STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petitions of **COUNTY OF SAN DIEGO, CITY OF NATIONAL CITY, and CITY OF NATIONAL CITY COMMUNITY DEVELOPMENT COMMISSION** For Review of Waste Discharge Requirements Order No. 88-57, Addenda Nos. 2 and 4, and Cleanup and Abatement Order No. 95-66 of the California Regional Water Quality Control Board, San Diego Region. Our File Nos. A-898, A-973, A-980, A-980(a), and A-980(b).	ORDER NO. WQ 96-2

BY THE BOARD:

This order addresses five petitions filed by three separate entities concerning waste discharge requirements (WDRs) and a cleanup and abatement order (CAO) issued by the California Regional Water Quality Control Board, San Diego Region (SDRWQCB). The matters have been consolidated for consideration by the State Water Resources Control Board (SWRCB) because they are closely related factually and legally.[1]

These matters involve a complex procedural history involving several parties and several SDRWQCB orders. Despite this procedural complexity, the essential question is whether each of the petitioners, having had some level of involvement

[1] *The SWRCB's regulations permit consolidation of legally or factually related cases. 23 Calif. Code Regs. § 2054. Although the time for formal disposition of the County's first petition (A-898) has elapsed, we have elected to review the SDRWQCB's action on our own motion. Water Code § 13320.*

with a landfill known as the Duck Pond Landfill, is appropriately named in a WDR order or a CAO regarding water quality problems at the landfill. The three petitioners are San Diego County (County), the City of National City (City), and the City of National City Community Development Commission (CDC or Commission). Boulevard Investors owns land overlying the landfill, but has not challenged inclusion in the orders.

I. BACKGROUND

The County operated the Duck Pond Landfill, a small, 2 1/2-acre site, under a lease between 1960 and 1963 as a disposal site for nonhazardous municipal waste pursuant to SDRWQCB WDR Order No. 60-R26. The County was the landfill's only operator. The landfill ceased accepting waste in 1963. Thereafter, the SDRWQCB rescinded Order No. 60-R26 by its issuance of Order No. 73-12. The property apparently sat vacant in a post-closure state for some two decades following its closure.

Around 1984 the CDC became involved in a plan to purchase the property in order to develop the National City Mile of Cars. Under the plan, the Commission would purchase the property from the County and later transfer the property to a private investor who would actually develop the property. The Commission proceeded to buy the property, and later sold it to Boulevard Investors (the present owner of much of the property) who subsequently built a car dealership on part of the property.

In 1987 the SDRWQCB adopted WDR Order No. 87-55, which named the City of National City[2] as operator of the Duck Pond Landfill, assigning to the City the responsibility to properly maintain the site in an adequate post-closure condition as required by Title 23, Division 3, Chapter 15 (Post-Closure Regulations). Generally, the SDRWQCB order requires ongoing surface and subsurface monitoring and surface maintenance. Upon conveyance of the property to Boulevard Investors, Addendum No. 1 to Order No. 87-55, dated April 24, 1988, was adopted by the SDRWQCB, replacing National City with Boulevard Investors as the entity solely responsible for post-closure maintenance. According to the SDRWQCB and the CDC, Boulevard Investors was expected to assume responsibility for known problems with the landfill, including subsidence resulting in ponding of stormwater, leaking sewer lines beneath the surface, and other potential water quality concerns.

Several years later, according to the SDRWQCB, monitoring reports disclosed evidence of impacts upon the water quality beneath the site, apparently caused by the landfill. The record in this matter contains documentation of communications between the SDRWQCB and the parties regarding the apparent

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[2] *The order names the City of National City, despite the fact that it was the CDC that purchased, owned, and later sold the property. This action fails to recognize the fact that the City and the CDC are apparently legally separate, individually viable entities. Evidently, the City failed to take action to correct the SDRWQCB's action in naming it--instead of the CDC--as the discharger responsible for WDR Order No. 88-57. While there is some confusion in the SDRWQCB record (prior to issuance of Addendum No. 4) regarding the City's and the CDC's status, it is not an issue in these consolidated petitions.*

leakage from the landfill, and efforts of the SDRWQCB staff to compel responsive action.[3] Given this evidence of water quality problems, in January 1994, the SDRWQCB notified the parties of its intent to again modify the WDRs by including the names of all the parties having previous involvement with the property as responsible under the post-closure WDRs.

