STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petitions of PATRICIA McSWEENY-McCAULEY and CITY OF HEMET for Review of Order No. 82-80 of the California Regional Water Quality Control Board, Santa Ana Region. Our Files Nos. A-316 and A-316(a).	Order No. WQ 82-16

BY THE BOARD:

On August 13, 1982,[1/] the California Regional Water Quality Control Board, Santa Ana Region (Regional Board) adopted waste discharge requirements in Order No. 82-80 for Fred and Ken Douma and Douma Desert Dairy (dairy or discharger). The waste discharge requirements regulate the discharge of wastewater for the discharger's new dairy operation. The dairy will have an animal population of approximately 2,700 cattle and will discharge approximately 50,000 gallons per day of dairy wash water onto 65 acres of land. On August 13, prior to adopting Order No. 82-80, the Regional Board adopted Resolution No. 82-210, approving the Initial Study and adopting the Negative Declaration prepared for the dairy operation.

On August 30, the State Water Resources Control Board (State Board) received a petition for Patricia McSweeny-McCauley (petitioner McSweeney-McCauley) and on August 31, the State Board

1. Unless otherwise indicated, all dates refer to 1982.

received a petition from the City of Hemet (petitioner Hemet). Both petitioners sought review of the resolution adopted by the Regional Board.[2/] On September 10 and September 14, respectively, petitioner McSweeny-McCauley and petitioner Hemet submitted amended petitions to the State Board. The amended petitions seek review of the waste discharge requirements adopted by the Regional Board. The petitioners also seek a stay of the requirements.

Because of the intense public concern surrounding this project, this Board has attempted to complete its review on the merits as expeditiously as possible. Because this order disposes of the issues presented regarding this matter, the request for a stay is now moot.

I. BACKGROUND

Fred and Ken Douma proposed to establish a new dairy operation in the Hemet area of Riverside County. As discussed below, the Regional Board is the lead agency for the project pursuant to the California Environmental Quality Act, Public Resources Code Sections 21000 et seq. (CEQA). In an effort to comply with CEQA, the Regional Board adopted an Initial Study and a Negative Declaration regarding possible adverse environmental effects of the dairy operation. The Regional Board then adopted waste discharge requirements, permitting the discharger to begin operation of the dairy.

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2. Because of the substantial similarity of the issues raised by the petitioners, the two petitions have been consolidated for purposes of review.

The petitioners claim that it was improper for the Regional Board to adopt a Negative Declaration for the project, and that it instead should have prepared an Environmental Impact Report (EIR). The petitioners argue that because the Regional Board violated CEQA, the waste discharge requirements were not properly adopted.

We are deciding this case on the record submitted by the Regional Board augmented by the Krieger/Stewart report submitted by the discharger.[3/]

II. CONTENTIONS AND FINDINGS

The petitioners contend that adoption of Order No. 82-80 was contrary to the provisions of CEQA. The provisions of CEQA and its interpretative regulations require state agencies to comply with the Act prior to approving discretionary projects. (Public Resources Code §21080(a); Title 14, Calif. Admin. Code §15060.) If the project may have a significant effect on the environment, CEQA requires that the agency prepare an EIR. (Public Resources Code §21100.)

The petitioners' argument is based on the petitioners' claim that the Regional Board's adoption of a Negative Declaration was arbitrary, improper and not in accordance with the CEQA Guidelines

3. At the hearing, the Regional Board excluded a report prepared by Krieger and Stewart for the discharger. While the report was submitted after the closing date for written comments, the report will be admitted into the record. There was some doubt as to whether the comments had to be in the Regional Board's hands by the closing date or only in the mail. We need not resolve this doubt regarding the closing date as we have decided to consider the report pursuant to our authority under Water Code Section 13320 to augment the record. We also find that the Regional Board correctly rejected new evidence proffered at the second meeting, on August 13. Because the Krieger-Stewart report is admitted into the record, we will not admit the alternative documents received from the discharger on October 7 by this Board.

adopted by the Resource Agency (Title 14, Calif. Admin. Code, §§15000 et seq.).

