987.

In Resolution No. 87-23, adopted on March 19, 1987, the State Board approved the basin plan amendments adopted by the Lahontan Regional Board. The Board found that there was substantial evidence in the record that the continued discharge

of waste from individual disposal systems utilizing subsurface disposal in the Mesa area would unreasonably degrade water quality. The State Board noted, however, that conclusive evidence of contamination in existing water supply wells was not available. In addition, the State Board directed the Lahontan Regional Board, if construction of a sewer system was not feasible, to consider appropriate relief from the prohibition against discharge and to take appropriate steps to assure that public health was protected.

Although Mesa CSD was on the State Board's priority list for Clean Water Grant funding, the district's low priority made the receipt of funding unlikely. Due to the fact that construction of an alternative wastewater disposal system for the Mesa area by January 1, 1989 appeared infeasible and that geologic and hydrologic data did not support use of leaching systems, the Lahontan Regional Board Executive Officer issued a letter, dated March 30, 1987, stating that exemptions from the first basin plan prohibition against installation of new systems would no longer be granted. On October 8, 1987, the Lahontan Regional Board adopted Resolution No. 6-87-120, supporting the decision of its Executive Officer to cease granting exemptions from the first prohibition.

At present, the Lahontan Regional Board is conducting the Mustang Mesa Ground Water Study, using Cleanup and Abatement Account funds, to investigate the effects of existing septic tank

discharges on the local ground water. The water quality testing phase of this study is expected to be completed by January 1, 1989. Upon completion of the study, the Lahontan Regional Board will reconsider the propriety of the current prohibitions.

On September 22, 1987, the petitioner requested an exemption from the first prohibition in order to build a two-bedroom home in the Mesa area. Petitioner's lot, Assessor's Parcel No. 9-323-08, was one of the 40 lots previously granted exemptions under Order No. 6-77-111. The septic tank and leachfield system proposed by petitioner met the design criteria specified in Order No. 6-77-111. Petitioner testified before the Lahontan Regional Board that the lot was approximately eight-tenths of an acre and that it was almost level. In addition, petitioner's consultant testified that the lot has a 2-1/2 foot thick soil mantle. The Lahontan Regional Board decided to deny the request for an exemption on the basis of findings that:

1. the discharge did not meet the condition for an exemption specified in Order No. 6-77-111 that "[t]he discharge shall not cause a pollution";

2. routine sampling of water wells in the prohibition area showed evidence of bacterial contamination in several wells; and

3. an increase in the number of leaching or percolation systems in the area would result in additional pollution of underlying ground water.

In response to this action, petitioner filed the present request for review with the State Board on December 10, 1987. Petitioner contends that the Lahontan Regional Board's action denies him the right to build a home, that the date of the exemption was changed without notice to affected property owners, and that the action was discriminatory. Petitioner requests that the State Board reverse the decision of the Lahontan Regional Board.

## II. CONTENTIONS AND FINDINGS

1. Contention: Petitioner contends that, by denying his request for an exemption, the Lahontan Regional Board denied him the right to build a home.

Response: The Lahontan Regional Board's action does not preclude petitioner from building a house on his lot. The applicable basin plan prohibition applies to "leaching or percolation systems" installed after May 15, 1975 in the affected area. Denial of an exemption from this prohibition only means that petitioner cannot use a leaching or percolation system for

onsite waste disposal. Alternative means of onsite disposal, such as a mound system or a holding tank, can still be utilized without violating the prohibition.

Upon denial of petitioner's request for an exemption, the Lahontan Regional Board should have informed petitioner that there were acceptable alternatives to an onsite leaching or percolation system. It is unclear from the record whether petitioner was so informed. If the Lahontan Regional Board denies exemption requests in the future, the Board should inform the applicants of available options to comply with the basin plan prohibition.

2. Contention: Petitioner alleges that his lot was one of the 40 lots exempted under Order No. 6-77-111, that the right to request an exemption under this order was extended from January 1985 to January 1989, and that the right to request an exemption pursuant to the order was terminated by the Executive Officer of the Lahontan Regional Board without notice to affected parties on March 30, 1987.

Response: Petitioner's lot was, in fact, one of the 40 lots for which an exemption from the basin plan prohibition against installation of new systems was granted in Order No. 6-77-111. To date, residences have been constructed on about 15 of the 40 lots covered by the order.

