STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of COUNTY OF IMPERIAL For Review of Orders Nos. 88-105 and 88-106 of the California Regional Water Quality Control Board, Colorado River Basin Region. Our File No. A-559.	ORDER NO. WQ 89-7

BY THE BOARD:

On June 30, 1988, the California Regional Water Quality Control Board, Colorado River Basin Region (Regional Board), adopted Orders No. 88-105 and 88-106. These orders contained waste discharge requirements for the agricultural land application of wastewater treatment plant sludge by Pima Gro Systems, Inc., (Pima Gro), and E. T. Technologies, Inc., (E.T.T.), respectively. On June 30, 1988, the Regional Board also adopted negative declarations, pursuant to the California Environmental Quality Act, Public Resources Code Section 21000 et seq. (CEQA), for the two projects. On July 28, 1988, Imperial County filed a petition with the State Water Resources Control Board (State Board) for review of the Regional Board's actions. Petitioner sought a stay of Orders Nos. 88-105 and 88-106 and, in addition, requested an evidentiary hearing before the State Board.

I. BACKGROUND

In January 1988 the Regional Board received reports of waste discharge from Pima Gro and E.T.T. for the application of sewage sludge on farm lands within the Imperial Hydrologic Unit of Imperial County, an area encompassing roughly 6,000 acres. Pima Gro and E.T.T. proposed to use sludge as a soil amendment for the production of non-food chain crops, such as bermuda grass, alfalfa, cotton, sugar beets, and small grains. Sludge would be transported to sites within Imperial County by truck and would be stockpiled for spreading. After the sludge was distributed on an application site with a spreader, the material would be tilled into the soil within 24 hours.

Pima Gro and E.T.T. proposed to use stabilized wastewater treatment plant sludge from several sources. These included Encina Water Pollution Control Facility, located in northern San Diego County, Orange County Sanitation District, and the City of San Diego's sludge drying facility at Fiesta Island. Other potential sources of municipal sludge included the City of Los Angeles and Los Angeles County.

In response to receipt of the reports of waste discharge, the Regional Board prepared draft waste discharge requirements, circulated the drafts for public comment, and

scheduled the requirements for adoption at the Regional Board's March 23, 1988 public meeting. At that meeting, the Imperial County Health Officer presented a resolution, adopted by the Imperial County Board of Supervisors on March 22, requesting a 30-day continuance of the matter. The additional time was requested to enable the county to adequately analyze the proposals for sludge application. The Regional Board denied the request and adopted Orders No. 88-39 and 88-40, waste discharge requirements for Pima Gro and E.T.T., respectively. The orders included findings that the projects were exempt from CEQA because they entailed "minor alterations to land". See 14 CCR Section 15304.

The Regional Board subsequently filed Notices of Exemption for Orders Nos. 88-39 and 88-40 on April 29, 1988. At the Regional Board's May 12 meeting several county representatives, including County Counsel and the Agricultural Commissioner, appeared before the Regional Board and requested that the Regional Board consider withdrawing the Notice of Exemption. County officials expressed concern about the lack of any environmental assessment of potential impacts of the use of sewage sludge on agricultural lands. The Regional Board agreed to hear additional testimony on the matter at its June 30, 1988 meeting.

On May 18, 1988, the Regional Board filed Notices of Withdrawal of Exemption and, concurrently, circulated for comment proposed negative declarations[1] for the Pima Gro and E.T.T. waste discharge requirements. By letter dated June 16, 1988, Imperial County submitted formal written comments objecting to the proposed negative declarations. On June 29, 1988, the Board of Supervisors for Imperial County adopted a resolution reiterating its concerns about the lack of an adequate environmental assessment of the potential impacts of the agricultural land application of sewage sludge in the county. The Board of Supervisors requested that the Regional Board disapprove the proposed negative declarations and require preparation of an environmental impact report (EIR).

On June 30, 1988, the Regional Board received comments on the proposed negative declarations and waste discharge requirements for Pima Gro and E.T.T. County representatives, including the Agricultural Commissioner, County Counsel, and the Planning Director again expressed the viewpoint that the county's environmental concerns had not been adequately addressed and that

1 The Regional Board was "lead agency" under CEQA for the projects because the Regional Board, at the time, was apparently the only agency with permitting authority over the projects. See Public Resources Code Section 21067; 14 CCR Section 15367.

an EIR was required. At the conclusion of public comment, the Regional Board approved the negative declarations and adopted requirements for Pima Gro and E.T.T., Orders Nos. 88-105 and 88-106, respectively.

II. STAY AND HEARING REQUESTS

Imperial County has requested both a stay of and an evidentiary hearing regarding Orders Nos. 88-105[2] and 88-106. See 23 CCR Sections 2050(b) and 2053. Subsequent to the filing of the County's petition, however, the County enacted its own regulatory program for the land application of sewage sludge. This action obviated the need for a stay.

