

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
FRANK COBB and)
SANDYLAND NURSERY COMPANY, INC.)
)
For Review of Order of Administrative)
Civil Liability No. 88-21 of the)
California Regional Water Quality)
Control Board, Central Coast Region.)
Our File No. A-522.)
_____)

ORDER NO. WQ 89-3

BY THE BOARD:

On January 8, 1988, the California Regional Water Quality Control Board, Central Coastal Region, adopted Order No. 88-21 imposing an administrative civil liability (ACL) against Petitioner in the amount of \$50,000, half of which was due in 30 days, and the other half due only if Petitioner failed to complete specified modifications to its operation by February 23, 1988. On February 5, 1988, Petitioner filed a timely petition seeking review of the order. The Regional Board submitted a response on July 19, 1988. A response was also submitted by David H. Henderson, counsel for the Sandyland Protective Association.

I. BACKGROUND

The Sandyland Nursery Company (Sandyland, hereinafter) is located on an 18-acre site along the California coastline in Carpinteria. It was established in 1965 by its president and owner, Frank Cobb. Sandyland grows chrysanthemums which it sells throughout the U.S. and Canada for resale by large grocery

chains. The flowers are grown in six large greenhouses which occupy some 14 acres at the site. The nursery receives water for its operation from the Carpinteria Water District. Fertilizers and pesticides are added to the water which is piped to the plants and applied automatically by individual emitters. Plants are positioned over trays which collect used water.

Sandyland receives some 85,000 gallons of water per day (gpd) from the District to use in its operations. Much of the water is consumed in the growing process. However, an uncertain amount of used water -- which cannot be reused and is therefore considered to be wastewater by Sandyland -- must be discharged. Under an industrial waste discharge permit issued by the Carpinteria Sanitary District, Sandyland is authorized to discharge up to 6,000 gpd to its sewer connection. Additionally, Sandyland is able to transfer up to 20,000 gpd to its neighbor, Robert C. King grower-shipper, where it is reused. The transfer is made through a pipe that exits the Southwest corner of the Sandyland site and enters King's property. Regional Board staff determined from the neighbor that, because of an overabundance of water in its own operation, there are many occasions when King cannot accept any of Sandyland's wastewater, requiring Sandyland to make alternative disposal plans. Staff estimates that Sandyland must dispose of a daily average of 30,000-40,000 gallons of wastewater.

During the twelve-year period preceding the events that are the substance of this petition, Sandyland's discharges have

been the subject of numerous complaints and have led to three previous Regional Board enforcement actions. In August, 1976, James Powers -- a neighboring resident who owns some 700 feet of beachfront, including the area where Sandyland's discharges have been observed entering the ocean -- reported to the Regional Board that Sandyland was unlawfully discharging into the Pacific Ocean, resulting in death to beach animals as the wastewater flowed over the beach and into the ocean. The Regional Board communicated this and other similar complaints to Sandyland over the course of the following year.

Beginning May, 1979 the Regional Board began receiving reports that Sandyland was discharging wastewater into nearby Carpinteria Marsh. A November, 1981 Department of Fish and Game study concluded that the discharges were adversely affecting the marsh. In February, 1982, the Regional Board issued a Cleanup and Abatement Order against Sandyland for those discharges. In response, Sandyland proposed hookup to the Sanitary District for discharge of its wastewater. Sandyland failed to comply with time limits set forth in the Cleanup and Abatement Order for Sanitary District hookup, and the Regional Board found it necessary to issue a second Cleanup and Abatement Order in August 1983. In response to this Cleanup and Abatement Order, Sandyland on November 2, 1984 submitted plans to continue its ocean discharges rather than to connect to the sewer. At that point, the Regional Board notified Sandyland that the matter was being transferred to the Attorney General's Office. In apparent

response to that notification, Sandyland began discharging to the sewer in December, 1984.

Again in April, 1986, Sandyland was found to be discharging into Carpinteria Marsh. The Regional Board responded with an ACL in the amount of \$20,000, \$5,000 due immediately and \$15,000 suspended. Discharges into the marsh ceased and Sandyland was not required to pay the additional \$15,000.

