

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of Fairfield-Suisun  
Sewer District -- Petition to  
Review Cease and Desist Order  
of Regional Board

Order No. 71-12

On February 5, 1971, Fairfield-Suisun Sewer District petitioned the State Water Resources Control Board to review and stay a cease and desist order issued by the California Regional Water Quality Control Board, San Francisco Bay Region, on January 28, 1971.

On February 18, 1971, this board adopted Order No. 71-8 granting the petition to review the regional board order and staying that part of the order which prohibited additional discharges to the sewer system.

This board, having considered the record before the regional board, finds:

1. Requirements were prescribed by the regional board by Resolution No. 659 on April 15, 1965 for the waste discharge of Fairfield-Suisun Sewer District into Suisun Slough near Suisun City, Solano County. The requirements provide, in part, as follows:
  - "1. The discharge of the waste at the present discharge point and/or the proposed discharge point shall not cause:  
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.  
.  
d. Atmospheric odors recognizable as being of waste origin at any place outside the discharger's property ...."
2. The regional board adopted Resolution No. 70-82 on October 22, 1970, ordering the district to comply with the requirements of Resolution No. 659 for prevention of odors by November 6, 1970.
3. The regional board received 54 complaints by 35 separate parties regarding odor from the district's sewage treatment plant from January 10 to January 26, 1971.
4. The regional board's staff inspected the location on four occasions during the months of December 1970 and January 1971 and on each occasion found atmospheric odors outside the district's property in violation of the requirements.

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5. On January 13, 1971 the regional board notified the district that a cease and desist order hearing would be held on January 28, 1971 for violation of odor requirements. The notice stated that the district could submit evidence. The notice also stated that the board would consider issuance of discharge restrictions to the sewer system. This notice was duly published and was mailed to the district and to the Home Builders Association of Solano County. Contrary to the district's contention, the notice was sufficient to inform the district and other affected persons of the matters to be considered and determined.
6. On January 28, 1971 the regional board conducted a hearing pursuant to the foregoing notice.
7. The letters and reports of telephone calls of complaints of odors from the district's treatment plant received by the regional board from residents near the plant were entered into evidence by referral to board files and reading into the record some examples of the complaints.
8. At the hearing the district's consulting engineer admitted that it was "undeniable" that there had been some "atypical" odor problems. (Transcript of hearing, page 45, lines 3-8.)
9. At the conclusion of the hearing on January 28, 1971, the regional board adopted Order No. 71-2 ordering Fairfield-Suisun Sewer District to cease and desist violating the waste discharge requirements prescribed in Resolution No. 659. A prohibition of additional discharges to the sewer system of Fairfield-Suisun Sewer District after January 28, 1971 was included in the order.
10. Contrary to the district's contention, it was given an adequate opportunity to present evidence and to cross-examine witnesses. The district's testimony and cross-examination covers 80 of the 100 pages of the reporter's transcript.

Counsel for the district cites only pages 49-50 of the transcript of the hearing in support of his claim that the regional board improperly excluded evidence as to present compliance with the odor requirement (letter dated March 24, 1971 from Saul M. Weingarten). Reference to this portion of the hearing, beginning on page 48 of the transcript, shows that the only evidence excluded was the testimony of the district's engineer that he planned to present a recommendation to the district board at a future meeting of the board. This testimony was properly ruled irrelevant.

The substantial evidence that was received of periodic odor violations over a considerable period of time and extending to within a few days of the hearing, fully supported the issuance of the cease and desist order. Evidence that the district had made efforts to correct the problem and had very recently taken action for that purpose and intended to take further action in the near future would not be cause for a ruling by this board that issuance of the cease and desist order was improper. Such evidence should be presented to the regional board in support of a request for rescission of the cease and desist order after sufficient time has elapsed to demonstrate that the corrective measures have permanently solved the odor problem and that periodic violations will not recur.

11. The record does not support the allegations of the petition that board members considered as evidence matters not presented at the hearing or that the regional board made its decision before any evidence was presented.
12. No evidence was received which would indicate that a limitation on additional discharges to the sewer system would prevent further aggravation of the odor problem.
13. The regional board correctly found a violation of the odor requirement and the action of the board in issuing the cease and desist order was appropriate and proper.

