

Terry

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
PRUDENTIAL INSURANCE COMPANY OF)
AMERICA)
)
For Review of Order No. 86-90 of the)
California Regional Water Quality)
Control Board, San Francisco Bay)
Region. Our File No. A-460.)
)

ORDER NO. WQ 87-6.

BY THE BOARD:

On November 19, 1986, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Board) issued waste discharge requirements to Micro Power Systems, Inc., Fairchild Semiconductor Corporation, and Prudential Realty Group.¹ At issue was the cleanup of volatile organic chemicals found in the soil and ground water under a site used to manufacture, test, and assemble semiconductors. The site, located in the City of Santa Clara, is owned by Prudential and leased to Micro Power. Fairchild was the tenant immediately before Micro Power. All three businesses were named as dischargers in the Regional Board order and were required to perform various tasks according to a time schedule.

On December 12, 1986, Prudential filed a timely petition asking that its duties under the waste discharge requirements be distinguished from those of the other two dischargers.

¹ The name "Prudential Realty Group" appears in the Regional Board order and was used in the original petition. However, a request to correct the name to Prudential Insurance Company of America was received on January 21, 1987 and that name has been used in all matters concerning the petition since that date.

I. BACKGROUND

Prudential leased the site to Fairchild Semiconductor for ten years beginning in 1975. In March 1982, subsurface investigations detected low levels of volatile organic compounds in the soil and ground water beneath the site. A 1983 study concluded that the source of the contamination was off-site and upgradient. Other evidence places the source on-site. In December 1983, Prudential and Fairchild cancelled the remaining portion of the lease but Fairchild agreed to continue to be responsible for conducting the investigation on the site and to accept full liability for any cleanup. Prudential agreed to guarantee Fairchild full access to the property so that it could do what was necessary to handle the investigation and cleanup.

The following February, Prudential leased the property to Micro Power (which already held the lease on the adjoining parcel) for five years. The lease places the burden on Micro Power to comply with all hazardous waste and other laws and very specifically requires Micro Power to cooperate with Fairchild in Fairchild's effort to clean up the existing problem. So far as we can determine, that cooperative effort has worked well for the last three years.

Prudential is included in the Regional Board order merely because of its ownership of the property. There is no evidence that Prudential has ever contributed directly to the discharge.

II. CONTENTION AND FINDINGS

1. Contention: The petitioner raises only one issue. Although the petitioner conceded that it is proper to name a landowner as a discharger in a

cleanup and abatement order,² it argues that it is an abuse of the Regional Board's discretion and beyond its jurisdiction to require the landowner to meet the same deadlines as the other dischargers in conducting monitoring and completing investigative reports.

Based on the specific and unique facts of this case, we agree with petitioner's argument that it should only bear secondary responsibility for the cleanup. Those facts include: (a) the petitioner did not in any way initiate or contribute to the actual discharge of waste, (b) the petitioner does not have the legal right to carry out the cleanup unless its tenant fails to do so, (c) the lease is for a long term, and (d) the site investigation and cleanup are proceeding well.

The Regional Board order contains a time schedule for the submission of a number of technical reports. The first report was due on March 1, 1987 and the last is due on April 4, 1989. Remedial measures implementing recommendations contained in those reports are also contemplated in the time schedule.³ There is nothing improper about making the petitioner responsible for doing anything in the time schedule which the other responsible dischargers fail to do. But the logical fallacy in the Regional Board order has been identified by the petitioner. If Micro Power and Fairchild are to turn in a report on June 1, 1987, Prudential will not necessarily know until June 2 that

² Although the Regional Board order is entitled "waste discharge requirements", we will treat it as a cleanup and abatement order in this discussion and will modify its designation in our order.

³ We do not address the merits of the Regional Board order. Both Micro Power and Fairchild have filed petitions with us seeking review of the order. Both petitions are currently being held in abeyance at the request of the petitioners.

they have not done so. By then it will be too late for the petitioner to comply with the time schedule. Thus, in order for the petitioner to ensure that it does not violate the order, it will have to assume that there will be non-compliance on the part of both the other parties and comply independently. In view of its somewhat limited access to property, it will be very difficult for the petitioner to conduct the on-site tests needed to comply. Indeed, only if Micro Power breaches its lease by failing to cooperate with Fairchild or the Regional Board may Prudential reenter to make tests.

The difficult position into which the petitioner has been placed does not further any legitimate public purpose. The petitioner is named in the order and bears ultimate responsibility for everything in it. A more careful crafting of the Regional Board order would satisfy all concerned while protecting the public's interest in seeing that the pollution is cleaned up.⁴

The petitioner has asked that three references in the Regional Board order to "dischargers" be changed to refer only to Micro Power and Fairchild. One of those references is to the time schedule discussed above. By deleting the word "dischargers" and substituting the names of the other two parties, the petitioner would no longer be responsible for meeting the deadlines in the order. This will be done. However, it should be clear in the order that the petitioner must immediately step into the shoes of the other dischargers and fulfill the requirements of the order as soon as it is known that a deadline will not be met. Language will be added to the order giving the petitioner

⁴ This discussion responds to the petitioner's allegation that the Regional Board abused its discretion. We do not address the contention that the order was in excess of the Regional Board's jurisdiction.

sufficient time from the date of any non-compliance to carry out the order with regard to that task.

III. CONCLUSION

For the reasons discussed above, we conclude that the order of the Regional Board assigning exactly the same duties to all three dischargers is, under these limited circumstances, unfair. The Regional Board can, without undue difficulty or expense, set a slightly different standard of performance for a landowner where, as here, the tenants are primarily responsible for complying with the order and the landlord is restricted by lease conditions from overseeing the work until violations of the order have occurred. The order will be modified to reflect that distinction.

IV. ORDER

IT IS HEREBY ORDERED THAT:

The waste discharge requirements issued by the Regional Board in Order No. 86-90 are hereby amended as follows:

1. In paragraphs B.2., C.1, and C.2, the word "discharger" is deleted and the phrase "Micro Power Systems, Inc. and Fairchild Semiconductor Corporation" is inserted in its place.

2. In paragraphs B.2, C.1, and C.2, the following sentence is inserted:

"Within 60 days of the Executive Officer's determination and actual notice to Prudential Insurance Company that Micro Power Systems, Inc. or Fairchild Semiconductor Corporation has failed to comply with this paragraph, Prudential Insurance Company of America, as landowner, shall comply with this provision."

3. The Regional Board's order is hereby retitled "Cleanup and Abatement Order."

CERTIFICATION

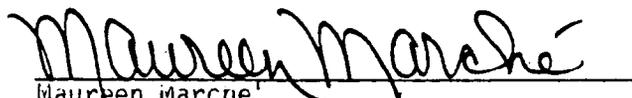
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 18, 1987.

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

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

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Based on the specific and unique facts of this case, we agree with petitioner's argument that it should only bear secondary responsibility for the cleanup. Those facts include: (a) the petitioner did not in any way initiate or contribute to the actual discharge of waste, (b) the petitioner does not have the legal right to carry out the cleanup unless its tenant fails to do so, (c) the lease is for a long term, and (d) the site investigation and cleanup are proceeding well.

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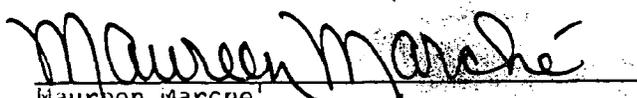
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certify that the foregoing is a full, true, and correct copy of an order duly
and regularly adopted at a meeting of the State Water Resources Control Board
held on June 18, 1987.

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

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marcie
Administrative Assistant to the Board