Petitioner requests a hearing to present additional expert testimony not presented to the Regional Board on the risks associated with land application of sewage sludge. The County does not explain why this information was not presented to the Regional Board. In view of the Board's disposition of this petition, the Board concludes that an evidentiary hearing is unnecessary.

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2 By letter dated May 1, 1989, Pima Gro notified the Regional Board that Pima Gro is no longer interested in pursuing its project in Imperial County. Pima Gro, therefore, requested rescission of Order No. 88-105. The petition of Imperial County has not become moot as a result of this recent development, however, because Order No. 88-106 is still in effect.

III. CONTENTIONS AND FINDINGS

1. Contention: Imperial County contends that the Regional Board abused its discretion in adopting negative declarations because the Regional Board was presented with substantial evidence by the county that the projects would have a significant effect on the environment. Alternatively, Imperial County argues that an EIR should have been prepared due to the existence of serious public controversy over the projects. Pima Gro, on the other hand, alleges that Imperial County only raised "concerns" about the proposed land application of sludge and that none of these concerns rose to the level of substantial evidence. Pima Gro, in addition, contends that serious public controversy alone is not sufficient to require the preparation of an EIR.

Finding: The Board finds it unnecessary to resolve the dispute over the sufficiency of the evidence because the Board concludes that the initial studies prepared by the Regional Board to support the negative declarations were inadequate. In reaching this conclusion, the Board is guided by the words of the California Supreme Court "that the Legislature intended [CEQA] to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." Friends of Mammoth v. Board of Supervisors, 8 Cal.3d. 247, 259, 104 Cal.Rptr. 761, 502 P.2d 1049 (1972).

Both at the Regional Board meeting on June 30, 1988 and in its petition Imperial County challenged the adequacy of the Regional Board's initial studies. One of the purposes of an initial study is to "[p]rovide the lead agency with information to use as the basis for deciding whether to prepare an EIR or negative declaration . . . ." 14 CCR Section 15063(c)(1). If an initial study is defective, however, and the study is used as the basis for a negative declaration, review of the lead agency's decision to prepare a negative declaration becomes difficult, if not impossible.

The CEQA regulations prescribe the necessary contents of an initial study. In particular, an initial study must contain: a description, including the location, of the project; an identification of the environmental setting; an identification of environmental effects by use of a checklist, matrix, or other method; and a discussion of ways to mitigate any identified significant effects. Id. (d).

An important function of an initial study is to "[p]rovide documentation of the factual basis for the finding in a negative declaration that a project will not have a significant effect on the environment . . . ." Id. (c)(5). This purpose is consistent with the California Supreme Court's directive that an

agency "which renders [a] challenged decision . . . set forth findings to bridge the analytical gap between the raw evidence and ultimate decision or order." Topanga Assn. for a Scenic Community v. County of Los Angeles, 11 Cal.3d 506, 515, 113 Cal.Rptr. 836, 522 P.2d 12 (1974). Consequently, the courts have held that "although an initial study can identify environmental effects by use of a checklist . . ., it must also disclose the data or evidence upon which the person(s) conducting the study relied." Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo, 172 Cal.App.3d 151, 171, 217 Cal.Rptr. 893 (1985). See Sundstrom v. County of Mendocino, 202 Cal.App.3d 296, ___, 248 Cal.Rptr. 352, 357-358 (1988).

The State Board's regulations incorporate the State CEQA guidelines contained in Title 14 of the California Code of Regulations. 23 CCR Section 3720. State Board regulations also specifically require an applicant for waste discharge requirements to complete the Environmental Information Form contained in Appendix H of the State CEQA Guidelines if specified conditions, which are present in this case, are met.[3] See id. Section 3741(a).

3 These conditions are: (a) The project is subject to CEQA; (b) The project is neither ministerial nor subject to Water Code Section 13389 (see Section III.2 of this Order); (c) The project is to be carried out by a person other than a public agency; and (d) No other agency is lead agency for the project.

It does not appear, based upon our review of the Regional Board record, that the project proponents were requested to prepare the Environmental Information Form. Rather, the Regional Board's initial study consisted of a checklist similar to that contained in Appendix I of the State CEQA Guidelines. The checklist identified several potential environmental effects stemming from the projects, such as odors, health hazards, and impacts on soils and surface waters, and mitigation measures were proposed to address these identified impacts. The initial study also included a brief description of the project and an identification of the environmental setting as "the Imperial Hydrologic Unit which encompasses a significant portion of Imperial County."

The California Court of Appeal stated in Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo, supra, "[i]t is for the most part impossible to determine whether the findings which ultimately resulted in negative declarations are supported by the evidence because it is unclear what raw evidence, if any, was relied upon in preparing the initial studies." 172 Cal.App.3d at 171-172, 217 Cal.Rptr. 893. "Neither the source nor the content of the information relied upon for the . . . subcategories which required environmental conclusions in each initial study were identified." Id. at 172, 217 Cal.Rptr. 893. These statements are equally applicable to the Regional Board's actions in this case.

