STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of SAN DIEGO UNIFIED PORT DISTRICT For Review of Cleanup and Abatement Order No. 85-91 and Stay of Addendum No. 3 of the California Regional Water Quality Control Board, San Diego Region. Our File No. A-614.	ORDER NO. WQ 89-12

BY THE BOARD:

On February 27, 1989, the California Regional Water Quality Control Board, San Diego Region (Regional Board) adopted Addendum No. 3 to Cleanup and Abatement Order No. 85-91, which added the San Diego Unified Port District (Port District) as a responsible party to Order No. 85-91. On March 29, 1989, the Port District filed a timely but incomplete petition for review of the Addendum No. 3 and requested a stay of the Addendum. On April 14, 1989, the Port District supplemented the petition. The Port District contends that it should not be named in the Order or, in the alternative, that it should be named as a secondarily liable party. Because this Order resolves the issues on the merits, this Board will not address the stay request.

I. BACKGROUND

In March 1978, Paco Terminals, Inc., entered into a lease agreement and terminal operator agreement with the Port District. Under these agreements, Paco was authorized to conduct copper ore handling, storing, and loading activities at the Port District's 24th Street Terminal in San Diego. The lease agreement granted Paco exclusive use, for a 10-year period, of 100,000 square feet of the terminal where it unloaded and stored copper ore. The terminal operator agreement granted Paco a non-exclusive right to use the last 120 feet of the pier face for its ship loading operations. The agreements required Paco to comply with all federal and state laws. (Lease Paragraph 17, Terminal Agreement Paragraph VIII). The agreements also required Paco to indemnify the Port District from any damage arising from use and operation of the premises. (Lease Paragraph 20, Terminal Agreement Paragraph VII). For several years, Paco rented on an hourly basis a container crane from the Port District which it adapted for its use with a clamshell bucket for bulk loading copper ore.

Prior to the agreements and at the request of the Port District, Paco provided information to the Port District for preparation of an environmental assessment of Paco's proposed operations in compliance with the California Environmental Quality Act. The environmental assessment concluded that there would be no significant impacts on the environment from the operation, but identified mitigation measures to prevent copper discharges to the Bay.

On March 1, 1978, the Port District notified the Regional Board of Paco's proposed operations. On March 10, 1978, the Regional Board informed the Port District that it needed to obtain a National Pollutant Discharge Elimination System (NPDES) permit for Paco's operations. The Port District states that it misfiled the letter and did not inform Paco of the requirement for the NPDES permit. Paco began operations in March 1979 and on March 20, 1979, the Regional Board visited the site and observed three modes of discharge to the Bay -- airborne, waterborne, and direct discharges. The Regional Board sent a letter in April to the Port District concerning the need for an NPDES permit. The Port District, in turn informed Paco of the need for the permit and requested that Paco respond to the Regional Board's letter. While there appeared to be a dispute between the Port District and Paco concerning who should be named in the NPDES permit, the Regional Board utltimately issued the permit to Paco and not to the Port District (Waste Discharge Requirements Order No. 79-72, NPDES Permit No. CA0107930, November 26, 1979).[1]

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1 The federal regulations concerning NPDES permits do not specify who must be named in a permit, only who must apply and obtain the permit. See 40 CFR Section 122.21(b). That section, which is applicable to state programs, states:

> (b) Who applies? When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit.

The section does not preclude the Regional Board from naming the landowner in the permit, but does specifically require the operator (i.e., Paco) to obtain the permit.

The permit required Paco to follow a best management practices plan to prevent the discharge of copper ore to San Diego Bay. The plan, as approved by the Regional Board, required Paco to cover the storm drains with water filtration material to prevent discharge of copper through the drains; to cover stockpiles with polyethylene material; to use water trucks for dust control during loading; and to clean the loading area after each use. In 1983 and 1984, the Regional Board found elevated levels of copper in the sediment of the Bay near Paco's operation. On November 26, 1984, the Regional Board renewed the permit (Order No. 84-50), with new provisions to prevent discharges during loading operations.

In 1985, after a compliance inspection identified copper discharges to the Bay, the Regional Board issued Cleanup and Abatement Order No. 85-91, naming Paco as the responsible party. The Order concluded that the increased copper concentrations in the Bay were due to inadequate implementation of the best management practices plan and/or inherent weaknesses in the plan. In 1988, the Executive Officer issued a complaint for administrative civil liability of $200,000.00 against Paco for violations of the Cleanup and Abatement Order and the waste discharge requirements. (Complaint No. 88-58.) Paco settled the complaint by paying administrative civil liability of $50,000.00 and agreed to conduct further studies of the contamination.

Addendum No. 1 to Cleanup and Abatement Order No. 85-91, issued November 13, 1987, established a compliance schedule and cleanup standards and Addendum No. 2, issued November 29, 1988, altered the compliance schedule. The Port District did not participate in any of these proceedings.

