

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD
ORDER WQO 2005-0006

In the Matter of the Petition of

**HUMBOLDT WATERSHED COUNCIL, ENVIRONMENTAL PROTECTION
INFORMATION CENTER, AND SIERRA CLUB**

For Review of Directive to Enroll Pacific Lumber Company Timber Harvesting
Plans under General Waste Discharge Requirements, Order No. R1-2004-0030
California Regional Water Quality Control Board,
North Coast Region

SWRCB/OCC FILE A-1692

BY THE BOARD:

On March 16, 2005 the North Coast Regional Water Quality Control Board (Regional Water Board) adopted a motion directing its Executive Officer to enroll additional timber harvesting plans (THPs) submitted by the Pacific Lumber Company (PALCO) under General Waste Discharge Requirements Order No. R1-2004-0030 until the total acreage enrolled in the Freshwater Creek and Elk River drainages equaled 75% of the acreage in the THPs previously approved by the Department of Forestry. The THPs are located in areas that had previously been subject to State Water Resources Control Board (State Water Board) review. On March 22, 2005, the Humboldt Watershed Council filed a timely petition with the State Water Board on behalf of itself and the Environmental Protection Information Center¹ contesting the validity of the directive and asking that the State Water Board stay the effective date of any enrollments until the petition could be addressed on its merits.

For the reasons discussed below, the Request for Stay is granted.

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¹ The Sierra Club was later added as a petitioning party at the request of the Council.

I. BACKGROUND

PALCO has been harvesting timber along the north coast of California for many decades. In recent years, a number of complaints have been received by the Regional Water Board about flooding damage to property and significant impacts on water quality and fisheries resulting from runoff of dirt and debris from PALCO sites. In December 2003, the Regional Water Board determined that its existing regulatory approach in that area was insufficient to protect water quality. The Regional Water Board decided to prepare watershed-based waste discharge requirements to address the cumulative impacts of past and future timber activities. The Regional Water Board allowed existing permits for calendar year 2004 to remain in effect until January 1, 2005, by which time they hoped to have the watershed-based requirements in place. Because of delays, caused largely by PALCO's limited cooperation, the adoption of those requirements has been delayed until the summer of 2005.

With the expiration of the 2004 permits and the delay in adoption of the new requirements, PALCO had no legal authority to conduct timber operations in the Freshwater Creek or Elk River drainages after January 1, 2005. To bridge this gap, PALCO asked the Regional Board to allow it to proceed on a number of THPs, under the auspices of the General Order, until such time as the watershed-based requirements could be adopted. In December 2004, the Executive Officer, having been directed by the Regional Water Board to "consider a limited number of THPs for enrollment," found among PALCO's 22 proposed THPs, four that justified enrollment. The total acreage covered by those four was about 25% of the total contained in the 22 THPs approved by the Department of Forestry.² Council filed a petition challenging those enrollments and requested a stay. After a hearing before a State Water Board hearing officer, the stay was denied on January 20, 2005. The merits of that petition are still pending.

On February 23, 2005, the Executive Officer conducted a public workshop regarding whether additional THPs could be enrolled under the General Order without causing undue environmental problems. After the workshop she enrolled four additional THPs bringing the total acreage upon which PALCO could conduct timber operations to about half of the total in

² All THPs are based on "clearcut equivalent acreage" but, for simplicity sake, "acreage" is used throughout this order.

those approved by the Department of Forestry. No petition was filed challenging those additional enrollments.

PALCO approached the Regional Water Board asking that all of the remaining THPs be enrolled under the General Order. At the March 16, 2005 meeting, the Regional Water Board heard testimony and received evidence on that issue. A motion was made to direct the Executive Officer to enroll still more THPs under the General Order, with an acreage limit of 75% of that contained in the 22 THPs. This petition and stay request resulted.

To qualify for a stay, a petitioner must allege facts and produce proof of three things:

1. Substantial harm to the Petitioners or to the public interest if a stay is not granted;
2. A lack of substantial harm to other interested persons and to the public interest if a stay is granted; and
3. Substantial questions of law and fact regarding the disputed action.³

Petitioners presented sufficient information in support of the request to justify holding a hearing. A notice of the hearing was sent to the parties on March 23, 2005. Each party⁴ submitted timely information to the State Board in support of its position on the Request for Stay. A hearing was held before Richard Katz, Member of the State Board, sitting as hearing officer by appointment of the Chair, on April 5, 2005 in the State Board's offices.⁵

II. CONTENTIONS AND FINDINGS

1. Contention: Petitioners contend that the public will suffer substantial harm if a stay is not granted.

Finding: Although there is evidence that harm will not occur from conducting further timber operations under the General Order, the more persuasive evidence is that actual harm will result. While it is impossible to quantify the additional harm caused by enrolling a few more THPs under the General Order at this time, it is abundantly clear that harm has resulted from timber operations in the recent past. All witnesses, PALCO included, agreed that all the trees

³ (Cal. Code Regs., tit. 23, § 2053.)

⁴ In addition to the Petitioners, PALCO, and the Regional Water Board, a group comprised of owners of property in the two drainages was afforded party status for purposes of the stay hearing.

⁵ Because this order is issued by a single State Board member sitting by appointment of the Chair, this order will not be considered precedential by the State Board.

that are to be cut will be felled within three months, before the State Water Board can address this matter on the merits. The action will be irreversible and any harm that may result will be unavoidable. Thus, the harm must be considered substantial.

