

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
NORTHWESTERN PACIFIC RAILROAD)
COMPANY for Review of Order)
No. 79-23, California Regional)
Water Quality Control Board,)
North Coast Region. Our File)
No. A-230.)

Order No. WQ 79-39

BY THE BOARD:

On March 22, 1979, the California Regional Water Quality Control Board, North Coast Region (Regional Board), adopted Order No. 79-23. The Order provides waste discharge requirements for the discharge of waste from track maintenance performed by the Northwestern Pacific Railroad Company (petitioner). On April 20, 1979, the State Water Resources Control Board (State Board) received a petition seeking review of Order No. 79-23 from the petitioner.

I. BACKGROUND

The Petitioner and Its Operations

The Northwestern Pacific Railroad Company operates a rail line 239 miles in length between Shellville, Sonoma County, and portions of Humboldt County. For the substantial portions of its length, the line follows the Russian and Eel Rivers. The line crosses these rivers at several locations.

The petitioner's railroad traverses an area known for its many landslides. Slide movement is, typically, at a maximum during winter and spring months when rainfall saturates the

slide masses. Such slides contribute a substantial silt load to the Russian and Eel Rivers. Track maintenance operations remove earth and rock slides from the road bed and discharge or place the slide materials where they may enter the rivers.^{1/} Much of the work occurs during the months when the rivers have high turbid flows. There is, however, a significant amount of work that is done when the flows in the rivers are neither high nor turbid.

Waste Discharge Requirements

Order No. 79-23 includes provisions governing: (1) the manner in which maintenance activities may be conducted; (2) the reporting of incidents of noncompliance; and (3) measures to be taken in the event of a spill of oil or hazardous substances.

The following provisions are relevant to the petition:

"A. PROHIBITIONS

1. The discharge of soil, silt, or other organic and earthen material from any construction or associated activity of whatever nature into any stream or water-course in the basin in quantities deleterious to fish, wildlife, or other beneficial uses is prohibited.
2. The placing or disposal of soil, silt, or other organic and earthen material from any construction or associated activity of whatever nature at locations where such material could pass into any stream or water-course in the basin in quantities which would be deleterious to fish, wildlife, or other beneficial uses is prohibited.

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1. As used herein, track maintenance includes the construction or reconstruction of the railroad.

3. Except as may be necessary to correct right of way damage which is preventing safe passage of trains, the discharge of soil, silt, or other earthen material to any stream or water-course in the basin is prohibited.

"B. RECEIVING WATER LIMITATIONS

1. Discharges from Northwestern Pacific Railroad property shall not cause turbidity in receiving waters to be increased more than 20% above naturally occurring background levels.
2. Discharges from Northwestern Pacific Railroad property shall not alter the suspended sediment load or the suspended sediment discharge rate of receiving waters in such a manner as to cause nuisance or adversely affect beneficial uses.
3. Discharges from Northwestern Pacific Railroad property shall not cause diminution of the habitat or population density of aquatic biota of the receiving waters.

"C. PROVISIONS

1. Exceptions to Prohibition A.3. may be made for right of way improvements planned and executed in accordance with the streambed alteration provisions of the Fish and Game Code, or as approved by the Executive Officer.

* * *

9. In case of any oil or hazardous substance 'spills' occurring in connection with Northwestern Pacific Railroad operations east of MP 45.2, the Executive Officer shall be notified as outlined in provision C.8 if the spilled material enters a waterway or threatens to enter a waterway. In the event of such spills, the discharger shall effect reporting, containment, and cleanup as described in Southern Pacific's Water Pollution Manual or such superceding [sic] publication(s) as may be approved by the Executive Officer."

Among the more sensitive beneficial uses these provisions are designed to protect include warm and cold freshwater habitat, fish migration and fish spawning. Of particular concern is the need to preserve the summer run steelhead on the Eel River, a species low in reproducing stock.

II. CONTENTIONS AND FINDINGS

1. Contention: So long as the river's usefulness is not impaired, the direct and/or indirect discharge of earthen materials to state waters by track maintenance operations is authorized by the Public Utilities Code.

Findings: The Public Utilities Code provides, in part, that railroad corporations have the following powers and duties:

"(d) To lay out its road, not exceeding 10 rods wide, and to construct and maintain it, with one or more tracks, and with such appendages and adjuncts as are necessary for the convenient use of the road.

* * *

"(e) To construct its roads across, along, or upon any stream of water, watercourse, roadstead, bay navigable stream, street, avenue, or highway, or across any railway, canal, ditch or flume which the route of its road intersects, crosses, or runs along, in such manner as to afford security for life and property. The corporation shall restore the stream or watercourse, road, street, avenue, highway,

railroad, canal, ditch, or flume thus intersected to its former state of usefulness as near as may be, or so that the railroad does not unnecessarily impair its usefulness or injure its franchise." (Emphasis added.)^{2/}

It is clear from the above provisions that the petitioner is authorized to construct and maintain its railroad along and/or across state waters. However, these provisions do not support the proposition that the petitioner is authorized to discharge waste to state waters in derogation of the state's water quality laws.