A hearing was held on February 10, 1994, and Addendum No. 2 to Order No. 87-55 was adopted by the SDRWQCB. Finding No. 5 of that Addendum indicates that the City, the CDC and Boulevard Investors are named in the WDRs because of their status as prior or current landowners. Finding No. 6 makes clear that the County is named as the only operator of the landfill. The County of San Diego filed a petition contesting the addendum (Petition No. A-898).[4]

On May 3, 1995, the SWRCB held a workshop to consider a draft order which would have removed the County as a responsible party under the WDRs. During the workshop, the SDRWQCB notified the SWRCB and the parties that it was planning to issue a cleanup and abatement order naming the County as a discharger. On May 5, 1995, the SDRWQCB's Executive Officer issued Cleanup and Abatement Order No. 95-66 naming all four parties in this matter as dischargers: the County, the City, the CDC, and Boulevard

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[3] *The record contains numerous items of correspondence in this connection. For example, the SDRWQCB sent a letter to the CDC on April 3, 1991; another was sent to Boulevard Investors on April 26, 1991, transmitting an Administrative Civil Liability Complaint; and Mr. Herbert Fox, of Boulevard Investors, wrote the SDRWQCB concerning his efforts to comply on May 7, 1991.*

[4] *Neither the City nor the CDC filed a petition regarding Addendum No. 2.*

Investors, Inc. The SDRWQCB itself, following a hearing held on June 8, 1995, affirmed the cleanup and abatement order.

Also following the SWRCB's workshop, the SDRWQCB took two additional actions regarding WDR Order No. 87-55, which resulted in no net effect on the parties' status under the order. On May 12, 1995, it adopted Addendum No. 3, which removed the CDC as a responsible party under the WDRs, and on May 16, 1995, it adopted Addendum No. 4, which put the CDC back in as a responsible party under the WDRs.[5] Shortly thereafter, the County, the CDC, and the City each filed petitions challenging their respective inclusion in the WDRs and the CAO.[6]

Boulevard Investors filed an opposition to the County's petition.

II. CONTENTIONS AND FINDINGS

In summary, the three local government agencies argue that the SDRWQCB acted improperly by naming them, respectively, as dischargers under the WDRs and the CAO. All three argue that they should not be named in either order. This order first

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[5] *Addendum No. 3 was the result of the SDRWQCB's apparent belief at that time that the CDC was not legally separate from the City and, therefore, was superfluous. Addendum No. 4 reflects the SDRWQCB's corrected interpretation that the CDC is a legally separate entity and, therefore, must be included in the WDR as a responsible party.*

[6] *The County filed a second petition challenging its inclusion in the CAO (Petition No. A-980(b)); the City petitioned its inclusion in the CAO and the WDRs (Petition No. A-980(a)); the CDC filed a petition challenging its inclusion in the WDR (Petition No. A-973) and in the CAO (Petition No. A-980). The CDC and the City requested that the SDRWQCB's orders be stayed to the extent that they are included in such orders. By letter dated September 11, 1995, the Office of the Chief Counsel notified the CDC and the City that their requests for stay were incomplete, and extended an opportunity to submit further documentation. No response having been received, those stay requests are deemed abandoned and, if not, then denied for failure to submit the necessary documentation.*

examines contentions regarding the petitioners' responsibilities under the WDRs, then turns to the CAO issues.

1. Contention: The County contends that it should not be named a "discharger" in the post-closure WDRs for the Duck Pond Landfill since its activities at the landfill ceased over twenty years ago. The CDC contends that, as a prior owner having terminated its involvement with the landfill several years ago and never having operated the landfill, it is not properly named in the WDRs. The City asserts that it should not be named in the WDRs because its involvement with the landfill has been even more limited than that of the other petitioners.

Finding: The record indicates that, in issuing its orders, the SDRWQCB has attempted to address actual, current clean-up needs. In addition, since the site happens to be a landfill, the SDRWQCB has sought to impose upon the parties the responsibility of assuming duties required by Title 23, California Code of Regulations, Chapter 15. The SDRWQCB's response to the petitions (memorandum dated October 10, 1995) states, in part, at page 3:

> "The purpose of naming the four responsible parties (Boulevard Investors, the County, the CDC, and the City) as dischargers in Order No. 87-55 is to ensure compliance with ongoing post-closure maintenance and monitoring requirements and prevent further degradation of the site."

The approach taken by the SDRWQCB, to broadly name all parties in both the WDRs and the CAO, unnecessarily blurs a purposeful distinction between WDRs and CAOs.

Water Code Section 13260 provides, in part, that the following persons must apply for, and obtain WDRs:

> "(1) Any person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state, other than into a community sewer system.
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> "(2) Any person who is a citizen, domiciliary, or political agency or entity of this state discharging waste, or proposing to discharge waste, outside the boundaries of the state in a manner that could affect the quality of the waters of the state within any region.
>
> "(3) Any person operating, or proposing to construct, an injection well."