Order No. 6-77-111 granted exemptions to the 40 lots subject to approval of the lot owner's application by the Executive Officer and subject to a number of conditions, including a condition prohibiting discharge after January 1, 1985. Although the Lahontan Regional Board did amend its basin plan to extend the discharge prohibition deadline from January 1, 1985 to January 1, 1989, the Board did not concurrently amend the condition in Order No. 6-77-111 prohibiting discharge after January 1, 1985.

Having extended the discharge prohibition deadline in the basin plan, the Lahontan Regional Board should have amended the condition in Order No. 6-77-111. Alternatively, the Lahontan Regional Board or its Executive Officer should have ceased approving applications pursuant to Order No. 6-77-111 after January 1, 1985. The record reflects that the Lahontan Regional Board did neither. Rather, the Lahontan Regional Board continued to process applications from the 40 lot owners, including petitioner's application, under Order No. 6-77-111 after January 1, 1985.

The question of whether the Lahontan Regional Board or its Executive Officer could legally approve applications under Order No. 6-77-111 after January 1, 1985, appears to be a moot point for three reasons. First, even assuming that applications



under Order No. 6-77-111 could no longer be approved, a lot owner covered by the order could still seek an exemption from the underlying basin plan prohibition on which Order No. 6-77-111 was based. Secondly, all lots in the Mesa area, including the 40 lots covered by Order No. 6-77-111, are subject to the amended discharge prohibition deadline in the basin plan of January 1, 1989. This date is quickly approaching. Therefore, it would be inappropriate for the Lahontan Regional Board to approve any additional applications under Order No. 6-77-111. Finally the Board takes official notice that on June 6, 1988, the Lahontan Regional Board adopted Resolution No. 6-88-74, which, in fact, rescinded Order No. 6-77-111.

The Executive Officer's letter of March 30, 1987, did not deny petitioner the right to seek an exemption from the basin plan prohibition against installation of new leaching systems. The basin plan delegated to the Executive Officer the authority to grant exemptions to this prohibition. The Executive Officer's letter of March 30, 1987, indicated that he would no longer grant exemptions because the construction of a community sewer system by January 1, 1989, or shortly thereafter, appeared unlikely and because existing geologic conditions in the Mesa area would probably preclude the issuance of exemptions to the January 1, 1989 discharge prohibition deadline. The Executive Officer's decision was later ratified by the Lahontan Regional Board in Resolution No. 6-87-120, adopted on October 8, 1987.

The only consequence of the Executive Officer's March 30, 1987 letter was that lot owners in the Mesa area could not obtain an exemption from the Executive Officer. Affected owners could still seek an exemption from the Lahontan Regional Board itself, which retained the authority to grant exemptions. In this regard, Resolution No. 6-87-120 expressly stated that "[a]ny person proposing a discharge of waste contrary to the Basin Plan prohibition for the Alta Vista/Mesa Vista/Mustang Mesa area can seek Regional Board approval of an exemption to the prohibition".

3. Contention: Petitioner alleges that the action of the Lahontan Regional Board was discriminatory because it was the first and only exemption request denied by the Board.

Finding: Petitioner is correct that his request was the only request denied by the Lahontan Regional Board as of the November 1987 Board Meeting. The exemption request was denied on the ground, among others, than "an increase in the number of leaching or percolation systems in the area [would] result in additional pollution of underlying ground water". This finding was based on the conclusion that existing geologic conditions in the Mesa area are unsuitable for conventional onsite disposal systems. In general, the Mesa area is underlain at shallow depths by impervious rock formations. The rock formations have occasional fractures, which provide a conduit for the migration

of leachfield effluent directly into the ground water, which is used for domestic water supply. The soil cover is generally inadequate, ranging from zero to three feet.

In order to obtain an exemption, the basin plan required petitioner to present sufficient evidence to demonstrate "that the use of the proposed leaching system [would] not, of itself or in conjunction with the use of other systems in the area, result in a pollution or nuisance". Petitioner was unable to present such evidence. Therefore, the Lahontan Regional Board acted on proper legal grounds in denying petitioner's exemption request. The Lahontan Regional Board's action was also consistent with this Board's findings in Resolution No. 87-23.