14. There was no adequate basis for the finding in Order No. 71-2 that "Any increase in discharge of waste will cause an increase in nuisance."

15. The district's petition for review raises a number of legal questions concerning the validity of the cease and desist order, including the following:

a. Waste discharge requirements issued under the old law became invalid on January 1, 1970 when the Porter-Cologne Act became effective.

This board agrees with an opinion of the Legislative Counsel that the Porter-Cologne Act did not repeal waste discharge requirements issued under the prior law and that such requirements remain in effect and are enforceable.

b. Former Section 13054 of the Water Code "does not pertain to the District" and was repealed on January 1, 1970.

This section expressly authorized a regional board to prescribe requirements for all waste discharges except those into a community sewer system and clearly applied to the district. Repeal of this section did not invalidate the requirements.

c. The order is invalid in unlawfully delegating to the regional board executive officer the power and authority to determine when and if certain provisions of the order should be judicially enforced.

The order directs the executive officer to request the Attorney General to take appropriate enforcement action if the discharger fails to comply with the order. Water Code Section 13223 authorizes a regional board to delegate any of its powers and duties to its executive officer with certain exceptions. The exceptions do not include reference of a cease and desist order to the Attorney General for enforcement action.

d. The discharge requirements are arbitrary, unreasonable and unrelated to valid or purposeful needs of water quality; such requirements are more stringent than those of the Department of Public Health under Section 7958 of Title 17, California Administrative Code, and unreasonably impose on the district responsibility for determining performance as to odor without objective standards.

The statutory powers of the regional boards cannot be limited by provisions of the California Administrative Code nor does Section 7958 purport to do so. Water Code

Section 13263(a) authorizes requirements that prevent nuisance. Odor is not susceptible to objective standards nor are such standards necessary for the district to determine that its treatment facilities are creating an odor in the neighborhood in violation of the requirements. Any person endowed with the natural sense of smell is capable of making that determination.

- e. The order prescribes the manner in which compliance may be had in violation of Water Code Section 13260.

Order No. 71-2 makes no reference to "the manner in which compliance may be had." It merely directs the district to cease violations of the odor requirement, prohibits additional discharges, and requires the district to provide reports of progress toward compliance and status of compliance.

- 16. Other legal contentions of the petition are either totally devoid of merit or refer to the prohibition on additional connections to the sewer system which need not be considered in light of this board's determination that the prohibition should be deleted from the order.

IT IS HEREBY ORDERED:

1. That Order No. 71-2 of the California Regional Water Quality Control Board, San Francisco Bay Region, is amended by deleting paragraph (9) of the findings and paragraph (2) of the order on page 2 which prohibits additional discharges to the sewer system of the Fairfield-Suisun Sewer District.
2. That in all other respects said order is affirmed.

This order is without prejudice to the regional board, in its discretion, holding a further hearing to determine the need for a restriction on additional discharges to the sewer system of the district.

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

Dated: April 5, 1971.

KERRY W. MULLIGAN  
Kerry W. Mulligan, Chairman

E. F. DIBBLE  
E. F. Dibble, Vice Chairman

NORMAN B. HUME  
Norman B. Hume, Member

RONALD B. ROBIE  
Ronald B. Robie, Member

W. W. ADAMS  
W. W. Adams, Member

## STATE WATER RESOURCES CONTROL BOARD

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JEROME B. GILBERT, *Executive Officer*

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Sewer District -- Review of Cease  
and Desist Order of Regional Board

NOTICE OF  
SPECIAL MEETING

NOTICE IS HEREBY GIVEN that on April 5, 1971, the State Water Resources Control Board will hold a special meeting to act on the petition of the Fairfield-Suisun Sewer District to review the cease and desist order of the California Regional Water Quality Control Board, San Francisco Bay Region. The State Board will meet at 2 p.m. in the Resources Auditorium, Main Floor, 1416 Ninth Street, Sacramento, California.

The board action will be based upon the record before the regional board and any written comments received by the Board on or before March 25, 1971. No additional evidence will be received.

Dated: March 24, 1971.

STATE WATER RESOURCES CONTROL BOARD

Jerome B. Gilbert  
Executive Officer