

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of
New Penn Mines, Inc., to Review
Order No. 73-128 of the California
Regional Water Quality Control
Board, Central Valley Region

Order No. WQ 73- 13

BY THE BOARD:

On December 15, 1972, the California Regional Water Quality Control Board, Central Valley Region (Regional Board), adopted Order No. 73-128. Order No. 73-128 requires New Penn Mines, Inc. (Petitioner) to cease and desist discharging wastes contrary to waste discharge requirements established by the Regional Board on September 24, 1971, by Order No. 72-57, as amended July 28, 1972.

On January 2, 1973, Petitioner filed its petition with the State Board requesting review of Order No. 73-128 and specifically requesting that the State Board vacate and rescind this order. Petitioner advances five specific contentions in support of its petition, all of which are hereafter considered in detail. After review of the record of the Regional Board and after consideration of the contentions of the Petitioner, we have determined that the action of the Regional Board in adopting Order No. 73-128 was appropriate and proper.

I. BACKGROUND

The New Penn Mine (aka Penn Mine) is a nonoperating copper mine owned by Petitioner and located near the head of Camanche Reservoir on the Mokelumne River in Calaveras County,

California. (See Figure 1). The mine property is drained in part by Hinkley Run Creek and Mine Run Creek. Drainage and runoff waters from the mine, mine tailing areas, and at least one underground adit flow into these creeks and thence into Camanche Reservoir.

There is a lengthy history of difficulty associated with discharges from the mine property which need not be detailed in connection with the present petition. We do note that the current waste discharge requirements were adopted by the Regional Board on September 24, 1971, in Order No. 72-57. Full compliance with requirements was ordered by March 1, 1972. After review by the State Board, the Regional Board was ordered to extend the compliance date. Accordingly, on July 28, 1972, Order No. 72-57 was amended by the Regional Board to provide that full compliance with requirements should be achieved by October 16, 1972. Except for extension of the compliance date, the waste discharge requirements adopted on September 24, 1971, remained unchanged by the amendment of July 28, 1972.

Current waste discharge requirements which have been in effect since September 24, 1971, provide, in part, as follows:

"1. The discharge shall not cause a pollution."

...

"3. The discharge shall not cause Hinkley or Mine Run Creeks to contain constituents in excess of the following limits:

	<u>Units</u>	<u>Maximum</u>
...		
c. Copper	mg/l	0.05
d. Zinc	mg/l	0.1
e. Aluminum	mg/l	0.2
f. Fe	mg/l	0.2

"4. The discharges shall not have a pH less than 6.5 nor greater than 8.5."

...

"6. The discharges shall not cause the survival of test fishes in 96-hour bioassays of the undiluted waters of Hinkley or Mine Run Creeks to fall below:

A. Any Determination 70% Minimum"

As heretofore indicated these requirements were to be complied with by the discharger not later than October 16, 1972.

A hearing was held by the Regional Board on December 15, 1972. Based upon evidence introduced at the hearing, the Regional Board found that Petitioner was in violation of all of the foregoing requirements and ordered the Petitioner to cease and desist violation of requirements.

II. CONTENTIONS OF PETITIONER AND FINDINGS

The contentions of the Petitioner and our findings relative thereto are as follows:

1. Sufficiency of the Evidence. Petitioner contends that the evidence at the hearing on December 15, 1972, does not support the findings of the Regional Board in its cease and desist order. Presumably, this contention relates to the finding of violation of the aforementioned requirements, since the remainder of the findings in Order No. 73-128 do not appear disputable. We will separately consider the violations found and the evidence in support thereof.