Paco ceased operations on the site in December 1986 and its lease and terminal agreement with the Port District terminated in January 1988. Paco has substantially complied with Order No. 85-91 and Addenda. However, discharges of copper may be continuing to occur from the storm drains at the area where Paco operated.

On September 1, 1988, after unsuccessfully making a claim for response costs to the Port District under the Government Claims Act, Paco requested that the Regional Board add the Port District as a primarily responsible party to Order No. 85-91. On February 27, 1989, the Regional Board issued Addendum No. 3 to Order No. 85-91 adding the Port District as a responsible party. The Port District submitted a timely petition contesting the Addendum.

II. CONTENTIONS AND FINDINGS[2]

1. Contention: The Port District (petitioner) contends that it is improper to name it as a party to Order No. 85-91 because its involvement was entirely passive.

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2 Other contentions raised by petitioners are denied for failure to raise substantial issues. 23 CCR Section 2052(a)(1); People v. Barry, 194 Cal.App.3d 158, 239 Cal.Rptr. 349 (1987).

Finding: Section 13304 of the Water Code (Porter-Cologne Water Quality Control Act) authorizes the Regional Board to issue a cleanup and abatement order to:

> "any person . . . who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be discharged into waters of the state . . ."

The question is whether the Port District "caused or permitted" the copper to be discharged to the Bay. There is no question that the Port District permitted the discharges to occur. This Board has consistently taken the position that a landowner who has knowledge of the activity taking place and has the ability to control the activity, has "permitted" the discharge within the meaning of Section 13304. In such case, we have concluded that it is appropriate to hold the landowner responsible for the discharges which it permitted.[3]

There is ample evidence in the record to support the Regional Board's conclusion that the petitioner should be a

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3 See, e.g., Order No. WQ 86-18 (Vallco Park, Ltd.), Order No. WQ 86-15 (Stuart Petroleum), Order No. 86-11 (Southern California Edison Company), Order No. WQ 86-2 (Zoecon Corporation), in which we upheld the decision of the Regional Board to name in waste discharge requirements or cleanup and abatement orders the owner of the land on which the discharge occurred. In each case, the landowner did not take an active role in the discharge but, in each case, the landowner was in a position to prevent the discharge and knew or should have known that the discharge was taking place. See also State Board Orders Nos. WQ 89-1, 87-5, 87-6, 86-16, and 84-6; Memorandum, dated May 8, 1987, from William R. Attwater, Chief Counsel, to Regional Board Executive Officers, entitled "Inclusion of Landowners in Waste Discharge Requirements and Enforcement Orders".

responsible party. It is undisputed that the Port District owned the portion of the 24th Street Terminal leased to Paco and that it owned the 120 feet portion of the pier Paco was authorized to use for its loading operation under the terminal agreement. In addition, under the San Diego Unified Port District Act, California Harbors and Navigation Code, Appendix I, the Port District also owns a portion of the tidelands and submerged lands underlying the inland navigable waters of San Diego Bay adjacent to the 24th Street Terminal that are contaminated. See Sections 5 and 14 of the Act.

The Port District concedes and the record verifies that the Port District knew of the potential for discharge of copper ore to San Diego Bay from Paco's activities. The Environmental Assessment prepared prior to execution of the lease agreement identified the possibility of run off of copper concentrate into San Diego Bay. The Environmental Assessment also identified measures to be implemented, "if deemed advisable by the appropriate authorities," including the use of tarpaulins, timber barriers, and a strainer device around the storm drains to prevent run off to the Bay. In addition, the Regional Board informed the Port District on two occasions of the potential for a discharge of copper ore to San Diego Bay and requested that the Port District file an application for an NPDES permit. Prior to the lease the Port District and Paco discussed Paco's experience in handling the bulk loading of copper ore and the possibility of contamination.

The record also indicates that the Port District had the ability to control activities under the lease agreement and the terminal agreement. The agreements between Paco and the Port District required Paco to "abide by and conform to . . . any applicable laws of the State of California and Federal Government . . . ." Lease Paragraph 17, Terminal Agreement Paragraph VIII. Paco was also required to keep the leased premises in a clean and sanitary condition, free and clear of waste. The Port District had the right to enter and inspect the leased premises at any time during normal business hours. In addition, the lease authorized the Port District to terminate the lease, after 60 days written notice, if Paco defaulted in the performance of these provisions.[4] The Port District also retained the right to enter and inspect the premises during ordinary business hours. The terminal agreement could be cancelled by either party giving 30 days notice to the other party.

