STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of Vistec, Inc./Housing Resource for Review of Order No. 72-136 of the California Regional Water Quality Control Board, Central Valley Region	Order No. 72-2

On December 31, 1971, Vistec, Inc./Housing Resource petitioned the State Water Resources Control Board to review Order No. 72-136 of the California Regional Water Quality Control Board, Central Valley Region, adopted on December 17, 1971. Order No. 72-136 prohibits waste discharge from The Grove, a proposed development of Vistec, Inc., located near Chico. The petition requests that the prohibition be rescinded and that waste discharge requirements be issued.

The State Board having considered the petition and the records of the regional board which concern petitioner's contentions finds:

1. On December 17, 1971, the regional board adopted Order No. 72-136 prohibiting discharge from The Grove, a development of Vistec, Inc.

2. The basis for such prohibition was a finding that the proliferation of small treatment plants in the area would result in an ultimate threat to water quality.

3. The record does not contain evidence which supports finding No. 9 of Order 72-136 of the regional board. The prohibition of waste discharge without evidence of unreasonable effects upon water quality is improper and not an acceptable method of implementation of water quality control plans as required by Water Code Section 13263(a).

IT IS HEREBY ORDERED that the California Regional Water Quality Control Board, Central Valley Region, reconsider Order No. 72-136 and after hearing adopt an appropriate order based upon evidence concerning the following: (1) the beneficial uses to be protected, (2) the quality of the waste discharge necessary to protect these beneficial uses, and (3) the necessity of preventing a nuisance.

Adopted as the order of the State Water Resources Control Board at a meeting duly called and held at Sacramento, California.

Dated: February 17, 1972

ABSENT

E. F. Dibble, Acting Chairman

Norman B. Hume

Norman B. Hume, Member

Ronald B. Robie

Ronald B. Robie, Member

W. W. Adams

W. W. Adams, Member

T.H.

STATE WATER RESOURCES CONTROL BOARD

INTERNAL MEMO

TO: Benjamin D. Kor
Region 1

FROM: William R. Attwater
Chief Counsel

DATE: FEB 18 1982

SIGNATURE:

SUBJECT: DIRECT ENFORCEABILITY OF BASIN PLANS

ISSUE

To what extent can water quality objectives and effluent limitations in water quality control plans (basin plans), which are not incorporated into waste discharge requirements, be directly enforced?

CONCLUSION

Basin plan prohibitions, as a general rule, are directly enforceable. Water quality objectives and effluent limitations, which are not incorporated into waste discharge requirements, on the other hand, are not directly enforceable.

DISCUSSION

In 1959 the Regional Boards first acquired the right to prohibit entirely the discharge of waste. Chapter 1299 of the Statutes of 1959 added Section 13054.3 to the Water Code. This section provided:

> "Each regional board, within its region, may specify certain conditions and locations where no direct discharge of sewage or industrial waste will be permitted."

The legislative history of this section indicates that the section was proposed because the State and Regional Boards felt that under existing law they were limited to setting requirements for a proposed discharge but could not prohibit the discharge altogether.[1] The Boards took the position, for example, that

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1. Report of the Subcommittee on Bay and Water Pollution, Appendix to Assembly Journal of 1959, Volume 2, pp. 20, 61, 102.

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they lacked the authority to prohibit the discharge of sewage effluent to streams, reservoirs, or lakes, even where the discharge occurred in the immediate vicinity of a domestic water intake. Without a specific legislative statement to the contrary, it was considered doubtful whether the Regional Boards could forbid a discharge that was potentially hazardous. The 1959 legislation was a response to this concern.

When the Porter-Cologne Act was adopted in 1969, the provisions of former Section 13054.3, with some modifications, were incorporated into Section 13243 of the Water Code. Section 13243 provides:

> "A regional board, in a water quality control plan or in waste discharge requirements, may specify certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted."

The major changes in Section 13243 from its predecessor were the deletion of the word "direct" before discharge and the addition of authority to prohibit "certain types of wastes". The word "direct" was deleted "to cover situations, as in certain lava areas, where an indirect discharge can threaten domestic water supplies as much as a direct discharge can do so."[2] "Certain types of waste" was "added to cover situations where a complete prohibition of discharges is not required or desired."[3] In addition, Water Code Section 13243 clarified that the Regional Boards could include prohibitions in basin plans, as well as waste discharge requirements.