Judicial opinion has held that statutes should be construed according to the natural language and most obvious import of the language employed, without resorting to strained or forced construction to limit or enlarge their operations. (California Telephone and Light Company v. Jordon, 19 Cal.App. 536, 126 Pac. 598.) Further, it has been held that statutes are to be construed to harmonize with one another. (Giacalone v. Industrial Acc. Commission, 120 Cal.App.2d 727, 272 P.2d 79.) There is simply no conflict between provisions of the Public Utilities Code authorizing railroads to engage in construction activities along state waters and provisions of the Porter-Cologne Water Quality Control Act regulating activities which may affect state waters. Virtually identical provisions to those cited by the petitioner have been present in the Public Utilities Code since 1901. Dealing with the right of one railroad to cross another,

2. Public Utilities Code, Section 7526(d) and (e), Division 4, Ch. 1, Art. 2.

in 1913 the California Railroad Commission stated that "[w]hen a railroad company lays down its tract it does so by virtue of a franchise derived from the state, and which it holds for the public benefit, and subject to such future regulations, police and otherwise, which may for the proper care of the public interest be imposed from the same source." (California Railroad Commission, Decision 1102.) We must conclude, accordingly, that this contention is without merit.

2. Contention: The petitioner contends that it should not be subject to waste discharge requirements for slide materials deposited on its railroad line from adjacent property.

Findings: The lands adjacent to much of the rail line are highly unstable and subject to continual slides. A majority of slides occur during and immediately following periods of precipitation, when the flows of the Russian and/or Eel Rivers are high enough to carry the earthen material out of the area. Construction of the rail line and maintenance of it has altered the natural situation. Petitioner certainly has knowledge of the slide-prone nature of the area and that maintenance activities would be necessary to continue operations.

Having placed itself in the position of having to perform substantial maintenance efforts, the petitioner should not be permitted to claim immunity from the consequences of maintenance activities that may be destructive to the state's water resources or the beneficial uses made of the water resources by the people of California. Clearly the petitioner should be held accountable

for the discharge of slide materials where its maintenance activities may result in a discharge or contribute to the discharge of slide materials to state waters is not properly conducted.

Petitioner cites an opinion of the Attorney General for the proposition that it should not be held accountable for the discharge of slide materials from its land in situations where the material originated from adjoining properties. The opinion states, in part:

"Waste discharge requirements prescribed by a regional water pollution control board to correct the pollution or nuisance which may result from such drainage, flow, or seepage should be imposed upon the persons who presently have legal control over the property from which the harmful material arises."
(27 Ops. Cal. Atty. Gen. 182.) (Emphasis added.)

This 1956 opinion dealt with the questions of (1) whether the Regional Boards have jurisdiction over the discharge of earth, debris and the like from abandoned or inactive operations, and (2) to whom should waste discharge requirements for such operations be issued. The opinion concluded that the Regional Boards had jurisdiction to issue requirements on the person(s) responsible for the discharge. In the case of wastes from abandoned property, such person is the current owner of the property from which the discharges were occurring. Rather than supporting the petitioner's contention, the opinion supports the Regional Board's issuance of waste discharge requirements to the petitioner. In our case, the petitioner (1) has knowledge of the existence of slide activity, (2) takes control of the slide material during maintenance efforts, and (3) as a result of such maintenance efforts may

cause discharges to the rivers. Under such circumstances the Regional Board is clearly authorized to issue waste discharge requirements.

3. Contention: Petitioner submits that, since the discharge of earthen slide material would occur notwithstanding the existence of the rail line, no unreasonable harm can be shown from the maintenance activity upon which to base waste discharge requirements. Without a showing of unreasonable harm, it is contended that the issuance of waste discharge requirements is both premature and illegal.

Findings: That the Regional Board should await substantial evidence of a discharge of waste causing unreasonable harm to state waters before issuing waste discharge requirements is a proposition directly in opposition to the intent of the Legislature when the Porter-Cologne Water Quality Control Act was adopted in 1969 (Water Code Sections 13000, et seq.) When enacting these comprehensive changes to the state's water quality laws, the Legislature declared "...that activities...which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable..." and that the "...welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state, that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation...." (Section 13000.) Section 13260 requires that "[a]ny person discharging...or proposing to discharge

waste...that could affect the waters of the state...shall file" a report of the discharge with the Regional Board. Section 13263 provides that "[t]he regional board...shall prescribe requirements... as to the nature of any proposed discharge...." It is thus clear that the Regional Boards are empowered to take preventive action to regulate activities that may affect the quality of the waters of the state and need not await evidence establishing that a discharge causes or will cause a condition of pollution or nuisance.