Water Code Section 13263 provides in part:

> "(a) The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change therein, except discharges into a community sewer system, with relation to the conditions existing from time to time in the disposal area or receiving waters upon, or into which the discharge is made or proposed."

The language of Water Code Sections 13260 and 13263 suggests that WDRs are applicable to proposed or current controlled discharges, as opposed to past discharges.

On the other hand, Water Code Section 13304 provides:

> "Any person who has discharged or discharges waste into the waters of this state in violation of any waste discharge requirement or other order or prohibition issued by a regional board or the state board, or who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall upon order of the regional board, clean up the waste or abate the effects of the waste . . . ."

Water Code Section 13304 is broader in its coverage than Sections 13260 and 13263. It applies to discharges that are past discharges, and clearly applies to uncontrolled, intentional, or negligent releases. In previous orders, the SWRCB has made known its intention to maintain a distinction between WDRs and CAOs. In one case, the SWRCB reversed a Regional Water Quality Control Board decision to use WDRs to require investigation and cleanup of sites where extensive investigation and cleanup activities are involved. In County of Santa Clara, et al., Order No. WQ 86-8 (Footnote No. 11), the SWRCB indicated that the proper action to effectuate cleanup in most cases is adoption of a CAO rather than WDRs.) Again, in Vallco Park, Ltd., Order No. WQ 86-18 (Footnote No. 1), and in Prudential Insurance Company of America, Order No. WQ 87-6 (Footnote No. 2), the SWRCB made it clear that a CAO issued in accordance with Water Code Section 13304 is the appropriate means to require clean-up actions, not WDRs.

The Duck Pond Landfill matter clearly involves a clean-up situation. The clean-up issues appear paramount to the closure and post-closure maintenance requirements of Chapter 15. In such a situation, the most appropriate regulatory approach is to issue one order, a CAO, to deal with both issues.[7]

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[7] *This approach is consistent with Chapter 15 requirements. Chapter 15 requires the issuance of a cease and desist order to provide for early closure of waste management units in order to prevent violation of WDRs at active sites. 23 Calif. Code Regs. § 2593. Such orders are to include closure and post-closure plans. Where the site is no longer active, issuance of a CAO to deal with both clean-up issues and closure and post-closure maintenance activities is appropriate.*

Having concluded that a CAO is the most appropriate action to comprehensively deal with the water quality issues at the Duck Pond Landfill, the WDRs should be rescinded. Applicable provisions from the WDRs should be added to the CAO to address the closure and post-closure maintenance issues. Because the WDRs are being rescinded, this Board need not resolve petitioners' questions as to whether they can legally be named in the WDRs.

We now turn to the issues involving who is appropriately named in the CAO. Each party's responsibility will be taken up in turn.

2. Contention: The County contends that it should not be named as a discharger in the CAO because it has not discharged into the ground water at the site, nor is it currently discharging. Furthermore, according to the County, any pollution at the site was caused by subsequent owners' and operators' lack of proper maintenance. Finally, the County argues that Water Code Section 13304(f) prevents the SDRWQCB from imposing liability upon the County for pre-1981 conduct.

Finding: The SWRCB disagrees. The County was the sole operator of the landfill during its active life. There is no dispute in the record that its placement of waste during 1960-1963 (perhaps combined with faulty surface maintenance) caused the current conditions at the site, which include volatile organic compounds detected at elevated levels, particularly in Monitoring Wells 6 and 7. It is clear that under Water Code

Section 13304, any person whose action is the direct cause of a waste discharge is properly included in a CAO. Lake Madrone Water District v. Department of Water Resources Control Board (1989) 209 Cal.App.3d 163, 246 Cal.Rptr. 894. The fact that there were other exacerbating factors, such as faulty surface maintenance, does not absolve the County of its liability.

Finally, the County's argument that Water Code Section 13304(f) provides a shield to liability, is unmeritorious. That section provides that acts occurring prior to 1981, if lawful then, do not become unlawful by virtue of Water Code Section 13304. The County's placement of waste in a landfill, as the County suggests, is not the conduct with which the CAO is concerned. It is the release of pollutants associated with that waste into the ground water that is the subject of the CAO, and that release is a violation of law. Since 1872, California law has prohibited the creation or continuation of a public nuisance. See Civ. Code § 3490. Water pollution can constitute a public nuisance. See People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374 (1897). A successor property owner who fails to abate a continuing nuisance created by a prior owner is liable in the same manner as the prior owner. See City of Turlock v. Bristow, 103 Cal.App. 750, 284 P. 962 (1930). Additionally, since 1949, California law has prohibited the discharge of waste in any manner which will result in a pollution, contamination, or nuisance. Health and Saf. Code § 5411. See also Gov. Code § 12608 and Fish and G. Code § 5650.

