

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petitions of)
)
CENTRAL DELTA WATER AGENCY,)
SOUTH DELTA WATER AGENCY,)
and CALIFORNIA FARM BUREAU)
FEDERATION)
)
for Review of General Waste)
Discharge Requirements Order)
No. 95-140 and Resolution)
No. 95-144 of the California)
Regional Water Quality Control)
Board, Central Valley Region.)
Our Files Nos. A-977 and A-977(a).)
_____)

ORDER NO. WQ 96-08

BY THE BOARD:

The Central Valley Regional Water Quality Control Board (CVRWQCB) considered two matters relating to the use of sewage sludge as a soil amendment at its May 26, 1995, meeting. The CVRWQCB adopted a general order for the application of sewage sludge that requires the filing of a notice of intent (NOI) before the project may commence. The CVRWQCB also adopted a waiver resolution for the use of exceptionally high quality sludge that required no such NOI. The CVRWQCB adopted negative declarations in support of both actions. Timely petitions were received from the Central Delta Water Agency, the South Delta Water Agency, and the California Farm Bureau Federation (petitioners). Petitioners requested a stay of the orders. The stay request was denied by the Executive Director.

I. BACKGROUND

Sewage sludge, now frequently referred to as "biosolids," has been applied to crops in California for some

years. In 1993 the United States Environmental Protection Agency (U.S. EPA) adopted regulations governing the agricultural application of sludge but the State Water Resources Control Board (SWRCB), as well as the Integrated Waste Management Board, declined to pursue delegation of that program. The CVRWQCB has granted individual waste discharge requirements for such operations a number of times in the past. In order to more efficiently deal with an increasing number of requests to apply sludge to agricultural operations in the Central Valley, the CVRWQCB proposed to adopt the general waste discharge requirements and the waiver resolution. In late 1993 the CVRWQCB staff circulated its proposals for public comment. Significant public comment was received, revisions were made, negative declarations were prepared and circulated, and the matter was set for CVRWQCB consideration. In summary, the CVRWQCB proposals parallel the U.S. EPA regulations but set more stringent standards in some areas.

Sewage sludge is highly treated before it is transported to agricultural areas. However, it may still contain certain harmful elements. Heavy metals are often found in sludge that comes from industrial and commercial areas. Residential use of cleaning products as well as corrosion of water supply and sewer lines also contribute to the presence of heavy metals. Pathogens can persist in the sludge if it is not fully treated to destroy them. (The "exceptionally high quality sludge" regulated by the waiver has received such treatment.) Nor is the product

odor-free. Both U.S. EPA regulations and the CVRWQCB orders take special care to keep the sludge away from residential areas, water bodies, and drinking water wells. No one seriously disputes the need to be cautious in the transportation, storage, and use of the sludge; the issues concern what level of care is necessary.

The large majority of the comments received by the CVRWQCB were strongly in favor of the adoption of the waiver and the general order. However, a number of comments were very negative and raised concerns about several important environmental considerations. Some of these commenters questioned the propriety of using a negative declaration instead of an environmental impact report (EIR) to comply with the California Environmental Quality Act (CEQA). The issues raised by these people generally focused on the continued presence of pathogens and heavy metals, the size of the buffer zones, the depth to ground water, the potential flooding of the area, and general odor and nuisance concerns.

After a lengthy hearing at which 24 people testified (most in favor of the order and waiver, a few against); the CVRWQCB voted unanimously to adopt the two negative declarations and to approve the general waste discharge requirements and the waiver resolution.

II. CONTENTION AND FINDING¹

Contention: The CVRWQCB abused its discretion when it adopted the two negative declarations in compliance with CEQA. The CVRWQCB should have prepared, circulated, and considered an EIR for each of the orders.

Finding: The CVRWQCB should not have relied on negative declarations under the circumstances. An EIR is required when there is identified a potentially significant, unmitigated environmental effect. In marginal cases, the existence of serious public controversy over the environmental effects of a project requires the same conclusion. (14 CCR § 15064.) EIRs should have been prepared and circulated in this case.

Even without the presence of serious public controversy, it is clear that a negative declaration was inappropriate for the general waste discharge requirements. In order to adopt a negative declaration, the CVRWQCB must find that there was "no substantial evidence" that the proposed order and waiver "may have a significant effect on the environment." (14 CCR § 15070.) While the written document on which the CVRWQCB voted did not reflect any unmitigated environmental impacts, the individual Board Members expressed contrary views on the record. Of the seven members present when the vote was taken to approve the negative declaration, five expressed concern about

¹ *Petitioners have raised a number of issues concerning the merits of the CVRWQCB orders. In light of our decision on the CEQA contention, it would be inappropriate for us to consider those at this time.*

the insufficiency of the depth to ground water below a sludge spreading project.² Each indicated that he or she saw the two-foot separation as a problem but, based on an earlier explanation from staff, indicated that it should be left to local agencies to provide for greater ground water protection. One Board Member, for example, said:

"And one other thing is that the 24-inch depth, I think--I had a lot of concern about that. It seems to me if the county or local areas can act independently on that, that that washes that out. I'm for it."
(Trans. p. 181.)

