

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 sewerage 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 Sydney 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 imputed 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 preceding 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

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