This petition concerns eight separate discharges which originated at the Southwest corner of the Sandyland property. The discharges occurred on the following dates in 1987: January 29, July 26, July 27, August 2, August 22, August 29, October 2, and October 18. Each of the discharges was determined by the Regional Board to consist of a release of approximately 6,500 gallons. In each instance, flows were observed running out of a drainage culvert onto the beach and into the ocean. The culvert originates at a flood control canal near Sandyland and runs beneath U.S. 101, Santa Claus Lane, and a set of railroad tracks and empties at the beach. Excess flows from Sandyland's Southwest corner drain into the flood control canal and flow through the culvert onto the beach.

January and July Discharges

These three discharges were reported to the Regional Board by Mr. Powers. He testified at the ACL hearing that he had observed wastewater discharges from Sandyland some 100 times during non-rain periods between June 1986 to January 8, 1988 (date of hearing), six of which he had personally traced back to

Sandyland. He further testified that he had taken photographs of dead sand crabs on the beach in the discharge flows; that he had complained to Sandyland on numerous occasions; and that he had not observed dead crabs in rainwater (fresh water) flow at the beach. Powers testified that on January 29, 1987 he saw hundreds of dead crabs in the beach flows. He reported this incident to the Regional Board on the same day.

Powers observed another discharge on July 26, 1987 which he reported the next day. On the evening of July 27, Regional Board staff inspected the site, finding that turbid water was flowing from a pipe at the Southwest corner of Sandyland into the flood control channel, continuing through the culvert and flowing out of the culvert onto the beach and into the ocean. Staff sampled the flow and found that the wastewater contained 370 mg/liter nitrate and 17 mg/liter ammonia. The Regional Board heard evidence that un-ionized ammonia is acutely toxic to aquatic life and other organisms at concentrations as low as .083 mg/liter. Pesticides in the wastewater flow can be expected to cause additional detrimental effects to living organisms.

August and October Discharges

On August 3, 1987, the Regional board received another complaint from Al Rivera, the owner of a restaurant located on Santa Claus Lane near the beach, that he had observed a discharge from the culvert on August 2. He testified that he had observed further similar discharges from the culvert during non-rainy

weather on August 22 and 23, all three of which he personally traced back to the Southwest corner of Sandyland's property. In addition to these, he also observed Sandyland discharges in March, April, July, and October of 1987. He testified that he observed numerous dead crabs in the discharge of October 2 and that a large number of birds were feeding on the dead crabs. He described the October 18 flow as "turbid, with algae-like substance, orange, sometimes clear."

On October 21, 1987, the Regional Board issued Cleanup and Abatement Order No. 87-192 concerning the five discharges that occurred in July and August. The January release and the two October discharges were not included in the Cleanup and Abatement Order.¹ A few days later, on November 4, 1987, the Regional Board issued ACL Complaint No. 87-04 and set a hearing for December 4, 1987. Sandyland requested a postponement of the hearing, which the Regional Board granted. It thereupon rescinded 87-04 and reissued the complaint as No. 87-07, setting a hearing for January 8, 1988. Following the hearing, the Regional Board adopted Order for Civil Liability No. 88-21.

¹ According to the Regional Board, the three discharges of January 27, October 2 and 18 were not included in the Cleanup and Abatement Order of October 21 because, at that time, staff were aware of the five earlier discharges and became aware of the other three discharges only after the order had already been prepared and was ready to issue. The office determined that rather than wait until the order could be amended and new backup material prepared, it was preferable to immediately issue the Cleanup and Abatement Order in order to deter further Sandyland discharges.

Section 13304, liability shall be imposed as follows:

"(1) Civil liability may be administratively imposed by a regional board pursuant to Article 2.5 (commencing with Section 13323) for a violation of this section in an amount which shall not exceed five thousand dollars (\$5,000) for each day in which the discharge occurs and for each day the cleanup and abatement order is violated.

* * *

"(e) When there is a discharge, and a cleanup and abatement order is not issued pursuant to Section 13304, liability shall be imposed as follows:

"(1) Civil liability may be administratively imposed by a regional board in accordance with Article 2.5 (commencing with Section 13323) for a violation of this section in an amount which shall not exceed ten dollars (\$10) for each gallon of waste discharged."

