

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of
the Department of Fish and Game
for Review of Order No. 74-05
(NPDES No. CA0001465) of the
California Regional Water Quality
Control Board, Central Coast
Region

Order No. WQ 74-15

BY THE BOARD:

The Department of Fish and Game (petitioner) has submitted a petition to the State Water Resources Control Board (State Board), requesting review of Order No. 74-05 adopted by the California Regional Water Quality Control Board, Central Coast Region (Regional Board) on March 8, 1974. Order No. 74-05 sets revised waste discharge requirements for the Standard Oil Company of California (discharger) at its Estero Bay facilities, San Luis Obispo County.

I. BACKGROUND

As a part of its Estero Bay operations, the discharger pumps ballast waters from oil tankers at Estero Bay ashore to certain detention ponds located adjacent to Toro Creek. After settling and skimming, these waste waters are eventually discharged to Toro Creek at a point approximately one-quarter mile from the Pacific Ocean.

The discharge had been subject to waste discharge requirements, the most recent requirements having been issued on October 17, 1969. As a part of the NPDES permit program, revised waste discharge requirements were scheduled for hearing before the Regional Board on March 8, 1974. At that time, after an extended hearing, the Regional Board adopted Order No. 74-05.

II. THE HEARING AND EVIDENCE

The discharge in question has continued for approximately 43 years at its present location. Volumes of discharge are increasing. At the hearing on March 8, 1974, the staff of the Regional Board proposed waste discharge requirements for this discharge which were considerably more stringent than those previously applicable to the discharge. The new constituent requirements would take effect on January 1, 1975, and until that date the discharger would continue to be subject to prior requirements. The proposed requirements also called for complete termination of the discharge to Toro Creek by January 1, 1978.

Prior to the hearing, under date of February 28, 1974, petitioner had submitted a letter to the Regional Board recommending that this discharge be prohibited. The letter recommendation of petitioner was received on March 4, 1974. Petitioner participated extensively in the hearing before the Regional Board. The petitioner stated its opposition

to the discharge of saline waters to Toro Creek, a freshwater stream, which petitioner felt might interfere with steelhead migration. Petitioner further contended that the discharge might cause pollutional problems unrelated to salinity. Petitioner indicated that the problem with the outfall was first noticed in approximately July of 1973 in connection with a survey of coastal creeks. The inspection indicated that there were large numbers of juvenile steelhead trout immediately above the outfall and none below the outfall. The local warden was notified, samples were taken, and the discharger was cited for pollution, eventually paying fines and being placed on probation. Other samples were taken in January of 1974, and bioassays, taken at various unspecified times, have indicated that the effluent may be toxic to saltwater acclimated fish. The petitioner indicated its position that this discharge was interfering with steelhead migration and creating an environment below the outfall which was adverse to steelhead and bottom fauna. The petitioner did indicate that no actual observation of a fish kill had been made.

The discharger testified, in substance, that it was aware that the requirements were being made more stringent, that certain improvements would be required to meet the new requirements and that it was willing to meet the new requirements. The discharger further testified that a project which would eliminate the discharge to Toro Creek had been in progress for some time and that new facilities

conceivably could be completed in 1975.¹ This project, as presently conceived, would generally consist of construction of a Monobuoy, treatment plant and associated outfall. Emphasis was placed by the discharger on the fact that it had been discharging at the same location with what the discharger characterized as "very little problem" for 43 years.

Upon completion of the hearing, the Regional Board adopted Order No. 74-05 as proposed by staff, with the exception that the date for termination of the discharge to Toro Creek was advanced from January 1, 1978, to January 1, 1976.

III. CONTENTION AND FINDINGS

The contention made by petitioner can be simply stated. On the basis of the evidence presented at the hearing on March 8, 1974, the petitioner contends that the action of the Regional Board in adopting Order No. 74-05 was inappropriate and that the discharge should be immediately prohibited.

-
1. There is considerable conflict in the record concerning the appropriate date when new facilities can be completed which would eliminate the discharge. Although, the discharger did, at one point in its testimony, indicate possible completion of new facilities in 1975, other testimony of both the discharger and the Regional Board staff indicates a probable completion date during 1977. The Regional Board ultimately selected a termination date of January 1, 1976.

At the outset, we should point out that the Regional Board agreed with the petitioner that the discharge should be terminated. We concur. It seems abundantly clear from the records of the Regional Board that the discharge of large quantities of saline waters to a freshwater portion of Toro Creek is adversely and substantially affecting the beneficial uses of waters of Toro Creek. Periodically, it appears that, due to failure in the treatment process, an effluent excessively high in hydrocarbons is discharged to Toro Creek and that this discharge may be toxic to fish life in the area. Generally speaking, the evidence tendered to the Regional Board is more than sufficient to justify the conclusion that the discharge interferes with steelhead migration, is adverse to bottom fauna below the discharge, and is thereby unreasonably affecting the beneficial use of Toro Creek for preservation and enhancement of fish. There seems to us to be ample justification to prohibit this discharge at its present location.