Plainly no lead agency can adopt a negative declaration in which the environmental problems are identified but the solutions are left for other agencies to find. (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 248 Cal.Rptr. 352.) While there is some case law to support a decision to deal with an identified problem in a later project (see *Sacramento Old City Association v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 280 Cal.Rptr. 478), that approach has been approved only where the same lead agency commits itself and/or a project proponent to deal with the problem at the later date and in a fairly specific manner.

The existence of serious public controversy adds weight to our decision. Some of the speakers at the CVRWQCB hearing and many of the written comments raised significant environmental

² Five speakers and several written comments discussed the depth to ground water issue. Some of them made specific reference to a 1993 study done at the University of Arizona that found viruses up to 60 feet below a site on which sludge had been placed.

concerns. Some pointed to serious scientific studies that raised questions about the size of the proposed horizontal and vertical buffer zones. Others questioned the approach taken by U.S. EPA in approving its regulations. Whether these comments are enough to overcome the evidence in support of adopting the general order is not the issue. They are enough to justify the more careful inquiry that occurs in an EIR.

Nearly all of the discussion and comments in the record concern the application of ordinary sewage sludge pursuant to the general waste discharge requirements. There is, however, some indication of serious public controversy in the record over the waiver of waste discharge requirements for exceptional quality sludge.³ While this controversy is not supported by the same level of evidence in the record, on balance, it clearly sets forth a case for the preparation of an EIR.

We have addressed the issue of the application of CEQA to the use of sewage sludge once before. In Order No. WQ 89-7 (County of Imperial), we found that the Colorado River Basin Regional Water Quality Control Board had failed to comply with CEQA when it adopted a negative declaration in support of waste discharge requirements for sludge application. That order found that the initial study was inadequate and did not provide

³ Concerns over the exceptional quality sewage sludge (voiced by individuals as well as public agencies) involve indications from studies that pathogen levels can still be fairly high and that metals and other chemicals are not removed by the process that reduces pathogens. The discussion of these issues was cursory and only one CVRWQCB member mentioned them in closing comments.

sufficient evidence to the record to justify the negative declaration. Here, the issue is somewhat different. The CVRWQCB has done an excellent job of providing evidence to support its decision. The problem lies in the quantum of contrary evidence and controversy that cannot be ignored.

Because of the finding of lack of CEQA compliance, this matter will be remanded to the CVRWQCB for preparation of an EIR. In the interim, farmers who have submitted waivers or filed NOIs with the CVRWQCB, on or before April 1, 1996, may continue to submit pre-application reports and may discharge sewage sludge on lands covered by the NOI or an approved waiver. Those who have not submitted an NOI or waiver request by this date may not discharge under these authorizations until there is CEQA compliance. Case law makes it clear that enjoining activities that have already commenced is discretionary and depends on a balancing of the environmental threat and other factors such as cost. (*Laurel Heights Improvement Association of San Francisco, Inc. v. The Regents of the University of California* (1988) 47 C.3d 376, 424, 253 Cal.Rptr. 426.) Representations in the record indicate that the magnitude of the environmental threat posed by the few additional operations is unlikely to cause water quality problems and, therefore, is not significant compared to the cost and inconvenience that would be visited upon the individual farmers.

The preparation of an EIR can be expensive and the allocation of those costs is problematic in the case of a general

permit. Legislation was adopted last year (SB 205 [Kelley] Chapter 613, Statutes of 1995) that specifically requires the SWRCB and the RWQCBs to adopt general waste discharge requirements for the use of sewage sludge but only if financing for environmental documentation can be arranged outside the General Fund. The CVRWQCB need not proceed with this matter any further unless such funding can be obtained.

It is clear from the record that a great deal of work has been done on this issue by the federal government, by scholars and researchers, and by the staff of the RWQCB. It should be understood that the results of those efforts ought to form the foundation for further CEQA compliance. The RWQCB should also give special consideration to the unique nature of the lands in the Sacramento-San Joaquin Delta, areas within flood plains, and areas with very high ground water in its CEQA document.

III. CONCLUSION

The CEQA requires that an EIR be prepared when there are identified potentially significant and unmitigated adverse environmental effects. From the record, it is clear that such effects exist in this case. The existence of serious public controversy over the issue makes it all the more clear that a proper environmental document is required.

IV. ORDER

Without judging the merits of the proposed general waste discharge requirements or the waiver, it is the order of

the SWRCB that the matter should be remanded to the CVRWQCB for further proceedings consistent with CEQA, in this case, the preparation of EIRs.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 18, 1996.

AYE: John P. Caffrey, Chairman
John W. Brown, Vice Chair
James M. Stubchaer, Member
Mary Jane Forster, Member
Marc Del Piero, Member

NO: None.

ABSENT: None.

ABSTAIN: None.



Maureen Marché
Administrative Assistant to the Board

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