The plain language of Section 13350 clearly provides the Regional Board with authority to impose the ACL in the manner that it did. Section 13350(d) applies to discharges for which a CAO has been issued and (e) applies to those discharges where a CAO has not been issued. The Legislature's intent in formulating the alternative ways of calculating an ACL was to give the Regional Boards a great deal of latitude to decide how to apply ACLs in a myriad of possible scenarios. Maximizing this latitude gives the Regional Boards needed flexibility to deal with individual cases. A lower assessment is appropriate as to those discharges for which a CAO has been issued because they presumably threaten lesser environmental damage. A higher

assessment is justified, conversely, for those discharges which are not subjected to cleanup.

In this case, Sandyland actually benefitted by the issuance of a CAO even though its discharge was not actually susceptible to cleanup. Sandyland's argument seeks to extend this benefit to the other three discharges. Under the plain language of subsections (d) and (e), however, the Regional Board could have decided not to issue a CAO on the five discharges and instead could have applied Section (e) to all eight, resulting in a maximum ACL of over \$500,000 and presumably a much higher final ACL.

The Regional Board explains that the distinction in treatment of the discharges was reasonable and based on a desire to move as quickly as possible to prevent further unlawful discharges by Sandyland. Petitioner does not claim that any evidence contradicts this assertion. Its argument, then, boils down to an assertion that since these discharges could have been included in the CAO, they should be treated as if they were.

If we were to construe the subdivisions as Petitioner suggests, subdivision (e) would have no purpose. This is so because other discharges can be amended into a CAO at any time during the proceeding. That is, discharges occurring after or before the issuance of a CAO and before a hearing always "could have been" included in the CAO. If so, then subsection (e) would never apply. Clearly, the Legislature did not intend that we interpret the subsection in such a manner. We conclude that the

Regional Board was authorized to distinguish between the discharges based on whether they had been included in the CAO, as the plain language of the statute sets forth.

Furthermore, we reject Petitioner's argument that subsection (e) should apply only to oil, petroleum, or hazardous waste discharges. Had the Legislature intended that result, it could have said so. No such distinction is made in the statute.

Petitioner argues that subsection (e) is applicable to dischargers against whom a higher liability is necessary to "coerce" them into compliance or to compensate the State for environmental damage. Citing State of California v. City and County of San Francisco, et. al., (1979) 94 C.A. 3d 522 and People ex rel Younger v. Superior Court, (1976) 16 Cal. 3d 30, Petitioner argues that (1) its discharges resulted in "minimal" environmental harm and (2) Sandyland needs no "coercion" to comply with requirements imposed on it.² The evidence is against Sandyland on both counts.

Although the impact of its discharges is unquantifiable, there is no basis to conclude that it was "minimal". To the contrary, there was evidence of extensive sand crab kills. Moreover, the effect on the environment must be

² In the San Francisco case, the Court of Appeal held that the maximum penalty which could be imposed for the discharge of raw sewage under Section 13385 was \$1,000 per day, regardless of the number of discharge points. In the Younger case, the California Supreme Court held, among other things, that under Section 13350, civil liability could only be imposed for the number of days that oil was discharged into the Oakland Estuary and not for the number of days that oil remains in the water.

measured, in addition to the crab mortalities, in terms of the potential effect of the discharges on other intertidal life forms and on the predictable carry-over effect from the fact that some of the dead crabs were observed to be eaten by birds, indicating an effect on the food chain. Furthermore, the history of Sandyland's repeated discharges and its remarkably slow response to complaints and enforcement actions concerning the discharges going back to 1976 clearly conflicts with its argument that it need not be encouraged into compliance with State and Federal laws. The ACL imposed by the Regional Board serves the purposes of encouraging compliance with the CAO and serves as a reminder of the consequences of future unlawful discharges.

B. The Regional Board's Exercise of Discretion

In reviewing this question, we keep in mind the principle that the regional board's judgment is entitled to considerable deference and we will only disturb its decision when it is clear from the record that the regional board has abused its discretion. Section 13350 gives the regional boards substantial discretion in order to attain the dual objectives of discharge cleanup and deterrence of further discharges. The record before us demonstrates a proper exercise of that discretion.

Petitioner's arguments are that (1) All eight discharges should have been included in the CAO; (2) Subsection (e) applies only to more serious types of discharges; (3) Sandyland's discharges minimally affected the environment;

- (4) There is no need to coerce it to abate the discharges;
- (5) Staff should have contacted Sandyland about the July, 1987 discharge, allowing Sandyland to reduce its costs.