A brief review of the administrative procedures followed is necessary to address these contentions.

On January 20, the Regional Board received a report of waste discharge for the proposed dairy. The discharger had already received a building permit from the County of Riverside.[4/] A permit from the City of Hemet was not necessary.[5/] Although both the County and the City appeared before the Regional Board to request that it prepare an EIR, neither local agency made any effort to become the lead agency nor to undertake a complete environmental review. We find this failure to be very unfortunate, since these agencies would be better equipped to address many of the environmental concerns raised regarding the project. In fact, the newly enacted zoning ordinances would not permit a similar dairy operation. In issuing its waste discharge requirements, the Regional Board thus became the first agency to issue a discretionary permit, and it properly assumed the role of lead agency pursuant to CEQA. (Title 14, Calif. Admin. Code §15064.)

The Regional Board prepared an Initial Study and a Negative Declaration for the proposed dairy. (Title 14, Calif.

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4. At the time, the County zoning ordinance permitted dairies in the area of the proposed dairy. The County therefore issued the necessary permit as a ministerial act, and there was no preparation of environmental documents. (See Title 14, Calif. Admin. Code §15073(b)(1).) A Superior Court found that CEQA did not apply and that issuance of the permit was proper. (Superior Court, County of Riverside, Case No. 148793.) Since then the zoning ordinance has been amended to exclude dairies.

5. At the time of issuance of the building permit, the dairy site was not part of the City of Hemet. It has recently been annexed to the City, and the present zoning does not allow dairy operations.

Admin. Code §§15080 and 15083.) The Initial Study disclosed that the project might cause some significant effects on the environment,[6] and proposed mitigation measures, mostly to be incorporated into the waste discharge requirements. The Regional Board then adopted a Negative Declaration (Resolution No. 82-210), finding that operation of the dairy in accordance with the waste discharge requirements would mitigate the identified impacts.[7] Finding that the provisions of CEQA had been met, the Regional Board adopted the waste discharge requirements.

The petitioners make several arguments in favor of their contention that the Regional Board did not comply with CEQA by adopting a Negative Declaration instead of preparing an EIR. First, the petitioners claim that a serious public controversy existed and that preparation of an EIR was required. Second, the petitioners argue that the Negative Declaration was deficient because it failed to contain a finding that the project would not have a significant effect on the environment. Third, the petitioners argue that the Regional Board did not fully consider whether the project would cause significant environmental effects because, in the Initial Study, the Regional Board assumed that various mitigation measures would be implemented.

CEQA and the Guidelines issued by the Resource Agency establish an administrative procedure to evaluate potential

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6. The potential environmental impacts checked in the Initial Study included odors, run-off of surface waters, reduction in crop acreage, land use changes and utilities required.

7. The CEQA Guidelines permit the lead agency to incorporate mitigation measures into a Negative Declaration in order to avoid potentially significant effects. (Title 14, Calif. Admin. Code §15083(c)(5).

environmental impacts of proposed projects prior to their approval by public agencies. If a project falls within an exempt category, no further evaluation is required. If there is a possibility of significant environmental effects, the agency must perform an initial study. If the agency can thereafter conclude there will be no significant effects, it may adopt a Negative Declaration. If the project may have a significant environmental effect, the agency must prepare an EIR.[8/]

Title 14, Calif. Admin. Code §15084 describes the circumstances in which an EIR must be prepared:

> "(a) If the Lead Agency finds, after an initial study, that the project may have a significant effect on the environment, the Lead Agency must prepare or cause to be prepared an Environmental Impact Report.
> (b) An EIR should be prepared whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant effect on the environment.
> (c) An EIR should be prepared when there is a serious public controversy concerning the environmental effects of a project. Controversy not related to an environmental issue does not require the preparation of an EIR."