A. Constituent and pH Violations. Theodore L. Fenner, Regional Board staff member, testified to the results of two field

trip investigations conducted on November 14, 1972, and December 11, 1972. At those times, the record reflects that all of the waters which would ordinarily flow in the Mine Run Creek channel above the confluence of Mine Creek and Hinkley Creek were being collected in ponds above the confluence point. On November 14, 1972, samples of Hinkley Creek waters were taken at two points, referred to herein as Points A and D. Point A was located on Hinkley Creek itself, approximately one-quarter mile above a diversionary ditch known as Hinkley Run diversion and prior to the passage of Hinkley Creek waters through the New Penn Mine workings. Point D was located shortly below the confluence of Hinkley Creek waters with the Mine Run Creek bed. The November 14, 1972, sampling results can be summarized as follows:

<u>Constituent</u>	<u>Concentration In Hinkley Creek at Point A</u>	<u>Concentration In Hinkley Creek at Point D</u>
Copper	0.08	107
Zinc	0.06	438
Aluminum	0.1	33
Fe	10.	536
pH	6.8	2.5

On December 11, 1972, additional samples of Hinkley Creek waters were taken at two additional points, Points B and C. Point B was on New Penn Mine property at the Hinkley Run diversion and prior to the passage of Hinkley Creek waters through the New Penn Mine workings. ~~Point C was also on New Penn Mine property~~ on Hinkley Creek itself and prior to the confluence of Hinkley Creek with the Mine Run Creek bed. The December 11, 1972, sampling results can be summarized as follows:

<u>Constituent</u>	<u>Concentration In Hinkley Creek at Point B</u>	<u>Concentration In Hinkley Creek at Point C</u>
Copper	0.06	104
Zinc	0.16	611
Fe	2.9	630
pH	6.6	---

In light of this record, the Regional Board was amply justified in concluding that discharges from the New Penn Mine were in violation of applicable waste discharge requirements pertaining to pH and to concentrations of copper, zinc, aluminum, and iron.

B. Fish Survival Violations. The Regional Board staff also presented evidence concerning bioassay results. Large volume water samples were collected for bioassay purposes on November 14, 1972. Dilution waters were taken from the Mokelumne River above Camanche Lake. Bioassay results can be summarized as follows:

<u>Sampling Location</u>	<u>% Survival</u>	<u>96 hr. T1m</u>
Hinkley Run Creek at Point A	100%	---
Hinkley Run Creek between Point A and Point D	0%	0.043%
Hinkley Run Creek at Point D	0%	0.027%

The bioassay results are not surprising in the light of the nature of the discharge of the Petitioner and the effect of excess concentrations of heavy metals on fish. Sterling Davis, California Department of Fish and Game, testified that some mortality of steelhead in the Mokelumne River can be expected when copper

concentrations exceed 0.005 mg/l or when zinc reaches 0.06 mg/l. He further testified mortality of 50 percent of steelhead can be expected when copper levels exceed 0.015 mg/l or when zinc concentrations exceed 0.086 mg/l.

The evidence clearly supports the finding of the Regional Board that discharge of Petitioner violated the applicable requirement of survival of test fishes in the waters of Hinkley Creek.

C. Pollution. "Pollution" means an alteration of the quality of waters of the state by waste to a degree which unreasonably affects such waters for beneficial uses or which unreasonably affects facilities serving beneficial uses. [Water Code Section 13050(1)]. Beneficial uses which may be protected against quality degradation include the preservation and enhancement of fish. [Water Code Section 13050(f)]. Beneficial uses in Camanche Reservoir include fishing and fish propagation. The record is replete with evidence concerning the value of Camanche Reservoir as a fishing preserve. Since 1964 the California Department of Fish and Game has stocked Camanche Reservoir with over 1,000,000 fish plants including steelhead fingerlings. It was estimated by Mr. Davis that each year 40,000 anglers fish all or a major portion of a day at Camanche Reservoir. He estimated the annual value of the Camanche Reservoir fishery at about \$280,000. An extensive salmon and steelhead hatchery is operated on waters from Camanche Reservoir. Mr. Davis testified that water samples at the Mokelumne River Fish Installation already contain concentrations of copper and zinc in excess of the lethal level for fish already mentioned.

There was substantial additional evidence presented to the Regional Board concerning the effort and expenditures which have been made and are being made in and about Camanche Reservoir to protect, enhance and rehabilitate fishing in this area. Under the factual circumstances presented to the Regional Board, the conclusion seems inescapable that one of the beneficial uses of Camanche Reservoir is fishing and fish propagation and that such beneficial use is already impaired by excess concentrations of heavy metals, including copper and zinc. The Regional Board determination that discharge of heavy metals by Petitioner into Camanche Reservoir was unreasonably affecting beneficial uses or facilities serving such beneficial uses was amply supported by the evidence before it.