The first two arguments have been previously discussed and rejected. Regarding the degree of the effect on the environment, that question was within the Regional Board's discretion to determine. It had before it, among other things, the direct evidence of dead sand crabs on the beach. As to the need to coerce Sandyland to abate its discharges, the record demonstrates that, contrary to Sandyland's argument, it was indeed necessary to resort to formal enforcement actions in order to gain its cooperation to control the discharges. Several years of complaints and enforcement actions against Sandyland amply support this observation. Finally, Sandyland argues that the Regional board staff should have apprised Sandyland at the time of the July discharges so that it could reduce its liability. However, given the extensive history of communications in the past, evidence of direct complaints by Powers and Rivera, and the fact that Sandyland was solely responsible for determining where its excess discharges were going, we are persuaded that the Regional Board acted appropriately. We conclude that the Regional Board did not abuse its discretion by applying both sections (d) and (e) in determining the amount of the ACL.

2. Contention: Petitioner next contends that the Regional Board incorrectly applied the Section 13327 factors in determining the final assessment.

Finding: Section 13327 provides in relevant part as follows:

"In determining the amount of civil liability, the regional board, and the state board upon review of any order pursuant to Section 13324, shall take into consideration the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require."

In our review of the record we will not second-guess the Regional Board's determination. If we are able to find facts that relate to the factors, we will assume that the factors were considered by the Regional Board and unless the record demonstrates a clear abuse of discretion in the application of the Section 13327 factors, we will not disturb the Regional Board's determination.

Petitioner asserts that the Regional Board failed to properly apply several of the nine factors. It points to a work sheet attached to the ACL complaint which lists and discusses various, but not all, of the nine factors. With regard to "nature, circumstances, extent and gravity," Petitioner faults the worksheet because it discusses Sandyland's past violations, which should be listed under "history of violations." However, the record in this matter is replete with references to facts concerning the nature, circumstances, extent, and gravity of the discharges, including evidence of numerous complaints about the

discharges and the thousands of dead crabs spotted on the beach. While it would be helpful on review, it is not necessary that the Regional Board's complaint display these factors in any particular fashion.

Petitioner next faults the worksheet for failure to discuss "susceptibility to cleanup and abatement," and "economic savings." Like the first factor, however, there are numerous references in the record, either in staff reports or the minutes of the hearing, citing information concerning these factors. Where it is not possible to find specific facts, it is clear that the Regional Board was able to make inferences about these factors from other facts. For example, it is reasonable to infer that Sandyland's discharges are not susceptible to cleanup because the flows, once in the ocean, can no longer be controlled and the many dead crabs have been killed.

Furthermore, as to voluntary cleanup and abatement, it is also clear from the record that, at the Regional Board's urging, Sandyland has made some efforts to abate -- that is, to cease or control -- the discharges by installing several holding tanks and by obtaining the permit to discharge into the Sanitary District. It is equally clear, too, that Sandyland has made no effort to clean up -- that is, to reverse the detrimental effects of -- its discharges. As to culpability, it is reasonable to infer that given the past history of discharges from the same point and the fact that Sandyland is in sole control of wastewater releases from that point, Sandyland was solely

culpable for the discharges. Finally, it is reasonable to infer from the facts that Sandyland enjoyed some undetermined economic savings by failing, over the course of several years, to control its discharges by, for example, paying the Sanitary District for a greater volume discharge.³

We are satisfied that the record fully supports the Regional Board's application of the Section 13327 factors.

