

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition for Review)
of Cleanup and Abatement Order for)
Big Hole Project, Cosumnes River)
Association and Professional Security) Order No. WQ 81-8
Service, Inc. of the California)
Regional Water Quality Control Board,)
Central Valley Region. Our File)
No. A-284.)
_____)

BY THE BOARD:

On November 14, 1980,^{1/} the California Regional Water Quality Control Board, Central Valley Region (Regional Board) adopted a cleanup and abatement order for Big Hole Project, Cosumnes River Association and Professional Security Service, Inc. The cleanup and abatement order alleges that Professional Security Service, Inc. (Professional), as operator of a gold mining venture called Big Hole Project, removed vegetation, constructed a diversion channel, excavated holes, and deposited debris where it could be discharged into the Middle Fork of the Cosumnes River. The order required Professional and Cosumnes River Association (Association), as the owner of the Project, immediately to begin stabilization and restoration of the stream to its original configuration. The order required complete restoration by November 30 and submission of a compliance report by December 8.

On December 16, the State Water Resources Control Board (State Board) received a petition from Francis Lindsay and

1. All dates herein refer to 1980, unless otherwise noted.

Professional Security Service, Inc. seeking review of the order and a stay of its effect. Lindsay is an agent for Professional. On March 19, 1981, this Board denied the petitioners' request for a stay. We now consider the issuance of the cleanup and abatement order on its merits.

I. BACKGROUND

The Big Hole Project is a gold mining venture operated on the Middle Fork of the Cosumnes River. The venture was regulated by both the Department of Fish and Game and the Regional Board. Professional executed a Streambed Alteration Agreement with the Department of Fish and Game, which was effective from May 2 through November 30. The Agreement permitted Professional to divert the Middle Fork of the Cosumnes River and required Professional to take certain actions including returning the stream to its original configuration by November 30. The Agreement also specified that site conditions after project completion should not allow or cause landslides, erosion, or other unstable conditions of riverbanks or adjacent hillsides.

In early October, Professional began mining operations. The activities included discharging mud, silt and other waste materials to the Middle Fork of the Cosumnes River, and stockpiling excavated materials. The stockpiled materials included large quantities of silt, sand and rocks placed where winter stream flows could wash them downstream. Approximately 100,000 cubic yards of sand, silt and rocks were placed in a steep gully tributary to the stream without precautions to stabilize them.

On October 24, the Regional Board issued waste discharge requirements for the mining operation in Order No. 80-165.^{2/} The requirements provided, in part, that the direct discharge of the process waters and the operation of equipment in or near free flowing water, causing turbidity, are prohibited. The requirements expired on November 30 and provided that any subsequent operation of the site would require the filing of a new report of waste discharge.

In the cleanup and abatement order, which is the subject of the petition, the Regional Board found that staff inspections on October 31 and November 13 revealed that work had not begun on stabilization or rehabilitation of the mining operation area.

In a related development, Sierra Properties Corporation (Sierra) agreed to take certain steps to restore the site in anticipation of mining the site the following year.^{3/} Sierra stated that if drilling tests confirmed the economic viability of further mining operations and if Sierra were permitted to mine in 1981, it would post a bond, provide funds to "winterize" the site, meet the water quality requirements set for Professional and complete restoration of the site. The steps comprising

-
2. On that same date the Regional Board also adopted Order No. 80-164, directing staff to refer the matter to the Attorney General. Therein, it was alleged that Professional began mining operations and discharged pollutants to the stream in early October, notwithstanding the absence of any waste discharge requirements. A complaint was filed on December 4.
 3. Letter to Department of Fish and Game from Gerald L. Davey, president of Sierra, dated November 4.

"winterization" were outlined by Alfred Thym, Sierra's engineer, in a letter to the Department of Fish and Game dated November 17. "Winterization" was intended to stabilize the site during the winter months, but was not to constitute complete restoration.