2. Reasonableness of Cost of Compliance. Petitioner contends that the burden, including costs, of complying with Order No. 73-128 bears no reasonable relationship to the need for the order or the benefits to be obtained from compliance with the order. There is no evidence in the record to support this contention of the Petitioner. Order No. 73-128 does not specify the manner or method of compliance with the order. It would have been improper for the Regional Board to specify the method of compliance. (Water Code Section 13360). The method of compliance is left to the Petitioner to determine. Petitioner was given until April 1, 1973, to develop an appropriate method to meet waste discharge requirements and to submit engineering plans detailing the method which it had chosen. Until the plans are developed and the costs

thereof determined by Petitioner, there would appear to be no basis for contending that the cost of compliance is unreasonable.

In connection with the cost of compliance, the record before the Regional Board establishes very clearly that the beneficial uses being affected by the discharge of Petitioner are extremely valuable. Again, without detailing the entire record, some of the evidence before the Regional Board should be emphasized. Camanche Dam was completed in 1963 by the East Bay Municipal Utility District. It resulted in a loss of the major portion of the salmon and steelhead spawning area below Pardee Dam. To mitigate for loss of spawning area an artificial spawning channel for salmon and a steelhead hatchery were constructed at a cost of \$1,000,000. Other major improvements were also constructed. The steelhead hatchery facility is capable of raising 100,000 steelhead and is operated by the California Department of Fish and Game with annual funds of about \$51,000 per year. Substantial steelhead plantings have been made in Camanche Reservoir and, as already indicated, the annual value of the Camanche Reservoir fishery is estimated at about \$280,000. Considering the values of the beneficial uses involved and the detrimental nature of the discharge on these uses, it is readily apparent that substantial expenditures by the Petitioner to protect beneficial uses are warranted.

Finally, we would note that the contention of Petitioner is apparently drawn from the provisions of Water Code Section 13267. This section requires that cost of technical reports be reasonably related to the need for the report and the benefits to be obtained

therefrom. Since Petitioner is not apparently complaining about the cost of technical reports, but rather about the cost of compliance, Section 13267 is not relevant to the propriety of Regional Board action.

3. Water Code Section 13305. Water Code Section 13305 generally provides that a regional board, upon determining that a condition of pollution or nuisance exists which results from a nonoperating industrial or business location, may, after notice and hearing, require the owner of the property responsible for the pollution or nuisance to abate the same. In the event that the owner does not so abate, the condition of pollution or nuisance may be abated by an appropriate city, county, other public agency, or by the regional board, at the expense of the owner. Petitioner contends that Section 13305 provides the exclusive remedy for regional board action against a nonoperating mine property such as the New Penn Mine. No authority is cited for this contention by the Petitioner, and we have found none.

The basic question involved is one of legislative intent. We find nothing in the legislative history of Section 13305 which would indicate that the Legislature intended that Section 13305 be the exclusive remedy available for abatement of a polluttional discharge from a nonoperating mine. At the time of enactment of Section 13305, the Legislature stated:

"The Legislature hereby finds and declares that over the years chronic and continuing conditions of pollution and nuisance have resulted from the physical and geographic locations of property once used as industrial or business

sites but not in operation. The Legislature further finds and declares that such conditions cannot be effectively dealt with pursuant to other regulatory authority exercised by a California regional water quality control board, since continuing discharges are not usually involved and the industry or businesses are not in operation and since the owners of such property are frequently absent from the board's jurisdiction and cannot readily be required to abate the condition. The Legislature, therefore, further finds and declares that it is imperative, in order to remedy conditions of pollution and nuisance emanating from nonoperating industrial or business locations, such as mines, that regional water quality control boards be authorized to regulate such conditions in the manner provided in Section 13305 of the Water Code." (Stats. 1969, Ch. 482, Section 33).

A fair reading of this language and Section 13305 indicates to us that the remedy supplied by Section 13305 was intended as a supplemental remedy, available at the discretion of a regional board, where other remedies might be ineffective because of the frequency of the discharge, the absence of owners from the jurisdiction of the regional boards, or other circumstances. In this particular case, it appears that the issuance of a cease and desist order is an effective and appropriate means of compelling compliance with waste discharge requirements.