Section 13301 of the Porter-Cologne Act continued the pre-existing authority of the Regional Boards to issue cease and desist orders directly for violation of discharge prohibitions, as well as for violations of waste discharge requirements.[4] In 1980 the Water Code was amended to allow the Regional Boards to also issue cleanup and abatement orders and to obtain civil monetary penalties, under specified conditions, for violation of discharge prohibitions.[5] Under these provisions, consequently,

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2. Appendix A of the Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program, p. 55 (March 1969).

3. Id.

4. Compare Stats. 1967, c. 1447, p. 3349, Section 15 with Water Code Section 13301.

5. Stats. 1980, c. 808, p. 2538, Section 3; Id. c. 877, p. 2754, Section 3.

a basin plan prohibition can be directly enforced without the prior adoption of waste discharge requirements.

In the absence of a basin plan prohibition, however, the Water Code requires that the Regional Boards first adopt waste discharge requirements prior to taking most types of enforcement actions.[6] For example, water quality objectives contained in a basin plan must be incorporated into waste discharge requirements before violation of those objectives can be enforced through a cease and desist order.[7]

The legislative history of Water Code Section 13243 and its predecessor leads to the conclusion that the Legislature was drawing a distinction between regulating a waste discharge and forbidding it entirely. If a discharge prohibition were adopted, it could either be complete or partial, that is, limited to certain types of waste. It could also, presumably, be limited in time, for example, limited to dry weather months.

For the statutory distinction between regulation and prohibition to have any meaning, however, a prohibition of discharge, whether total or partial, must be distinguished from regulation of that discharge, through effluent limitations or receiving water objectives. If this distinction is not maintained, virtually every limitation or objective can be rewritten as a prohibition. A receiving water quality objective of 250 milligrams per liter of total dissolved solids (TDS) can be rephrased, for example, as a prohibition of discharge of any effluent which causes the TDS objective to be exceeded. This approach would obviate the necessity of adopting waste discharge requirements prior to taking

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6. Exceptions to this include actions under Water Code Sections 13304 and 13350(a)(3). Under 13304, a cleanup and abatement order can be issued, in the absence of waste discharge requirements or a prohibition, for past, present or threatened waste discharges which create, or threaten to create, a condition of pollution or nuisance. Actions for civil monetary remedies are authorized under Section 13350(a)(3) for intentional or negligent discharges of oil "except in accordance with waste discharge requirements" or other provisions of Division 7 of the Water Code. See attached memo from me to Harry M. Schueller, dated April 13, 1981, which discusses the various enforcement remedies available for prohibitions, as opposed to water quality objectives or limitations.

7. See Water Code Section 13301.

enforcement action in virtually all cases, but it is unlikely that this result was intended by the Legislature.

In sum, a basin plan prohibition is, as a general rule, directly enforceable. Water quality objectives and effluent limitations, on the other hand, must be incorporated into waste discharge requirements before they can be directly enforced. Further, a prohibition against discharge must be distinguished from limitations, objectives or other requirements which regulate, but do not actually prohibit the discharge of waste, or certain types of waste.

Other options are available to the Regional Boards which would alleviate the necessity of adopting waste discharge requirements for each discharger in a category of dischargers, where a discharge prohibition would not be appropriate. First, the Regional Board could waive the filing of a report of waste discharge and the adoption of requirements for a category of discharges, where the Board finds that "such waiver is not against the public interest."[8] A waiver may be appropriate where the Board has adopted guidelines or an action plan for a category of discharges and has, or anticipates, a degree of success in obtaining voluntary compliance with the guidelines or plan. A waiver issued under these circumstances should be made conditional upon such compliance. Conversely, if a waiver were issued, the Board would be required to adopt waste discharge requirements, in the event of noncompliance with the guidelines or plan, prior to taking most types of enforcement actions.[9]

A second alternative would be to issue one general set of waste discharge requirements to all known dischargers in a particular category, e.g., timber companies, which imposes uniform requirements on all dischargers in that category. The principle drawback of this approach, however, would be that any dischargers who were not known or in existence at the time the requirements were adopted would not be subject to the requirements.

Attachment

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8. Water Code Section 13269.

9. As an exception, the Board could issue a cleanup and abatement order under Water Code Section 13304, in the absence of waste discharge requirements, if a discharge caused or threatened to cause a condition of pollution or nuisance. See the memo cited supra in footnote 6.