A Streambed Alteration Agreement was executed between the Department of Fish and Game and Sierra on November 25. Pursuant to this agreement, Sierra was to "winterize" the site. "Winterization" was to be completed by December 10. The agreement specifically stated that it did not alter the terms of the Streambed Alteration Agreement between Professional and the Department of Fish and Game.

An inspection by a Regional Board staff member on January 7, 1981 revealed that Sierra had completed "winterization" of the site. On February 27, 1981, Sierra indicated to the Regional Board that it would not engage in mining operations at the Big Hole Project in 1981.^{4/}

II. CONTENTIONS AND FINDINGS

1. Contention: The petitioners contend that the clean-up and abatement order is overly broad.

Finding: The petitioners contend that the Regional Board has authority only to require such work as is reasonably necessary to prevent or correct a threat of pollution or nuisance. The petitioners claim that the "winterization" already completed by Sierra is all that is reasonably necessary, and that the Regional Board cannot require full restoration of the site.

4. Letter to Regional Board from Gerald L. Davey, dated February 27, 1981.

The authority of the state and regional boards to require cleanup and abatement is set forth in Water Code Section 13304(a), which provides in relevant part:

"Any person who discharges waste into the waters of this state in violation of any waste discharge requirement or other order issued by a regional board or the state board, or who intentionally or negligently causes or permits 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 such waste or abate the effects thereof or, in the case of threatened pollution or nuisance, take other remedial action."5/

The findings of the Regional Board included in the cleanup and abatement order indicate that the order is based upon a threat of pollution or nuisance. The Regional Board states that Professional stockpiled materials "where winter stream flows will wash it downstream" and deposited materials in a steep gully "without proper precautions being taken to stabilize this material or to protect it from being carried into the river by storms this winter."6/ 7/

The issues before us are whether the Regional Board is limited to steps which are necessary to prevent a pollution

-
5. This section was amended effective January 1, 1981, after the cleanup and abatement order was issued. The amendments have no effect on the issue presented here.
 6. Cleanup and Abatement Order, at page 2.
 7. We note that the record indicates that discharges of waste to the stream did occur early in October. However, since the Regional Board did not base its order on those discharges, we conclude that the order as written is not predicated on an actual pollution or nuisance.

or nuisance, and if so, whether an order requiring restoration of the site is outside the Regional Board's jurisdiction. It is our reading of Section 13304(a) that the Regional Board was not so limited. The section is plainly written to provide two remedies in the cases of an actual discharge: cleanup or abatement. An additional remedy is permitted in the case of threatened pollution or nuisance: other remedial action. The Regional Board's order requiring petitioners to restore the stream by returning it to its original configuration is therefore a proper exercise of its powers under Section 13304(a).

In any event, we agree with the Regional Board that complete restoration of the site is reasonably necessary to prevent pollution or nuisance. The stockpiled materials could be discharged into the stream and thus cause a pollution or nuisance. It is also clear at this time that Sierra does not plan to mine the site, and will therefore be under no obligation to complete restoration.

We therefore conclude that the petitioners' contention that the cleanup and abatement order is overly broad is without merit.

2. Contention: The petitioners contend that compliance with the order would be contrary to the public interest.

Finding: In support of its contention that compliance with the order would be against the public interest, the petitioners make the following arguments: (a) restoration of the site would preclude the "winterization" by Sierra; (b) restoration would subject Professional to contract liability by Sierra;

(c) restoration would subject Professional to civil and criminal liability for discharge of wastes; and (d) restoration would result in a risk of environmental damage.

The petitioners assert that full restoration of the site is against the public interest because it would have precluded "winterization" by Sierra. The record shows, however, that the Regional Board ordered Professional to restore the site before Sierra agreed to perform the "winterization" work. If restoration had been completed, it is true that there would have been no need to "winterize" the site.^{8/} We cannot see, however, how that result would have been against the public interest. Clearly it is in the best interest of the public to protect the site from the discharge of wastes into the stream.