In denying the request, however, the Lahontan Regional Board held petitioner to a different standard than that applied to another applicant, whose exemption request was considered by the Lahontan Regional Board at the same meeting. James Quirk, one of the 40 lot owners covered under Order No. 6-77-111, appeared before the Lahontan Regional Board at the November 1987 Regional Board Meeting seeking reissuance of an exemption from the first basin plan prohibition. Quirk's application, pursuant to Order No. 6-77-111, was approved on June 2, 1983 but was subject to a condition prohibiting discharge after January 1, 1985. Quirk subsequently built a cabin on his lot but, due to financial difficulties, had not, as of November 1987, installed a

wastewater disposal system. The Lahontan Regional Board granted Quirk's request for an exemption from the basin plan prohibition against installation of new systems and, at the same time, prohibited discharge after January 1, 1989. The Lahontan Regional Board took this action despite express findings that "[a]n increase in the number of leaching or percolation systems in the area will result in additional pollution of the underlying ground water" and that "any new subsurface disposal systems may not end up being 'interim' or short term use systems, but may, in fact, be used for quite a long period".

As a general rule, agency action which is arbitrary or unreasonable, an abuse of discretion, or contrary to law is subject to challenge. See, e.g., Board of Supervisors of Modoc County vs. Archer, 18 CA3d 717, 724, 96 Cal.Rptr. 379, 384 (1971); 2 Cal.Jur.III Section 284, Pages 536-537. In this case petitioner, like James Quirk, proposed to install a new onsite disposal system which met all of the design and location criteria specified in the April 6, 1976 letter. Both parties proposed to install new systems. The Lahontan Regional Board found in both cases that the installation of new onsite leaching systems would individually or collectively cause or add to pollution or nuisance conditions on the Mesa. We conclude that, under these circumstances, Quirk and petitioner should have been treated in the same manner. Although Quirk's exemption request is not before this Board, we find that the Lahontan Regional Board's action on his request was unreasonable. The Lahontan Regional

Board, however, acted properly in denying petitioner's request for an exemption.

As mentioned previously, in June the Lahontan Regional Board rescinded Order No. 6-77-111. At the same time, the Lahontan Regional Board rescinded exemptions previously granted pursuant to Order No. 6-77-111 for lots on which homes had not been constructed and septic systems had not been installed prior to June 6, 1988. The discharge prohibition deadline for exemption applications previously approved under Order No. 6-77-111 was extended from January 1, 1985 to January 1, 1989 for property owners who had constructed homes and installed septic systems prior to June 6, 1988. In addition, the Lahontan Regional Board indicated that it would reconsider granting exemptions to the first basin plan prohibition upon the conclusion of the Mustang Mesa Ground Water Study.

Petitioner will, therefore, be given the opportunity to file a new request for an exemption from the applicable basin plan prohibitions after the study results are available. If the study results document an existing water quality problem in the area, then petitioner's exemption request should be denied. In addition, the Lahontan Regional Board should take appropriate action to enforce the discharge prohibition deadline of January 1, 1989, with respect to existing systems and should deny requests for exemptions from the prohibition against installation

of new systems unless the systems meet the basin plan exemption criteria (i.e., the systems do not, individually or collectively, result in a pollution or nuisance).

If the study fails to document a change in water quality conditions on the Mesa, then the Lahontan Regional Board should reconsider the propriety of the basin plans prohibitions. The Lahontan Regional Board should also reconsider petitioner's exemption request in light of the Lahontan Regional Board's conclusions. Should the Lahontan Regional Board conclude that, although no problems have been documented from existing systems, additional new onsite leaching or percolation systems could create conditions of pollution or nuisance on the Mesa, the Lahontan Regional Board should deny requests for exemptions from the prohibition against installation of new systems unless the dischargers qualify for an exemption.

### III. CONCLUSIONS

1. The Lahontan Regional Board's action on November 13, 1987 does not preclude petitioner from building a home on his lot in the Mesa area.

2. Petitioner's exemption request was denied on the basis of proper findings of fact.

3. The Lahontan Regional Board should reconsider petitioner's exemption request after the results of the current ground water study are available.

IV. ORDER

IT IS HEREBY ORDERED that the Lahontan Regional Board shall reconsider petitioner's exemption request after the results of the Mustang Mesa Ground Water Study are available.

IT IS FURTHER ORDERED that the petition is otherwise denied.

CERTIFICATION

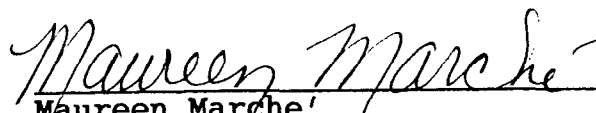
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 20, 1988.

AYE: W. Don Maughan  
Darlene E. Ruiz  
Edwin H. Finster  
Eliseo M. Samaniego  
Danny Walsh

NO: None

ABSENT: None

ABSTAIN: None

  
\_\_\_\_\_  
Maureen Marche  
Administrative Assistant to the Board