We agree with the petitioners that Section 15084(c) requires preparation of an EIR in this matter. The issue of the existence of a dairy in the Hemet area has raised a storm of protest, and almost without exception the protesters have cited concerns about environmental effects of the project. Approximately 1,500 people signed petitions opposing the project,

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8. The public agency may require the proponent of the project to supply data and information, including a draft EIR. (Title 14, Calif. Admin. Code §15061(b).) The public agency may also perform the work itself or through a contract and may charge the proponent for the costs incurred. (Public Resources Code §21089; Title 14, Calif. Admin. Code §15061(b).)

several hundred attended two Regional Board meetings, many wrote letters to the Regional Board, and testimony was taken from many opponents at the hearing. Media coverage was extensive. The opponents of the project included City and County representatives, hospital spokesmen, and representatives from homeowners' associations and mobile home parks. The environmental issues raised included vectors and odors, water quality, traffic, waste disposal and flood hazards.

The discharger responds that once the lead agency has made a finding that there will be no significant effect on the environment, the issue of serious public controversy disappears. We cannot accept this reading of Section 15084(c). The discharger appears to argue that in order for public controversy to be the catalyst for an EIR, the public agency must agree that there will be significant effects. But this interpretation would render Section 15084(c) meaningless because an EIR is required whenever there may be significant effects (Title 14, Calif. Admin. Code §15084(a)). Rather, the public controversy requirement is based on the need to allay citizens' fears and not simply on the technical facts:

> "One major purpose of an EIR is...to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action. A simple resolution or Negative Declaration, stating that the project will have no significant environmental effect, cannot serve this function." (No Oil, Inv. v. City of Los Angeles (1975) 13 Cal.3d 68, 86.)

The discharger also points to the language in Section 15084(c) which states that in the case of public controversy

the agency "should," rather than "shall" prepare an EIR. While this language does give the agency discretion to determine whether an EIR is necessary, it does not follow that there can be no abuse of discretion for not preparing an EIR. The evidence in the record before us, including the large display of public opposition to the project, convinces us that preparation of an EIR is required in this matter. (See Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles (1982) 134 Cal.App.3d 491.)

We therefore find that a "serious public controversy" over environmental issues exists. Citizens throughout the neighboring area expressed concerns that the dairy would cause vectors and odors, water quality problems, increased traffic, waste disposal problems and flood hazards. An EIR was required. As the California State Supreme Court stated, "the existence of serious public controversy concerning the environmental effect of a project in itself indicates that preparation of an EIR is desirable" (No Oil, Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 74; 118, Cal.Rptr. 34).

The Regional Board states that it decided to approve the Negative Declaration after receiving evidence and testimony "which did not persuade the Board that significant effects would occur." (Response to Petition, p. 1.) The Regional Board has misconstrued its role. Where there is serious public controversy over environmental effects, an EIR must be prepared. It is through the EIR process that the sufficiency of the evidence is to be weighed.

Since the question of public controversy is dispositive of the issues raised herein, we need not address the other arguments raised by the petitioners. We do note, however, that there is an additional basis for reaching the conclusion that the Regional Board should have prepared an EIR. Title 14, Calif. Admin. Code §15084(b) provides that an EIR should be prepared "whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant effect on the environment":

> "If there was substantial evidence that the proposed project might have a significant environmental impact, evidence to the contrary is not sufficient to support a decision to dispense with preparation of an EIR and adopt a negative declaration, because it could be 'fairly argued' that the project might have a significant environmental impact. Stated another way, if the trial court perceives substantial evidence that the project might have such an impact, but the agency failed to secure preparation of the required EIR, the agency's action is to be set aside because the agency abused its discretion by failing to proceed 'in a manner required by law.'" (Pub. Resources Code, §21168.5). (Friends of "B" Street v. City of Hayward (1980) 106 Cal.App.3d 988, 165, Cal.Rptr. 514).[9]

The record contains voluminous reports and oral testimony from experts hired by opponents of the project regarding potential