The petitioners argue that restoration of the site would have subjected them to liability for breach of contract. While the petitioners allege that their contract with Sierra precluded restoration of the site, they have made no attempt to enter this contract into the record. In any event, a contract between private parties could not form the grounds for this Board to prohibit action which is designed to prevent a nuisance or pollution.

The petitioners also argue that completion of restoration could subject it to liability for causing discharges to the stream. The petitioners claim that discharges would occur because of the season in which the restoration work was required.

8. While "winterization" involved diverting flows around stockpiled materials and other areas useful to mining operations, restoration required filling in excavated areas and grading the site to accommodate natural flow.

This argument is essentially the same as the petitioners' final argument, that performance of the restoration work at the onset of winter conditions would risk environmental damage.

The cleanup and abatement order was adopted November 14, 1980. The "winterization" work was begun, and completed, by Sierra shortly thereafter. While it is possible the restoration could have taken slightly longer to complete than "winterization," the petitioners have provided only vague assertions that they could not have completed the work before the winter rains began. We note also that the petitioners were first required to restore the site in the Stream Alteration Agreement executed with the Department of Fish and Game on May 2, 1980. If the petitioners had pursued restoration with diligence, no environmental damage or illegal discharges would have resulted.

We therefore conclude that compliance with the cleanup and abatement order would not be contrary to the public interest.

3. Contention: The petitioners contend that the order violates Water Code Section 13360 by mandating a specific method of compliance with water quality standards.

Finding: The petitioners argue that the cleanup and abatement order violates Water Code Section 13360. That section provides, in relevant part:

"No...order of a regional or state board or decree of court...shall specify the...particular manner in which compliance may be had with such...order...and the person so ordered shall be permitted to comply therewith in any lawful manner...."

The petitioners claim that Section 13360 is violated because the order "specifies" that the site be restored. The

pertinent portion of the cleanup and abatement order requires Professional, "immediately [to] begin stabilization of earthen materials to control erosion and sedimentation and return the stream to its original configuration."^{9/}

The cleanup and abatement order does not specify the method of compliance. Rather, the order merely specifies the results which are to be obtained by restoring the site. Professional is free to determine the specific method it will follow in complying with the order.

We therefore conclude that the petitioners' contention that the order violates Water Code Section 13360 is without merit.

III. REQUEST FOR HEARING

The petitioners have requested that the State Board conduct a public hearing in this matter. 23 California Administrative Code Section 2052(a) states that "the state board may, in its discretion, hold a hearing for the purpose of oral argument or receipt of additional evidence or both."

In their request, the petitioners state that no hearing was held before the Regional Board because the Executive Officer, rather than the Board itself, issued the cleanup and abatement order. Pursuant to Water Code Sections 13223 and 13304(a), the Regional Board properly delegated its authority to issue the order to the Executive Officer. Thus, there was no error in the Regional Board's failure to hold a hearing.