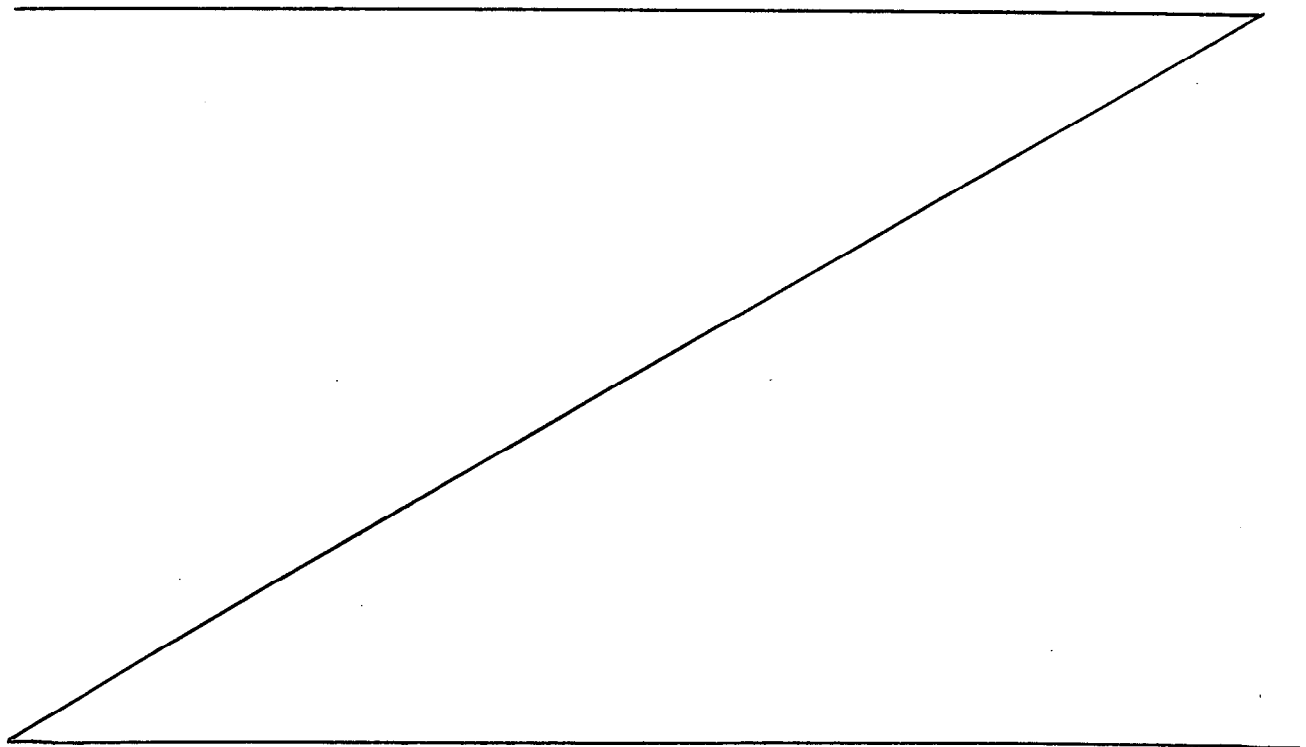
3. Contention: Petitioner asserts that the Regional Board failed to show that the discharges were toxic or had a significant impact on the waters of the State.

Finding: Petitioner asserts that Regional Board Staff Counsel advised the Board at the hearing that, in order to apply Section 13350(e), it had to find that the discharged material was toxic. Since toxicity was not proved, the Regional Board could not justify application of Section 13350(e) to the discharges, according to Petitioner. Our review of the hearing record in this matter, including the written minutes of the meeting and audio tape recording, reveals no such statement by staff counsel. Instead, the record discloses that counsel advised the Board that subsection (e) was applicable if pollution or nuisance are

³ A workshop meeting on this matter was held before the State Board on March 1, 1989 pursuant to Title 23 California Code of Regulations, Section 2066. At that time, Petitioner's Counsel stated that he had confidential financial documents relating to Petitioner's ability to pay the assessment. However, Petitioner failed to comply with the requirements of Section 2066(b) regarding the introduction of documents and also failed to actually submit the documents for introduction into the record. Accordingly, the documents are not part of the record in this matter and were not considered by the State Board.

present. (Meeting Minutes, January 8, 1989, Page 24.) Clearly, the record supports a finding of both pollution and nuisance.

Finally, Petitioner asserts that a witness testified that sand crabs die in fresh water as well as irrigation wastewater. Our review of the record discloses that the testimony is directly to the opposite effect. The witness was asked both by staff and by Petitioner's counsel at the hearing whether he had observed dead crabs during times of storm run off in his several years of observing Sandyland's discharges. The witness responded both times that he had not. (Meeting Minutes, January 8, 1989, Pages 17 and 20. We conclude that the Regional Board met the required burden to show pollution and nuisance.



III. CONCLUSIONS

The Regional Board acted appropriately in imposing the administrative civil liability against petitioner.

IV. ORDER

The petition is hereby dismissed.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of the order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 16, 1989.

AYE: W. Don Maughan
Darlene E. Ruiz
Eliseo M. Samaniego
Danny Walsh

NO: None

ABSENT: Edwin H. Finster

ABSTAIN: None


Maureen Marche
Administrative Assistant to the Board