



California Regional Water Quality Control Board Central Valley Region

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16 June 2009

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DISCHARGER CLARIFICATION OF MR. MILLER PROPERTIES ALONG SULPHUR CREEK, COLUSA COUNTY

In a meeting at the Central Valley Water Board's offices in Rancho Cordova on 6 May 2009, you questioned whether you were appropriately named in a Draft Cleanup and Abatement Order for Central, Cherry Hill, Empire, Manzanita and West End Mines. Your property has several inactive mines, and these require environmental remediation. At the meeting, you stated that you had purchased your property subject to a conservation easement, and that you lacked any ability to manage the environmental contamination on your property. As you left, you stated that you or your employees would submit documentation to the Central Valley Water Board that would illustrate your contentions.

The Central Valley Water Board has re-examined your property records, including the recorded Conservation Easement, to evaluate whether you should be excluded from the Cleanup and Abatement Order. The information from the County Recorder's office shows that you are appropriately named in the Order, as explained below.

Ownership of the Property

The property ownership records from the County Recorder's office show that you took title to the property on 3 December 1999. California Water Code section 13304(a), which gives the Board the authority to issue Cleanup and Abatement Orders, provides that any person who has caused or permitted 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." You contend that, because you have never conducted mining activities on your property, you have neither caused nor permitted a discharge.

This contention is untenable. The waste piles and adits on the property continue to discharge wastes that affect waters of the state. The Board understands that you did not conduct mining activities on your property, but that fact does not relieve you of your environmental liabilities. State Board Order WQ 86-2, In the Matter of the Petition of Zoecon Corporation (1986) and State Board Order WQ 92-13, In the Matter of the Petitions of Wenwest, Inc., et al. (1992), both involve property owners who did not cause the contamination that affected their properties. These Orders conclude that the passive migration of waste material, such as what is occurring on your property, constitutes the discharge of waste. In both of these Orders the State Board held that the owners were appropriately named in these Orders. You are in a comparable situation, and are appropriately named as a discharger in the Cleanup and Abatement Order.

California Environmental Protection Agency

The Conservation Easement

When a property owner demonstrates a legal inability to control wastes on their property, the Board may determine that the property owner should not be named primarily liable in a Cleanup and Abatement Order. You contend that a Conservation Easement recorded on your property contains prohibitions that absolve you of liability for the cleanup. However, the Conservation Easement demonstrates that you have the manifest ability to mitigate the effects of the waste material that is on your property. By failing to take remedial actions to mitigate the effects of this waste material, you have legally permitted waste to be discharged from your property into waters of the state where it creates a condition of pollution or nuisance.

It is clear from the County Records that you executed the Conservation Easement contemporaneously with the purchase of the property. When you acquired your ownership interest, it was within your discretion whether or not to record the Conservation Easement. It is incongruous with the directives of State Board Resolution 92-49, the guidance that the Regional Boards follow when naming responsible parties, to allow a purchaser to escape environmental liability by recording a Conservation Easement. If a property can escape liability in this manner, the Board is deprived of the party best positioned to manage cleanup issues at a given site. This property owner would reap the rewards of the cleanup without having the obligation to contribute to these efforts. In addition, none of the disincentives to buying contaminated property are present if a simple encumbrance precludes the Board from taking action against a purchaser of contaminated property. This would create a safe haven for individuals who lack the sophistication and resources to address complex remediation issues, and this is a scenario that the Central Valley Water Board must avoid.

In addition, the scope of the Conservation Easement does not preclude you from taking actions to prevent the discharge of waste into waters of the state. The goals of the Conservation Easement are to protect and preserve the conservation values of the property. It is difficult for the Board to envision how the cleanup of the toxic wastes does not "enhance the conservation values of the property." In fact, one of the activities explicitly permitted under the Conservation Easement is the undertaking of conservation practices to promote soil stabilization and to reduce erosion. Many of the discharges from your property are associated with waste rock piles that erode into sensitive waterbodies. It is the Board's view that, at minimum, undertaking stabilization measures to mitigate these discharges is within the scope of the Conservation Easement.

If you took the property subject to the conservation easement and if the conservation easement restricted all activities on your property, it may have been appropriate for the Board to exclude you from the draft Cleanup and Abatement Orders. Both of these factors would show that you lacked the ability to control the active discharge of wastes from your property. However, neither of these two factors is present, and you remain responsible for the discharges that are occurring on your property.

Conclusion

The facts in the Central Valley Water Board's records for the Central, Cherry Hill, Empire, Manzanita and West End mine sites indicate that you are appropriately named in the Orders. You have stated that, as a health professional, it makes you uncomfortable to be named responsible for the cleanup of potent toxins on your property. However, your participation is critically important in remediating these wastes to protect the health of those downstream from your property.

If you have any questions or would like to meet to discuss the above, please contact me at (916) 464-4626 or email me at vizzo@waterboards.ca.gov.



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