Moreover, we feel that the argument of the Petitioner results in an improper limitation on regional board discretion as to choice of remedies. The discharge of Petitioner is a violation of valid waste discharge requirements. Water Code Section 13301 provides that under such circumstances a regional board may issue a cease and desist order. The position advanced by Petitioner would result in complete negation of the enforcement remedy specifically provided by Section 13301. As a general rule, administrative agencies are given wide latitude as to selection of

remedies which are within their statutory authority. (Am.Jur.2d, Administrative Law, Section 464). We see no reason to narrowly construe Section 13305 of the Water Code so as to limit the broad discretion of the regional boards to select between those remedies specifically provided to the regional boards by statute.

4. Duty to Compensate. The Petitioner contends that Order No. 73-128 results in confiscation of Petitioner's land without compensation, in that the action of the Regional Board appropriates the Petitioner's land to public use by denying Petitioner the right to mine and otherwise use its lands. We find this contention to be without merit. The protection of the natural resources of the state, including protection of water quality, is in the general welfare and constitutes an exercise of the police power. (Freeman v. Contra Costa County Water District, 18 Cal.App.3d 404, 95 Cal.Rptr. 852 (1971); Chow v. Santa Barbara, 217 Cal. 673, 22 P.2d 5; Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal.2d 489, 45 P.2d 972). The constitutional guaranty of compensation for the taking of property does not apply to the state's exercise of its police power (17 Cal.Jur.2d, Eminent Domain, Section 3). In this case, we believe the action of the Regional Board clearly falls within the reasonable exercise of the state's police power. The protection of water quality is an essential state function, and the interest of the public in general requires appropriate regulation. In this case, the action of the Regional Board does not directly or unnecessarily limit the use of Petitioner's property. Petitioner

may use his property in any lawful manner and for any lawful purpose, including that of mining. The only limitation placed on such use is that Petitioner must regulate his activities so as not to damage the waters of this state, i.e., the Petitioner is only prohibited from conducting activities on its property in such a way as to result in damage to the property of others.

5. Claim that Action is Ex Post Facto. Petitioner claims that Order No. 73-128 was adopted under authority of laws which are ex post facto as to Petitioner. The ex post facto clause of both the federal and state constitutions applies only to criminal proceedings (Gardos v. Immigration and Naturalization Service, 324 F.2d 179; Murrill v. State Board of Accountancy, 97 Cal.App.2d 709, 218 P.2d 569), and then only to law which makes an action done before passage of the law criminal or subject to greater burdens than when the act was committed. Petitioner has not pointed to any law which has such an effect on the Petitioner with respect to Regional Board action, and we know of none. If, by reference to an ex post facto law, Petitioner refers generally to a claim that water quality laws are being retroactively applied to limit some vested right, we feel compelled to reply that Petitioner does not have a vested right to continue a discharge from its property [Water Code Section 13263(g)] and certainly has no vested right to pollute. It is also apparent that Order No. 73-128 does not really relate to any past conduct of the Petitioner. It is aimed at control of future discharges by the Petitioner.

III. CONCLUSIONS

After review of the record, and consideration of contentions of the Petitioner, the State Board concludes as follows:

1. Order No. 73-128 was supported by the evidence before the Regional Board.
 2. There is no evidence to show that the burden, including costs, of compliance with Order No. 73-128 is not reasonable related to the need for or benefits to be obtained from such compliance.
 3. Water Code Section 13305 does not provide an exclusive remedy for abatement of discharges from nonoperating mines where the discharge is in violation of waste discharge requirements.
 4. Order No. 73-128 is a valid exercise of the police power and does not result in the taking of Petitioner's land without just compensation.
 5. Order No. 73-128 was not adopted under laws which are ex post facto.
 6. The action of the Regional Board in adopting Order No. 73-128 was appropriate and proper.
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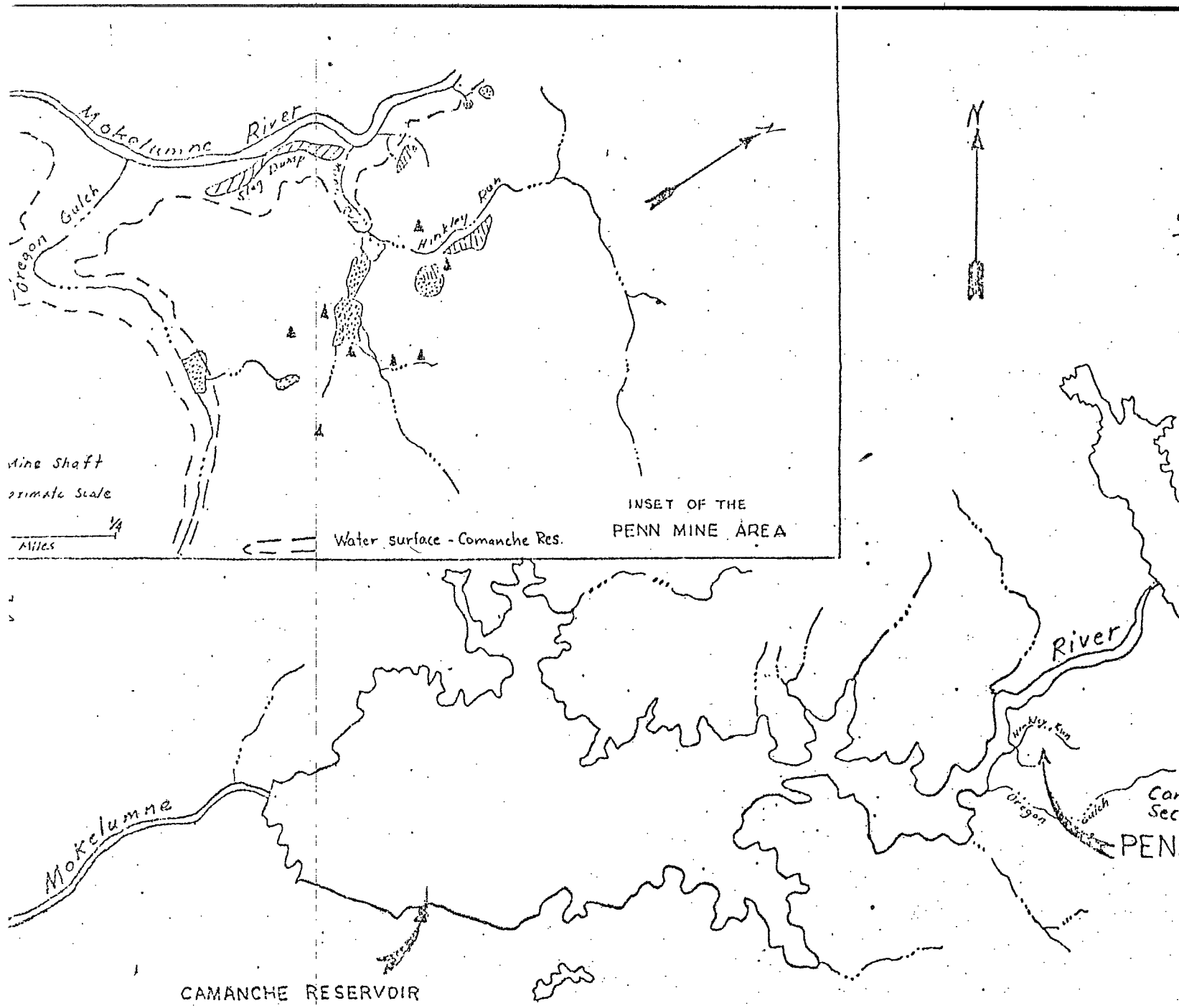


Figure 1
 Location Map - New Penn Mines

IT IS HEREBY ORDERED that the petition of New Penn
Mines, Inc. be, and it is, denied.

Dated: May 17, 1973

W. W. Adams
W. W. Adams, Chairman

Ronald B. Robie
Ronald B. Robie, Vice Chairman

ABSENT
Roy E. Dodson, Member

Mrs. Carl H. Auer
Mrs. Carl H. (Jean) Auer, Member

W. Don Maughan
W. Don Maughan, Member