Petitioner in essence alleges that its activities will not affect water quality since "the discharge of earthen material would take place at about the same rate and in the same time frame whether or not the railroad existed". While it is true that slides are a naturally occurring phenomena in the area, it is also true that the maintenance activities contribute additional increments of slide materials discharged to the river during periods of wet weather and high flows in the rivers. Of more concern, however, are the discharges which occur during portions of the year when flows are much lower. During the latter occasions such discharges may produce substantial harm to aquatic habitat (Petitioner's Exhibit E, January 25, 1979, Transcript, p. 1, line 28; p. 2, lines 1-10; p. 7, lines 24-25; p. 8, lines 1-3). Summer and fall season railroad maintenance activities can, if not properly done, make a significant silt contribution to streams and rivers at times during which they normally have relatively little turbidity.

The potential for harm to state resources from the maintenance activities is made abundantly clear from the following testimony by a representative of the petitioner:

"...certain slides that move as much as 18 feet a day, land masses two and three hundred feet wide... may come under this order where there is not the rail time nor the equipment available to move that out and the only other alternative is to either shut the railroad down or move the dirt across the tract on the down slope side...."

We conclude that the record contains substantial evidence demonstrating the potential for harm to the beneficial uses of the rivers from unregulated discharges of slide materials by maintenance activities.

4. Contention: The petitioner contends that the issuance of waste discharge requirements should be waived by the Regional Board.

Findings: Water Code Section 13269 provides that a Regional Board may waive the filing of a report of waste discharge or the issuance of waste discharge requirements "...where such waiver is not against the public interest". The petitioner offers three reasons why it believes waste discharge requirements should be waived.

(1) The petitioner submits that waste discharge requirements should be waived because the materials discharged would be discharged in about the same quantity and in the same time frame if the railroad did not exist. This contention has been analyzed previously.

(2) It is argued that waste discharge requirements should be waived because maintenance practices result in the net

reduction of the overall discharge of earthen materials to the river. Having made this argument the petitioner does not further develop this point or cite to any portions of the record that would substantiate or explain this contention. The record does not substantiate this contention.

(3) Finally, the petitioner contends that requirements should be waived because the waste discharge requirements will result in an unreasonable economic burden and impair the economic viability of the railroad. Although the petitioner discusses the costs of labor and equipment used in maintenance efforts, no evidence was offered which relates the railroad's average annual maintenance costs to projected increases in such costs as a result of Order No. 79-23. Testimony was offered indicating the railroad is experiencing current losses. Other testimony, however, indicated that such losses stemmed from a fire at Island Mountain Tunnel which has closed off the line. The impact of these factors on the current revenue picture is not made clear. In short, the information provided by petition does not support this concern that the economic condition of the railroad is such that it cannot comply with the Regional Board Order.

The record demonstrates plainly the potential for significant adverse impacts to the beneficial uses to state waters from the petitioner's maintenance activities. Even assuming the validity of arguments made by the petitioner, it would be inappropriate to waive the issuance of waste discharge requirements given the potential for harm to state waters from the maintenance

activities. The Regional Board Order contains reasonable requirements to minimize the silt loading situation and as such does not result in an unreasonable interference with the free flow of commerce. Such requirements are simply intended to assure that the petitioner exercises careful management of its maintenance operations so as to reduce the amount of earthen materials entering the waters of the Russian and Eel Rivers, especially during low flow periods. Petitioner suggests that the Regional Board Order will necessitate a large scale removal operation to haul earthen material out of the area. Of course, the Order does not specify the manner in which compliance with requirements should be assured since this is impermissible (Water Code Section 13360). Therefore, petitioner will have the flexibility to develop a suitable maintenance program designed to meet the requirements of the Order that the rivers not be harmed. In short, having reviewed the basis for the petitioner's contention that waste discharge requirements should be waived, we must concur with the Regional Board's judgment in this matter.

5. Contention: The petitioner contends that Provision C.9 of the Order is contrary to the Oil Spill Contingency Plan for California^{3/} because it requires a separate report of spills to the Regional Board.

Findings: Provision C.9 requires in part that the petitioner report spills of oil and/or hazardous substances which enter or threaten to enter state waters to the Regional Board.

3. Provision C.9 is set forth on page 3, supra.

Petitioner submits that the state Oil Spill Contingency Plan (Plan) establishes a reporting system for spills. However, neither the law authorizing the establishment of the Plan nor the Plan itself impose any legal requirement on the petitioner to report an oil or hazardous substance spill to the state or any state agency. Requiring the petitioner to report spills to the Regional Board is not a burdensome requirement. The requirement is reasonably related to the purposes for which the Regional Board has been established. Given the preceding consideration, we conclude the Regional Board's adoption of Provision C.9 was appropriate.

III. CONCLUSION

After review of the record and for the reasons stated herein, we conclude that the adoption of Order No. 79-23 by the Regional Board was appropriate and proper.

IV. ORDER

IT IS, THEREFORE, ORDERED that the petition for review of Order No. 79-23 is denied.

Dated: December 20, 1979

/s/ Carla M. Bard
Carla M. Bard, Chairwoman

/s/ William J. Miller
William J. Miller, Vice Chairman

/s/ L. L. Mitchell
L. L. Mitchell, Member