However, while petitioner presented ample evidence in support of an order to prohibit this discharge, the petitioner did not present any satisfactory evidence which would require or justify an order from the Regional Board to terminate the discharge immediately as the petitioner now requests. While we are not satisfied that the discharge has been as trouble free as the discharger indicated during the hearing, we are also not satisfied that the evidence of petitioner indicates the type of situation justifying an order to immediately terminate the discharge.

The evidence indicates that the discharge has continued at its present location for 43 years. It was not until 1973 that the petitioner noted any difficulty with the discharge. While there was evidence that the discharge was, at least at times, toxic to fish, there was no evidence that a discharge which actually complied with waste discharge requirements of Order No. 74-05 would be toxic in any degree. Despite the long duration of the discharge, there apparently is no evidence of any actual fish kills from the discharge. There was evidence of some probable impairment of steelhead migration and spawning. At the same time, it is obvious from the evidence that the discharge does not actually preclude either migration or spawning of steelhead. In short, we are faced with evidence which shows both a threatened and an actual impairment of beneficial uses in Toro Creek, but fails to establish that degree of impairment which would present an appropriate basis for immediate termination of the discharge.

We recognize that the duration of the discharge does not create any vested right to continue the discharge, even where the discharge has been made under waste discharge requirements which have permitted a discharge to continue. [Water Code Section 13263(g)]. Water quality standards and possible beneficial uses change, and, of course, enhancement of state waters is an important objective of both state and federal water quality programs. To achieve program objectives, it will be necessary from time to time to totally prohibit some discharges which have previously been allowed.

At the same time, however, we also recognize the fundamental requirement that action by an administrative agency must be "reasonable". Where a discharge has been permitted and waste discharge requirements adopted for that discharge, and where subsequent circumstances make it necessary to prohibit and terminate the discharge, we have consistently recognized the principle that the discharger must be given a "reasonable" time to provide for termination of the discharge. It is true that in appropriate circumstances, for example where public health considerations so require, the "reasonable" time may mean immediately. In other words, the circumstances may be such that the public interest is so drastically affected that the discharge must be immediately terminated regardless of the economic or social impacts which may flow from such termination. (See for example, Reserve Mining Company v. United States, 6 ERC 1449; 1609).

In this particular case, however, the record simply does not sustain such drastic action. Given the facts already recited, we cannot find that the public interest is so drastically affected, or likely to be affected, by a continuation of the discharge for the period of time necessary to eliminate it in an orderly manner that the discharger should be deprived of a reasonable time to provide for the termination. There is certainly no indication of any likely irreparable damage as a result of continuation of the discharge for the limited time permitted, particularly under the more restrictive

requirements which will apply after January 1, 1975. The Regional Board has required elimination of the discharge at the earliest possible date indicated by any of the evidence presented to it.

We would add that the record does disclose the possibility of inadequate treatment by the discharger resulting in the discharge of a toxic effluent. It goes almost without saying that the discharger should be required to strictly adhere to the interim requirements applicable to the discharge so as to minimize any adverse impact from the discharge pending its elimination.

IV. CONCLUSIONS AND ORDER

Having considered the contentions of the petitioner, and the records of the Regional Board, we conclude as follows:

1. The action of the Regional Board in adopting Order No. 74-05 was appropriate and proper.
2. Appropriate steps should be taken to minimize adverse impacts from this discharge pending its elimination.

IT IS HEREBY ORDERED that:

1. The petition of the Department of Fish and Game be, and it is, denied.
2. The Regional Board shall closely review monitoring data relative to the discharge of Standard Oil Company to Toro Creek, and shall otherwise take all necessary steps to assure that the applicable constituent limits of Order No. 74-05 are met by the discharger to minimize any adverse impacts from this discharge pending its elimination.

3. The Regional Board shall require the discharger to submit appropriate technical reports, including detailed time schedules, setting forth the manner, means, and actions which will be taken by the discharger to terminate the discharge to Toro Creek within the time required by applicable waste discharge requirements, and shall take all appropriate steps to assure that the schedule of compliance is met by the discharger.

4. No later than January 1, 1975, the Regional Board shall submit a detailed progress report to the State Board regarding the status of compliance with the time schedule.

Dated: **SEP 19 1974**

W W Adams

W. W. Adams, Chairman

Ronald B. Robie

Ronald B. Robie, Vice Chairman

Roy E. Dodson

Roy E. Dodson, Member

Mrs. Carl H. Auer

Mrs. Carl H. (Jean) Auer, Member

ABSENT

W. Don Maughan