

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of )  
SOUTH BAYSIDE SYSTEM AUTHORITY )  
For Review of Order No. 89-014 of the )  
California Regional Water Quality )  
Control Board, San Francisco Bay )  
Region. Our File No. A-603. )

ORDER NO. WQ 89-11

BY THE BOARD:

On February 14, 1989, the State Board received a petition from South Bayside Systems Authority asking for review and reversal of an order issued by the San Francisco Bay Regional Water Quality Control Board (Regional Board) which assessed administrative civil liability in the sum of \$50,000. The assessment stemmed from an incident wherein the petitioner spilled about 12.5 million gallons of raw sewage into Redwood Creek and Westpoint Slough and thence into the southern reaches of San Francisco Bay. The spill occurred on November 19, 1987 and the Regional Board issued its order on January 18, 1989. The petition was timely.

I. BACKGROUND

South Bayside operates a wastewater interceptor and a 24 million gallon per day subregional sewage treatment plant in Redwood City which receives and treats sewage from the cities of Redwood City, San Carlos, and Belmont and from the West Bay Sanitary District. In 1987, South Bayside determined that it was

necessary to replace a 100-foot segment of leaking sewer forcemain. They decided that they could do it during hours of low usage without interruption of service to their customers and made plans to shut down the flow in the forcemain at 11:00 p.m. on November 18, 1987. South Bayside had calculated that it was safe to keep the main closed until about 5:00 a.m. with the flow accumulating in the system and available off-line storage sites. The job was to be done in four hours and an additional two hours was allowed for unforeseen delays.

Almost immediately delays began to occur. It took substantially longer to break into the pipe than was expected and the job was more than an hour behind after the first task was complete. Another delay occurred when petitioner discovered that a great deal more concrete had been poured around the main than they had thought. Some of this had to be removed before the crane could lift out the section of pipe. More time was lost when it was discovered that the pipe would not fit together as well as it should have. Then, at about 7:30 a.m., two and one-half hours after they had expected to be done, the crane broke while still holding the pipe. Nothing could be done to quickly fix the crane or connect the pipe so it was determined that the only thing to do was to open up the main and release the wastewater building up inside. Raw sewage flowed all day until 11:00 p.m. on the 19th when the system was again closed down and the crew was able to finish the previous night's work.

The discharge from the one day is estimated to have been about 12.5 million gallons of raw sewage. It flowed into

the creek and the slough mentioned above. No specific damage to wildlife or otherwise was documented or quantified by the Regional Board. Since the spill occurred during November, no direct impacts on water contact recreation were found. No efforts to clean up the spill were practical and none was undertaken. The discharge was a direct violation of waste discharge requirements.

Most of the facts were undisputed by the petitioner. The question before the Regional Board was whether the actions of the petitioner constituted negligence. Because Section 13385 of the Water Code had not been amended as of the date of this spill, the Regional Board could only assess administrative civil liability under Section 13350 upon showing of negligence or refer it to the Attorney General for judicial recovery under Section 13385. In that case, no negligence need be shown.

## II. CONTENTIONS AND FINDINGS

1. Contention: The spill resulted from unforeseen problems and the Regional Board was in error in finding that South Bayside was negligent in its actions.

Finding: We agree with the petitioner that all reasonable precautions were taken to prevent the occurrence of accidents. The series of misfortunes which resulted in the spill were beyond the ability of reasonably cautious people to foresee.

Discussion: While we generally give great deference to a decision by a Regional Board when considering administrative civil liability orders, we, nevertheless, must consider whether

there was some reasonable basis for the order. Although there are some facts in this case which, when taken individually, might appear to show negligence, we have looked at the overall preparation and general attitude of the petitioner and have concluded that South Bayside acted as would any reasonably prudent person faced with the same or similar circumstances. It was not reasonable to find that South Bayside was negligent in this case and we, therefore, sustain the petition.

2. Contention: Petitioner was not given an adequate opportunity to present its case to the Regional Board.

Finding: The record does not support South Bayside's contention. They apparently had the opportunity to present whatever evidence and argument they wanted.

Discussion: The matter was heard by the Regional Board just before and just after a lunch break. As the hearing went on, the chair tried to hurry things along because she feared losing a quorum. Seven members of the Board were present, but one member had disqualified himself and one other member had indicated that he had to leave at 2:15 p.m. It is not clear from the transcript whether anyone else had already indicated the need of an early departure so, with a five-member quorum requirement, it did not appear to be a problem. However, on more than one occasion, the chair announced that things should be sped up. In its petition, South Bayside states that the chair:

"ordered the termination of testimony of one of SBSA's witnesses before he had completed. Thereafter, the Chairperson concluded the hearing and the SFRWQCB commenced its deliberations on the issuance of Order

No. 89-014. Thus, not only was the SBSA not permitted to complete its testimony, but also the SBSA was deprived of the opportunity to present oral argument. Argument was crucial to a fair hearing because the SFRWQCB clearly lost sight of the instructions of its own counsel that negligence must be found as a basis for the issuance of the Order. Rather, the majority of the Board members assumed facts not in evidence, presumed to ignore the law, and proceeded to vote in favor of a motion to issue the Order. Proceeding in such a manner deprived the SBSA of a fair hearing and, thus, its constitutional right of due process."

Petitioner dramatically overstates the situation. From the transcript it certainly appears that the chair was trying to hurry things along. However, there is no indication in the record that anyone was cut off or denied an opportunity to speak.<sup>1</sup> Indeed, on page 73, line 2, of the transcript, the chair asked if "anyone else wishes to speak?" No one responded and she closed the hearing. As for not being allowed to submit oral argument, the transcript does not disclose a request to do so from petitioner or anyone else. Rather, after one Board member had made a motion to close the hearing, petitioner's attorney interjected: "I would like to say one thing, if I might...." He went on with a short statement about negligence and burden of proof.

The issue of negligence was not given short shrift. Instead, it was the main topic of discussion among the Board members for the five pages of transcript leading up to the

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<sup>1</sup> On two occasions, the Regional Board staff had requested, in writing, that written responses to the complaint be filed before the Board meeting and that comments at the meeting be limited to summaries of those submittals. South Bayside did submit written comments before the meeting. A review of the record shows that the written and oral comments were virtually identical.

adoption of the motion to impose civil liability. The Board members were discussing whether they should refer the matter to the Attorney General (because they could find no negligence) or issue an administrative order (because they could find negligence). The Board's counsel joined in the discussion on the negligence issue and there is nothing to indicate that his advice was ignored.

On balance, the record reflects a full and fair hearing. While we find that the Regional Board did not have sufficient evidence to make a finding of negligence, we do not find that they abridged petitioner's rights during the hearing.

### III. CONCLUSION

The petitioner has persuasively argued that it took all reasonable precautions while planning this project, acted with proper care in carrying out the plan, and were only prevented from successfully completing the plan by a series of unforeseeable and largely unpreventable misfortunes. Negligence requires a showing that a duty of reasonable care was breached. We find no breach of that duty in petitioner's actions. Even though the Regional Board afforded South Bayside a full and fair hearing, the conclusion that negligence caused the spill was unfounded.

IV. ORDER

The order of the Regional Board is reversed for the reasons stated.

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 August 17, 1989.

AYE:           W. Don Maughan  
                  Edwin H. Finster  
                  Eliseo M. Samaniego  
                  Danny Walsh

NO:             Darlene E. Ruiz

ABSENT:       None

ABSTAIN:      None

  
Maureen Marche  
Administrative Assistant to the Board