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9. The discharger cites Pacific Water Conditioning Assn., Inc. v. City Council (1977) 73 Cal.App.3d. 546, for the proposition that the Regional Board's decision must be upheld if substantial evidence supports its determination that the proposed project will not have a significant environmental effect. However, that case does not appear consistent with the Supreme Court case in No Oil, supra, nor with the more recent appellate court cases of Friends of "B" Street, supra and Brentwood Assn., supra. It is interesting to note that the Resources Agency, in their proposed rewrite of the CEQA regulations, states that "The Friends of B Street decision provides a better analysis of the standard that applies to the agency's decision. Accordingly, this section seeks to codify the holding in Friends of B Street." (Proposed Rewrite of the State CEQA Guidelines, July 9, 1982).

significant effects to the environment, including vectors and odors, water quality, traffic, land use, flood hazards and waste disposal. While these arguments are countered by Regional Board staff and the discharger's own experts, the mere presentation of such evidence requires that an EIR be prepared. As the Court of Appeals recently stated in Brentwood Assn., supra, at p. 505:

> "Given such mass seismic and soil erosion consequences predicted by experts, although disputed by opposing experts, we must conclude, as did the court in No Oil, that '...in such cases of factual controversy "[t]he very uncertainty created by the conflicting assertions made by the parties as to the environmental effect...underscores the necessity of the EIR to substitute some degree of factual certainty for tentative opinion and speculation." [(County of Inyo v. Yorty (1973) 32 Cal.App.3d 795, 814.)]' (13 Cal.3d at 85.)"

We therefore find, pursuant to Water Code §13320, that the Regional Board's action in adopting these waste discharge requirements based on a Negative Declaration was inappropriate and improper.

Finally, we must address the status of the project itself. CEQA requires that the EIR must be considered prior to approval of the project (Public Resources Code §21061). Because the Regional Board did not prepare or consider an EIR, the waste discharge requirements were not validly adopted and cannot remain valid pending the CEQA review. Notwithstanding this fact that the requirements are no longer applicable, we note that, pursuant to Water Code Section 13264(a), the discharger may discharge wastes in the absence of requirements because more than 120 days have passed since it submitted its report of waste discharge.

Such discharges, however, will be at the risk of the discharger, and the Regional Board retains full authority to condition or even prohibit the discharge if necessary following completion of the EIR.[10/] Additionally, the Regional Board could, of course, take enforcement action at any time (14 C.A.C. §15108). Because the discharger may proceed with dairy operations without a permit, the Regional Board should complete the EIR and issue a permit in a timely fashion, and in any event, within six months.[11/]

III. CONCLUSIONS

1. The Regional Board should have prepared an EIR prior to adopting waste discharge requirements.

2. The Regional Board must reconsider the issuance of waste discharge requirements after completion of the EIR.

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10. The discharger has suggested that the Regional Board loses jurisdiction over the discharge after 120 days. This is nonsense. All discharges are privileges, not rights. (Water Code Section 13263(a).) The legislative history of the 120-day provision states that the "Regional Board could take as long as necessary to prescribe requirements, but could not prohibit the discharge pursuant to this section after expiration of 120 days until after issuance of the discharge requirements." (Final Report of the Study Panel to the California State Water Resources Control Board, March 1969, page 60.) If the discharger's argument that the project was deemed approved after 120 days were correct, the present discharge would be illegal pursuant to 15 C.A.C. Section 15054.1.

11. The Regional Board has expressed concern that this time period is too short. If the Regional Board feels, after three months, that it cannot complete the EIR within the six-month requirement, it shall report this fact to us. The report should outline why the deadline cannot be met and include a schedule of steps that will be taken to complete the EIR as soon as possible.

IV. ORDER

IT IS ORDERED that the Regional Board shall conduct an EIR for the Douma Desert Dairy.

DATED: November 18, 1982

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

/s/ L. L. Mitchell
L. L. Mitchell, Vice Chairman

/s/ Jill D. Golis
Jill D. Golis, Member

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

Voted No
Warren D. Noteware, Member