For these reasons, it was appropriate for the SDRWQCB's CAO to include the County, the landfill's only operator, as a discharger.

3. Contention: The City contends that it should not be named as a discharger in the CAO because, at most, it has been an easement holder for public right of way (30th Street) adjacent to the landfill.

Finding: The SWRCB disagrees. The SDRWQCB's CAO indicates (at Finding No. 7) that the City is named because of its easement of and authority to control and maintain 30th Street, which overlies part of the landfill. Furthermore, according to the SDRWQCB, improper maintenance of the roadway, sewage, and stormwater collection systems operated by the City have contributed to the pollution problems at the landfill. The City counters that it is not responsible for the sewer line beneath the landfill and that the maintenance of the street and the stormwater collection system has not contributed to pollution at the landfill. Also, control over the easement alone should not serve as the basis for naming the City.

Thirtieth Street overlies part of the landfill. During the SDRWQCB's hearing on this matter, information was presented to the SDRWQCB showing that subsidence of landfill material beneath the roadway was contributing to runoff coming from the street to the uncapped landfill surface. While the City's contribution to the effects of landfill discharges to the ground water in this regard may be relatively minor, it is apparent that

the City's participation in the remediation effort will be necessary. In the absence of any other entity otherwise responsible for the roadway, the City's control of the roadway by easement is properly relied upon by the SDRWQCB to name the City in the CAO.[8]

4. Contention: The CDC contends that it should not be named as a discharger because it was only an owner of the property for a "relatively short period of time", and that it neither discharged pollutants on the property nor exacerbated the existing problems. It further argues that the fact that it filed the Report of Waste Discharge, in application for WDRs in 1986, does not make it responsible. The CDC argues that it ended its obligations when it sold the property to Boulevard Investors on the condition that the latter assume full responsibility to address all regulatory requirements. It relies on the SWRCB's decision in Wenwest, Inc., (Order No. WQ 92-13) for the proposition that, as a short-term owner, it assumed no clean-up responsibility.

Finding: The SWRCB disagrees. First, the Wenwest case is inapplicable to this matter because factors on which that decision turned are not present in this matter. In the Wenwest case, short-term ownership meant four months. Here, the CDC held title to the property for the two-year period between 1986 and

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[8] *It is not within the authority of the SWRCB or the SDRWQCB to apportion responsibility for the remediation activities. However, principles of equity would dictate that the City should not have to bear a substantial portion of the cost of the overall remediation effort at the landfill as a consequence of its easement authority.*

1988. More significantly, several other responsible parties were available to address the environmental concerns. Here, relatively few are available. Additionally, the CDC filed a report of waste discharge in 1986, which led to the issuance (albeit to the City) of WDR Order No. 87-55 under which the CDC was to undertake some action to address the post-closure needs. This indicates an intent to assume such responsibility, and supports a conclusion that it is more than a mere short-term owner who intended to quickly sell to another.

The CDC's argument that its sale of the property to Boulevard Investors on the condition that the latter assume environmental responsibilities relieves it of responsibility, is without merit. While the CDC may be able to pursue this argument against Boulevard Investors in a court of law, the argument does not make it inappropriate for the SDRWQCB to name all parties for which there is a reasonable basis.[9]

III. CONCLUSIONS

1. Order No. 87-55 and its addenda should be rescinded and incorporated into CAO No. 95-66.

2. CAO No. 95-66 appropriately includes the County as a discharger.

3. CAO No. 95-66 appropriately includes the City as a discharger.

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[9] *The fact that CDC is a public agency does not alter its responsibility.*

4. CAO No. 95-66 appropriately includes the CDC as a discharger.

IV. ORDER

IT IS HEREBY ORDERED that the SDRWQCB's Order No. 87-55 and its addenda are rescinded.

IT IS FURTHER ORDERED that all of the terms and provisions of Order No. 87-55 and its addenda are incorporated into CAO No. 95-66.

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 February 22, 1996.

AYE: John P. Caffrey
Marc Del Piero
James M. Stubchaer
John W. Brown

NO: None

ABSENT: None

ABSTAIN: Mary Jane Forster

Maureen Marché
Administrative Assistant to the Board