The Regional Board contends that land spreading of treatment plant sludges has occurred in virtually every state in the country. Further, the Regional Board's review of the relevant literature on the subject has failed to reveal any documented problems associated with pathogens or heavy metals in sewage sludge applied to land.

This may be true. Nonetheless, as Imperial County pointed out, there is no evidence in the record indicating that climatic and soil conditions in any other state are comparable to conditions in Imperial County. In addition, although Pima Gro representatives discussed the composition of sludge from Encina at the Regional Board's June 30 meeting, there is no evidence in the record regarding the composition of sludge from other potential sources. Encina serves an area described as "largely a bedroom community" with less than five percent industrial flow into the treatment plant. Sludge from Encina, consequently, would obviously not be comparable to sludge from more industrialized areas, such as Los Angeles.

Because we find that the Regional Board's initial studies were inadequate, we also find that there is insufficient evidence in the record to support the negative declarations adopted by the Regional Board. The Board will, therefore, remand Orders No. 88-105 and 88-106 to the Regional Board for action consistent with our findings.

We note, however, that, due to intervening events, the issue of the Regional Board's compliance with CEQA may have become, to some extent, a moot point. Subsequent to adoption of Orders Nos. 88-105 and 88-106, Imperial County enacted an ordinance regulating the land application of sewage sludge in the County. Ordinance No. 975, adopted July 12, 1988. Pursuant to the ordinance, the County now regulates the land application of sewage sludge under conditional use permits.[4] Assuming that the County acted as the lead agency and complied with CEQA in enacting Ordinance No. 975 by adopting either an EIR or negative declaration, the Regional Board may be able to rely on the environmental documents prepared by the County when the Regional Board reissues Orders Nos. 88-105 and 88-106.

2. Contention: Pima Gro contends that Water Code Section 13389 exempted the Regional Board from compliance with CEQA in the adoption of Order No. 88-105.

Finding: This contention is erroneous. Order No. 88-105 contained waste discharge requirements issued under the exclusive authority of the Porter-Cologne Water Quality Control Act, Water Code Section 13000 et seq. Water Code Section 13389

4 We note, however, that the County has been sued over the validity of the ordinance. Consequently, no permits have yet been issued by the County.

is applicable only to National Pollutant Discharge Elimination System [NPDES] permits issued pursuant to Chapter 5.5 of the Water Code. Order No. 88-105 was not an NPDES permit. Water Code Section 13389 was, therefore, inapplicable to the Regional Board's action. See Committee for a Progressive Gilroy v. State Water Resources Control Board, 192 Cal.App.3d 847, 862, 237 Cal.Rptr. 723 (1987).

3. Contention: Pima Gro additionally contends that the adoption of Order No. 88-105 was exempt from CEQA under Sections 15307 and 15308 of the State CEQA Guidelines.

Finding: We disagree. Sections 15307 and 15308 exempt actions taken by regulatory agencies "to assure the maintenance, restoration, or enhancement of a natural resource" or "to assure the maintenance, restoration, enhancement, or protection of the environment", respectively. Only activities which do not have a significant effect on the environment are exempt under these sections. See Public Resources Code Section 21084; 14 CCR Section 15300. Where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption is improper. International Longshoremen's and Warehousemen's Union v. Board of Supervisors, 116 Cal.App.3d 265, 276, 171 Cal.Rptr. 875 (1981), citing Wildlife Alive v. Chickering, 18 Cal.3d 190, 206, 132 Cal.Rptr. 377, 553 P.2d 537 (1976).

On the basis of the record in this case, the Board finds that there is a reasonable possibility that the land application of undisinfected sewage sludge, containing pathogens and heavy metals, will have a significant effect on the environment. Therefore, an exemption under Sections 15307 and 15308 would have been inappropriate.

III. CONCLUSIONS

1. The initial studies, which served as the basis for the negative declarations approved by the Regional Board for Orders Nos. 88-105 and 88-106, were inadequate.

2. There is insufficient evidence in the record to determine whether the Regional Board's decision to approve negative declarations for Orders Nos. 88-105 and 88-106 was proper.

3. The adoption of Order No. 88-105 is not exempt from CEQA under Water Code Section 13389 or under Sections 15307 or 15308 of the State CEQA Guidelines.

4. Orders Nos. 88-105 and 88-106 should be remanded to the Regional Board for action consistent with the findings of this order.

IV. ORDER

IT IS HEREBY ORDERED that Orders Nos. 88-105 and 88-106 are remanded to the Regional Board for action consistent with the findings of this Order.

IT IS FURTHER ORDERED that the petition of Imperial County 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 May 16, 1989.

AYE:	W. Don Maughan Darlene E. Ruiz Edwin H. Finster Eliseo M. Samaniego
NO:	None
ABSENT:	Danny Walsh
ABSTAIN:	None

Maureen Marche
Administrative Assistant to the Board