STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of SPENCER RENTAL SERVICE For Review of Cleanup and Abatement Order No. 86-201 of the California Regional Water Quality Control Board, Central Coast Region. Our File No. A-439.	ORDER NO. WQ 87-1

BY THE BOARD:

On June 13, 1986, the California Regional Water Quality Control Board, Central Coast Region (Regional Board) issued a cleanup and abatement order to address underground pollution caused by leaking underground diesel storage tank and gasoline fuel.[1] The order names as responsible parties the owner of the site (Robert Rutherford) and petitioner (Spencer Rental Service), who has leased in site since 1977. On July 11, 1986, the State Board received a timely petition for review of the Regional Board action.

I. BACKGROUND

Robert Rutherford owns a piece of property in Morgan Hill, Santa Clara County. The site has been used as a gasoline service station, a used car lot and an equipment rental yard. Since February 1977, Spencer Rental Service has leased the site to operate an equipment rental business. Gasoline and diesel have been stored in separate adjacent tanks on the property since 1972. A

[1] This cleanup and abatement order superseded two previous orders issued in November 1985 and January 1986.

former gasoline tank had been removed in 1971 and new diesel and gasoline tanks installed at that time.

In October 1985, the Regional Board received a report from the Morgan Hill Fire Department that diesel fuel had leaked from the diesel fuel tank. An onsite inspection by the Fire Department determined that soils in the vicinity of the diesel storage tank were saturated with petroleum products. When the diesel tank was removed, contaminated soil was found around both the diesel tank and the adjacent gasoline tank. The soils in the area are alluvial in nature with much sand and gravel. Distance to ground water is at an average of 26 feet. Monitoring has determined both diesel and gasoline pollution. Maximum concentrations of pollutants in the ground water at the site on March 5, 1986 were as follows:

Pollutant	Maximum Concentration (ppb)	Department Health Services Action Level (ppb)
gasoline	860,000	--
diesel	20,000	--
benzene	9,200	0.7
toluene	110	100.
xylene	6,400	629.

II. CONTENTIONS AND FINDINGS

1. Contention: While conceding responsibility (along with the owner) for the diesel fuel leak, petitioner asserts that it is not responsible for the gasoline leak.

Finding: We have reviewed the record and find the Regional Board properly named Spencer Rental in the cleanup and abatement order with responsibility, along with the owner, for the cleanup of the gasoline. We base our conclusion on a number of facts in the record:

1. The petitioner has leased the site since 1977.

2. Petitioner has stored petroleum products at the site.

3. Gasoline was found directly under the gasoline tank used by petitioner when it was removed.

4. The plume of gasoline is small and has not spread to a downgradient monitoring well 80 feet away.

5. There was no gasoline underneath the location when the gasoline tank was installed in 1972 according to the landowner.

6. The old gasoline tank had not been used since 1956, according to the landowner.

Petitioner makes two assertions in support of the position that its gasoline tank did not leak despite the presence of gasoline as noted above. First, petitioner contends that the more likely source of the pollution is a gasoline tank that had been removed prior to its occupancy of the site. Secondly, petitioner relies on a gasoline tank testing of October 22, 1985 in which the gasoline tank was determined to be tight. In our view, these two points do not outweigh the evidence cited above. First, we can not regard leak detection tests as conclusive evidence that a tank does not leak even if they are correctly performed. A leak detection test is only capable of detecting an existing major leak at the time the test is taken. It provides no information on the history of the tank. The test will not detect minor leaks less than approximately 0.05 gallons per hour. Over a year, a leak this size can release up to 438 gallons of gasoline. Additionally, the gasoline pollution could have occurred through spills.

We note further that the limited areal extent of gasoline plume and the fact that no free product was found in the monitoring wells indicate that

the leak was not a major one. Additional contentions have been made by the landowner, Rutherford, concerning the underground gas tank. He claimed to have located the underground gas tank after it was removed in October 1985 and that it did have a hole in it. Second, he claimed that when the gasoline tank was installed in 1972, there were several witnesses in the vicinity and no trace of gasoline was apparent at the site at that time.

Our review of the entire record leads us to conclude that evidence in the record, including the physical evidence of the gasoline polluted soil column adjacent to the tank and the ground water with gasoline underneath the tank (which has not reached the nearby monitoring well) is more than sufficient to support the Regional Board's finding that Spencer Rental has responsibility for the gasoline spill. The Regional Board properly weighed all the evidence, including the tank test results.

Issue: We have decided to review, on our own motion, an additional issue not raised in the petition. This issue is whether the cleanup levels specified in the cleanup and abatement order are adequate to protect designated beneficial uses.

Finding: The site overlies ground water in the Pajaro River subbasin and the south Santa Clara Valley sub-area. Beneficial uses of ground water downgradient of the site are domestic supply, agricultural supply, and industrial supply. The site is also in the vicinity of Llagas Creek.