The record contains ample evidence that flooding and other water quality problems have been exacerbated by clear-cutting in the drainage. This has resulted in a reduced ability of the soil to absorb rainfall—resulting in more runoff—as well as a reduced capacity of the down gradient streams and rivers to carry off the water because of silt and debris blockage. There are other causes that contribute to this problem but the Regional Water Board record shows without question that timber operations have contributed and will continue to contribute to these problems.

The burden of showing harm falls on the petitioner. Here the Petitioners have advanced some evidence, both anecdotal and documentary, to support this contention. More importantly, the Regional Water Board has documented the cause and effect. Indeed, the State Water Board found in 2002 that there was “evidence of significant water quality problems that have been caused or aggravated by logging practices in the five watersheds.” (Petition of Humboldt Watershed Council, et al.; Order No. WQ 2002-0004) This required element of the stay regulations has been satisfied.

2. Contention: Petitioners contend that no substantial harm will result to others or to the public interest if a stay is issued.

Finding: Petitioners make a case that a delay in enrolling these additional THPs until after the State Board has resolved the merits of the petition will cause little, if any, harm to PALCO as a company. The overall size of PALCO’s operation as compared with the relatively small size of these THPs shows that the overall financial burden on the company will be relatively minor.

Testimony concerning these THPs revealed that about 9% of the total acreage enrolled to date (in other words, the 75% approved) could not be harvested because of endangered species nesting. This would amount to about 75 acres. PALCO already has permission to harvest about 50% of the total approved THP acreage, roughly 550 acres. Half of that was not even challenged. The 75 acre exclusion area amounts to about a quarter of the 25% added acreage. Thus, the extra harvestable acreage provided by the latest enrollments is about 200 acres. Considering the overall

size of the company and the acreage already available for harvesting, the additional 200 acres encompassed by these latest enrollments does not seem significant.

Furthermore, the evidence clearly indicates that PALCO is largely responsible for the circumstances in which it now finds itself. The Regional Water Board afforded permit coverage to PALCO through the end of 2004. With reasonable cooperation from PALCO, the Regional Water Board could have put into place its watershed-based waste discharge requirements in time for the 2005 harvest season. The record indicates that PALCO did not cooperate and that the adoption of the new permit system has been delayed for several months as a result.

PALCO asserted that other people will be injured if a stay is issued. PALCO offered the testimony of one of its contractors was on this point. He stated that the stay would hurt his logging/hauling business in a significant way. However, the situation into which such people have been placed is ambiguous. There is reason to believe that the adoption of the new permit system by the Regional Water Board will ultimately allow some or all of these trees to be harvested. Indeed, that was the predicate of the motion adopted by the Regional Water Board. Thus, the income from this work will ultimately be available. It is not clear that postponement of that work will cause the kind of problems that have been forecast. In addition, as was noted above, the underlying fault lies with PALCO and its unwillingness to work with the Regional Water Board to put in place the watershed-based waste discharge requirement process.

The added party, the property owners, have asserted that they do not believe that harm is being caused by the timber operations and that they want the benefit of long-term mitigation measures, now required of PALCO, to remedy the problems that earlier timber operations may have caused. Putting aside the inherent contradiction in their testimony—that no problems exist but that mitigation is important—they have nowhere explained why a delay of three or four months will make any difference in the effectiveness of the mitigation.

Petitioners have shown that the financial effects of the delay are relatively small compared to the scope of PALCO's operations and the record makes it clear that PALCO's actions are the underlying cause of any financial problems it faces. Thus, it is not possible to find substantial harm will result.

3. Contention: Petitioners contend that they have raised substantial issues of law and fact in its petition.

Finding: The standard of review on this requirement is not the same as the courts use for issuing restraining orders and preliminary injunctions. It does not require that the State Water Board make a determination that there is a likelihood that the petitioner will succeed on the merits. Rather, the rules require that there be substantial issues of law or fact. In this case, the petition has raised at least two very substantial issues. One is whether the Regional Water Board could legitimately find that these THPs fit within the terms of the previously adopted General Order. The Water Code prohibits a Regional Water Board from delegating to its Executive Officer the issuance of waste discharge requirements (Water Code Section 13223). A General Order is only legal because it creates, in effect, a ministerial act, not a discretionary one. The circumstances surrounding the enrollment of THPs under the General Order seems to involve considerable discretion. Second, a General Order must stand on its own. The use of additional mitigation to make a proposed project fit within its terms raises significant questions under the California Environmental Quality Act.

The petition raises significant legal issues.

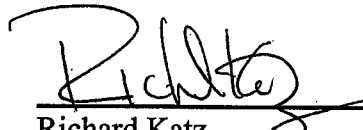
III. SUMMARY AND CONCLUSIONS

Between evidence submitted by Petitioners and the record assembled by the Regional Water Board, it is clear that harm will result from continued timber operations under the General Order above and beyond what has already been approved, that the harm will happen without question if no stay is issued, that financial harm to PALCO and its contractors is largely PALCO's fault, that the financial harm is not clearly significant, and that there are significant legal issues presented by the petition.

IV. ORDER

IT IS HEREBY ORDERED that the requested stay of the enrollment of the additional THPs under General Order No. R1-2004-0030 is granted.

Date: April 6, 2005


Richard Katz
Board Member/Hearing Officer