

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
the UNITED STATES DEPARTMENT OF)
AGRICULTURE, FOREST SERVICE, for)
Review of Order No. 6-82-123 of)
the California Regional Water)
Quality Control Board, Lahontan)
Region. Our File No. A-325)

Order No. WQ 83- 3

BY THE BOARD:

On December 9, 1982, the California Regional Water Quality Control Board, Lahontan Region (Regional Board) adopted waste discharge requirements (requirements) in Order No. 6-82-123 for Mammoth Mountain Ski Area and the United States Forest Service (dischargers). The requirements regulate discharges from the Mammoth Mountain Ski Area (Mammoth) to the Mammoth Creek watershed. The requirements are aimed at preventing erosion caused by runoff from Mammoth.

On January 11, 1983, the State Water Resources Control Board (State Board) received a petition from the United States Department of Agriculture, Forest Service (Forest Service or petitioner) seeking review of the Order. The petitioner leases land to Mammoth, and was named along with Mammoth in the requirements.

The sole issue raised in the petition is whether several provisions in the requirements violate Water Code Section 13360. That section generally prohibits the regional boards from specifying the manner of compliance with waste discharge requirements.

I. BACKGROUND

Since the late 1970's the Regional Board has documented erosion problems at Mammoth. In April 1979, the Forest Service adopted a report pursuant to the Clean Water Act, Section 208, entitled "Water Quality Management for National Forest Lands in California" (208 Report). The 208 Report established best management practices (BMPs) to be implemented to control activities undertaken pursuant to Special Use Permits on Forest Service Lands. In January 1980, the Forest Service adopted an Erosion Prevention Plan (Erosion Plan) for Mammoth, which in turn was incorporated into the Special Use Permit issued by the Forest Service to Mammoth. All activities at Mammoth must comply with the Erosion Plan. The Erosion Plan contains specific prescriptions for erosion control activities at Mammoth, but also provides that, upon agreement of the District Ranger and Mammoth, the Forest Service may authorize other methods. In June, 1980 the Forest Service adopted an "Environmental Analysis for the Expansion of Mammoth Mountain Ski Area" (Environmental Analysis) which analyzed expansion of Mammoth from 15,000 skiers at one time (SAOT) to 24,000 SAOT. The Environmental Analysis was prepared to comply with the National Environmental Policy Act (NEPA), and identified certain management provisions intended to mitigate potential environmental impacts. Those provisions require Mammoth to follow prescriptions set forth in the Erosion Plan and apply BMPs established in the 208 Report. Likewise, the Forest Service has entered into a management agency agreement with the State Board whereby it agreed to implement the 208 Report pursuant to

its designation as the water quality management agency for National Forest System lands in the State of California

In December 1982, the Regional Board adopted the requirements which are the subject of this petition. The requirements regulate the expansion of Mammoth. The Regional Board found that the Environmental Analysis adopted by the Forest Service complied with the requirements of the California Environmental Quality Act (CEQA).

II. CONTENTION

The Forest Service contends that the BMPs listed in the requirements, I.B.1-14, violate Water Code Section 13360.

III. FINDING

In the requirements, the Regional Board listed BMPs 1-14. The Forest Service claims that all of these BMPs violate Water Code Section 13360. That section states, in relevant part:

"No waste discharge requirement...shall specify the design, location, type of construction or particular manner in which compliance may be had with such requirement...and the person so ordered shall be permitted to comply therewith in any lawful manner...."

There is some guidance available for the interpretation of Section 13360. In Pacific Water Conditioning Association v. City Council of Riverside (1977) 73 Cal.App.3d 546, 140 Cal.Rptr. 812, the court held that as long as the Board's order does not specify the manner of compliance, Section 13360 is not violated,

even if all parties know there is only one way in which the discharger can comply. In a recent order of this Board, Order No. WQ 82-8; we stated that requirements which tell the discharger what to do, but not how to do it, do not violate Section 13360. These precedents suggest that Section 13360 allows the Regional Board to regulate discharges of waste fully, so long as it does not tell the discharger precisely how to meet the established limits.

Turning to the BMPs at question, we find that Nos. 1 through 8, 10 and 11 do not violate Section 13360. These sections generally limit the discharge of earthen materials and petroleum products, but do not specify the manner of compliance. For example, one provision prohibits removal of vegetation and disturbance of soil conditions "except where adequate erosion control and runoff control facilities are installed and operational." The decision regarding how to comply is left to the dischargers.

BMPs 9, 12, 13 and 14 do violate Section 13360. These provisions require the dischargers to follow the prescriptions in the Erosion Plan. As was stated above, the Erosion Plan contains specific provisions regarding erosion control. These detailed prescriptions clearly specify the manner of compliance. The Regional Board argues that because of the provision in the Erosion Plan allowing modification of the prescriptions (see p. 2 above), there is no violation of Section 13360. We disagree. The Forest Service does have the authority to change the manner of compliance pursuant to the Erosion Plan, but only upon the

agreement of Mammoth and the District Ranger. In addition, the Forest Service must substitute the BMPs with "a new or modified erosion and sediment control technique". BMPs 9, 12, 13 and 14 go beyond the Regional Board's authority to limit discharges by specifying details on compliance.^{1/}

In finding a violation of Section 13360, we stress that the Regional Board is precluded only from specifying the manner of compliance and not from setting and enforcing requirements on waste discharges. The Regional Board may, therefore, choose to reissue these requirements with erosion control limitations that would be achieved by the BMPs or a reasonable alternative thereto.

Finally, we must emphasize that the deletion of BMPs 9, 12, 13 and 14 will not mean that the Forest Service and Mammoth need not follow them. They will continue to be enforceable requirements against Mammoth through its Special Use Permit and against the Forest Service through the 208 Report and the management agency agreement.

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1. We do note that the Erosion Plan, with its prescriptions, was included in the Environmental Analysis conducted by the Forest Service pursuant to NEPA. In turn, the Regional Board accepted those prescriptions as mitigation measures in its review pursuant to CEQA. CEQA does not give the Board any added powers, and it cannot therefore enforce provisions in the Environmental Analysis which violate Section 13360. (Public Resources Code §21004.) It is important to stress, however, that the Erosion Plan has been incorporated into the Forest Service's Special Use Permit for the site, and the Forest Service is expected to enforce the plan as such.

IV: CONCLUSIONS

1. Best management practices 9, 12, 13, and 14, contained in Order No. 82-123, violate Water Code Section 13360 by specifying the manner of compliance with requirements.

2. In all other respects, the waste discharge requirements were properly adopted.

V. ORDER

IT IS ORDERED that for the reasons discussed above, best management practices 9, 12, 13, and 14 be deleted from Order No. 6-82-123.

Dated: April 21, 1983

/s/ Carole A. Onorato
Carole A. Onorato, Chairwoman

/s/ F. K. Aljibury
F. K. Aljibury, Member

/s/ Warren D. Noteware
Warren D. Noteware, Member

/s/ Kenneth W. Willis
Kenneth W. Willis, Member