The Order calls for removal of contaminants from ground water. However, the levels specified for benzene, toluene, and xylene are ten times greater than the action levels set by the Department of Health Services (DOHS). The Regional Board made no findings supporting these cleanup levels nor submitted any response to the petition to the State Board. We find these

concentrations to be too high to protect the beneficial use of domestic water supply. Generally, cleanup of a site is appropriate when the pollutant concentration is greater than the concentration required to protect beneficial uses and is at a level that can be reasonably cleaned up. In such cases, cleanup levels should be based on established action levels. The specific levels are shown below:

Compound	DHS Action Level (ppb)	Order No. 86-201 Required Cleanup Levels (ppb)
benzene	0.7	7
toluene	100.0	1,000
xylene	620.0	6,200

Accordingly, we find that the Regional Board cleanup levels are far too high to protect beneficial uses. The Regional Board shall reconsider the cleanup levels in the order. In so doing, the Regional Board needs to consider the levels listed above and other appropriate policies of the State Board.

III. SUMMARY AND CONCLUSIONS

1. There is sufficient evidence to support naming Spencer Rental in the cleanup and abatement order for the gasoline cleanup.

2. The cleanup levels established by the Regional Board allow excessively high concentrations of pollutants. The Regional Board must amend the cleanup levels to appropriately protect beneficial uses.

IV. ORDER

Regional Board Order No. 86-201 is remanded to the Regional Board for amendment of the cleanup levels. In other respects, the petition is denied.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 22, 1987.

AYE: W. Don Maughan
E.M. Samaniego
D.E. Ruiz
E.H. Finster
D. Walsh

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marche'
Administrative Assistant to the Board

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of FREEDOM COUNTY SANITATION DISTRICT For Review of Administrative Civil Liability Order No. 86-246 by the California Regional Water Quality Control Board, Central Coast Region. Our File No. A-443.	ORDER NO. WQ 87-2

BY THE BOARD:

Freedom County Sanitation District (petitioner) is a special assessment district within Santa Cruz County. The petitioner owns and operates a small wastewater collection system northwest of the City of Watsonville. The system transports wastewater to treatment and disposal facilities within Watsonville. An NPDES permit (No. CA0048216) was issued to Watsonville (most recently in 1984). The permit regulates the City's discharge but also applies to local sewering entities like the petitioner.

A break in the system in February 1986 resulted in the discharge of thousands of gallons of raw sewage into a nearby slough. A complaint for administrative civil liability was issued by the Executive Officer pursuant to a May 2, 1986 request by the Regional Water Quality Control Board (Regional Board). On July 11, 1986, the Regional Board affirmed the Executive Officer's action and ordered civil liability in the amount of $10,000. All but $2,000 was suspended pending compliance with the time schedule for repair and replacement of the system as required in Cleanup and Abatement Order No. 86-100.

The petitioner has asked the State Board to review the administrative civil liability order, arguing that there was no showing of negligence as is

required in Water Code Section 13350(a). The petitioner also contends that the assessment is too high since the community served by the petitioner is so poor, the environmental harm is speculative, and the petitioner has been cooperative.

I. BACKGROUND

The system operated by the petitioner is old, has a history of problems, and some of it is badly undersized. One trunk line in particular has experienced repeated failures, breaks, and overflows. However, the discharge that led to this action came from a break in another pipeline. As a result of its many problems, in 1979, the petitioner began trying to obtain funds to repair and replace the system.

On February 17, 1986, a break occurred in the Sydney Avenue trunk line, an eight inch pipe in a steep area which empties into the main trunk line. The Sidney Avenue line had suffered one break four years ago but otherwise had functioned without incident. It was not undersized and had experienced no overflows. The break resulted in a spill which lasted nearly twenty-four hours and which deposited over 200,000 gallons of raw sewage in a slough. The break happened during a significant storm and environmental damage was lessened by the dilution afforded by the rain. Harm to wildlife and non-contact water recreation (the listed beneficial uses) was not quantified. The petitioner responded promptly to the spill and reported it to the Regional Board without delay.

II. CONTENTIONS AND FINDINGS

1. Contention: The petitioner argues that negligence must be proved by the Regional Board in order to assess administrative civil liability. In this case, says the petitioner, no negligence was established.

Finding: Under Water Code Section 13350(a)(2), proof of negligence is required in each case.

Section 13350(a) of the Water Code provides:

> "Any person who...(2) in violation of any waste discharge requirement or other order or prohibition issued, reissued or amended by a regional board or the state board, intentionally or negligently discharges waste, or causes or permits waste to be deposited where it is discharged, into the waters of the state and creates a condition of pollution or nuisance...may be liable civilly in accordance with subdivision (d), (e), or (f)."

It is up to the Regional Board staff to affirmatively prove each element listed above: the existence of an order, a negligent or intentional violation, a discharge, and the creation of a condition of pollution or nuisance. Without any one element, no liability is possible.

Although in certain instances the Regional Board may infer negligence from the circumstances of the discharge, the record in this case contains nothing on which to base such a finding.