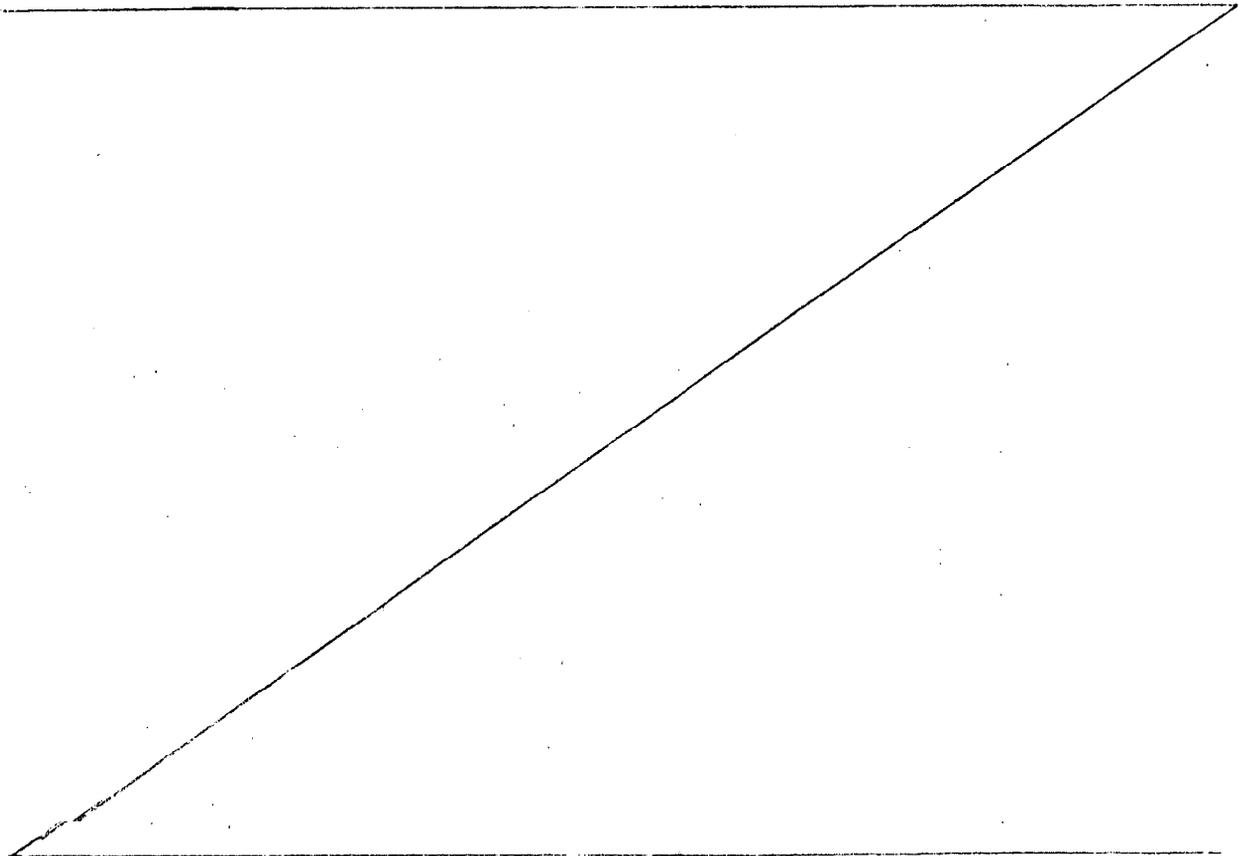
9. Cleanup and Abatement Order, at page 2.

Having reviewed the record in this matter, we find that a full evidentiary hearing is not required. The parties have been permitted to submit evidence in writing and have had an opportunity to present oral arguments at a public meeting of this Board. We therefore conclude that all parties have had full opportunity to present evidence and oral argument and that no further hearing is required.

IV. CONCLUSIONS

1. The Regional Board acted reasonably in failing to hold a hearing in this matter, and a hearing before the State Board is not required.

2. The Regional Board acted reasonably in adopting a cleanup and abatement order requiring Professional to restore the site of its mining operations.



V. ORDER

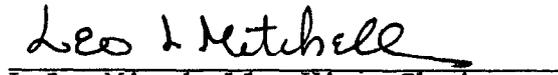
IT IS HEREBY ORDERED that the petitioners' request for a hearing in this matter is denied.

IT IS FURTHER ORDERED that the Petition of Francis Lindsay and Professional Security Service, Inc. for review of the Cleanup and Abatement Order for Big Hole Project, et al, of the California Regional Water Quality Control Board, Central Valley Region is denied.

DATED: June 18, 1981



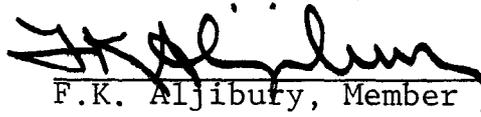
Carla M. Bard, Chairwoman



L.L. Mitchell, Vice Chairman



Jill B. Dunlap, Member



F.K. Aljibury, Member