The Regional Board made a finding in its order that "violations were caused by the discharger's failure to exercise reasonable care to avoid collection system overflows." (Finding No. 4) In support of that finding, the Regional Board staff made four allegations.

1. There were previous overflows at various points along the pipeline. There was no dispute that the actual break occurred in an area where few problems had been encountered. However, Regional Board staff argued that the system should have been considered as a whole. Furthermore, the County

admitted, in letters to the Regional Board, that the Sydney Avenue trunkline was inadequate and that some portions of it were dilapidated and undersized.

The District responds that, despite its shortcomings, the Sydney Avenue trunkline had experienced only one failure in a decade and none in the past four years. All evidence introduced concerning overflows and spills dealt with other portions of the system. The District argues that knowledge of likely problems in the Sydney Avenue line cannot be inputed based on knowledge of problems elsewhere.

2. The 100-year flood standard in the discharge permit established a measure against which failures could be judged. The Regional Board staff argued that, since this storm was less than the 100-year level, any failure resulting from flooding can only be the result of negligence.

The District responds that the 100-year flood standard is irrelevant. Larger storms, more nearly approximating the 100-year standard, had caused no problems in the three preceeding years. Thus, there was no reason for the petitioner to expect a problem from a mere two-year storm.

3. Corrective action should have been taken much earlier. The Regional Board staff charges that the District was negligent in delaying maintenance and replacement on the whole system.

The District responds that steps were being taken to replace the whole system. It also argues that the Sydney Avenue trunkline had been repaired only four years before and that other areas of the system had a higher priority for maintenance based on experience.

4. If the trunkline had not broken, a spill would have occurred elsewhere in the system. The Regional Board staff offered no evidence in support of this charge and the District offered no rebuttal.

In reviewing the evidence, it is apparent that the records lacks information about the actual circumstances of the break in the Sydney Avenue trunk line. We cannot tell how the break occurred or what sort of break was involved. All evidence of negligence introduced at the hearing concerned the maintenance history of the overloaded segments of the system and the general financial problems of the petitioner.

In some instances, the law will infer negligence. Certain activities should not cause injury to others if properly conducted. If they do cause injury, it must be because of negligence. While this principle can be applied to some aspects of the operation of a wastewater collection system, it cannot be applied to the facts of this case.

Experience and common sense tell us that there are two types of breaks in a wastewater collection system: those which should be anticipated and those which should not be. Anticipated problems can and should be prevented through backup systems, more stringent engineering standards, extra maintenance, more careful monitoring, or any of a number of extra precautions. A problem in areas that should have been anticipated can be assumed to be the result of negligence. However, the presumption is not conclusive and proof that all reasonable precautions were taken can be presented by the party thought to be negligent. On the other hand, unanticipated problems do not raise the presumption of negligence, and it would be the role of Regional Board staff to offer some evidence on the subject.

From the record we cannot tell whether the break was of the anticipated or unanticipated variety so we cannot uphold the Regional Board finding of negligence. If the break ought to have been anticipated by the petitioner, that fact should have been alleged and shown in the record. Then

the petitioner would have to demonstrate that no negligence was involved. If the break ought not to have been foreseen, the Regional Board staff must prove the petitioner was otherwise negligent.

Accordingly, we find that the imposition of administrative civil liability is not justified since the Regional Board has not established that the discharger was negligent.

2. Contention: The Regional Board should have reduced the administrative civil liability based on the relative poverty of the community served by the petitioner.

Finding: Based on our finding above, we need not decide this issue. However, the record clearly reflects that the Regional Board was made aware of the economic conditions prevailing in the petitioner's service area. The Regional Board staff recommended reducing the amount of the civil liability from $10,000 to $5,000 based on that consideration alone. Although the Regional Board voted a higher figure for liability ($10,000), the actual assessment, assuming future compliance with the time schedule, is only $2,000. Therefore, it is clear from the record that hardship was a factor in the Regional Board's consideration. If negligence can be shown, the amount of the assessment is proper.

III. SUMMARY AND CONCLUSIONS

1. The record is lacking in evidence on the issue of negligence. Therefore, the record does not support the order. If interested persons wish to present additional information bearing on the question of negligence, such information shall be fully considered by the Regional Board. If the Regional Board does reconsider the question of negligence, it must first consider

whether the break in the wastewater collection system should or should not have been anticipated. Then the burden of proof on the negligence issue can be allocated and evidence considered.

2. The record reflects that the Regional Board gave full consideration to the economic conditions in the petitioner's service area in assessing civil liability.

IV. ORDER

IT IS HEREBY ORDERED THAT:

1. The petition is granted without prejudice to the Regional Board's right to reconsider the order in light of this ruling.

2. The Regional Board is hereby directed to rehear this matter upon the request of any interested person and consider all relevant evidence.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on January 22, 1987.

AYE: W. Don Maughan
E.M. Samaniego
D.E. Ruiz
E.H. Finster
D. Walsh

NO: None

ABSENT: None

ABSTAIN: None

Maureen Marche
Administrative Assistant to the Board