The record does not resolve the question whether the Port District "caused" the discharges within the meaning of Section 13304. Both the Port District and Paco provide

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4 The lease agreement also required Paco to return the property at the end of the lease in as good condition as the premises were at the date of the lease. Lease Paragraph 29.

conflicting information concerning control of and discharges from the container crane on the pier and the storm drains inlets on the leased premises.[5] However, because we have determined that the Port District permitted the discharges it is not necessary to determine whether it caused them.

The lease agreement between Paco and the Port District terminated in January 1988 and no copper loading operations have occurred since 1986. However, recent sampling data indicate that discharges may be continuing to occur from the storm drains. Because Paco is no longer using the property, the Port District has complete control over the storm drains and the present ability to control any continuing discharges that may exist.

Because the Port District "permitted" the discharges and now has complete control over the discharges, we find that the Regional Board acted appropriately in naming the Port District as a responsible party in Order 85-91.

2. Contention: In the alternative, the Port District contends that at most it should be held only secondarily liable.

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5 Paco contends that the container crane did not work properly and caused the bucket to drop copper into the Bay during loading operations and that despite Paco's repeated requests, the Port District did not correct the problem until 1986. The Port District contends that it repaired the crane promptly when informed that it was not working properly and that Paco need not have used the crane at all because it had other portable cranes. Paco also contends that the Port District would not allow Paco to cover the storm drains as required by the Regional Board in December 1984. The Port District points out that it was Paco's responsibility under the waste discharge requirements and cleanup and abatement order to prevent the discharges. The Port District's ownership of the drains did not prevent Paco from complying with those orders.

Finding: The Port District argues that it should be held only secondarily liable because it played a passive role in the operations, it is a government agency, and Paco is in compliance with the Order.

In certain situations, the State Board has found it appropriate to consider a lessee primarily responsible and the landowner secondarily responsible if the lessee fails to perform the work. See Orders Nos. WQ 87-6 and 86-18. These Orders have identified factors which should be considered in determining whether it is appropriate to assign secondary liability to the Port District for compliance with Order No. 85-91. These factors include: (1) the status of the lessee's compliance with the order; (2) the ability of the landowner to control the property, including the status of the lease agreement, the authority of the lessor under the lease, the lessor's currently ability to conduct the cleanup; and (3) the landowner's role, if any, in the discharge of waste at the leased premises.

There is ample evidence in the record to support the Regional Board's conclusion that the Port District should be named primarily liable. First, the Regional Board has indicated in its response to the Port District's petition that Paco is several months behind in implementation of the Order. Thus, secondary liability may be inappropriate at this time. Second, both the lease agreement and the terminal operator agreement provided the Port District with substantial control over the areas from which discharges occurred. During the term of the

lease agreement, the Port District had the ability to terminate the lease if Paco was not in compliance with its terms and at all times had access to the premises to determine compliance with the lease. The Port District also had the ability to control the storm drains and the pier face area where the container crane is located from which discharges occurred because Paco had non-exclusive use of the pier and the crane and the Port District retained an easement for access to the storm drains. Since January 1988, when the agreements terminated, the Port District has had exclusive control over the premises and thus has been in a better position than Paco to control any continuing discharges that may exist. There is a question whether the Port District contributed to actual discharges of waste. However, the Port District did have control over the storm drains and container crane. Thus, unlike the landowner in Order No. WQ 87-6, the Port District had significant control over choosing its lessee and over the activities of the lessee.

The Port District has also argued that since it is a public agency, it should only be held to secondary liability, citing Order No. WQ 87-5 (United States Department of Agriculture, Forest Service). However, that Order concerned the issuance of waste discharge requirements prior to any discharge. In addition, the Forest Service, unlike the Port District, has specific authority to enforce environmental requirements.

We conclude that it was appropriate for the Regional Board to name the Port District primarily liable. However, by upholding the Regional Board's decision, the State Board is not attempting to allocate responsibility between the parties. The record indicates that there is a dispute between the Port District and Paco concerning the responsibility for discharges from the storm drains and the clamshell bucket. It is not appropriate for the Regional Board or the State Board to involve itself in deciding issues of allocation of responsibility between different parties to a cleanup. We have concluded that the Port District is a liable party because it is a landowner with knowledge and significant control over the property and thus should be held primarily responsible.[6]

3. Contention: The Port District contends that the Regional Board's order naming it as a liable party should be barred by laches because the Addendum was issued more than three years after the original cleanup and abatement order.

Finding: The Regional Board's order should not be barred by laches. The Port District has not been prejudiced by the delay in adding it as a party to the order because it is not obligated to repeat work done in the past and it will have the ability to control future activities and schedules.

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6 However, it may be appropriate for the Regional Board to direct the parties to submit a plan specifying the roles of each party in implementing the cleanup and abatement order.

III. CONCLUSIONS

The petitioner is properly named as a primarily responsible party to the Cleanup and Abatement Order.

ORDER

IT IS HEREBY ORDERED that the petition in this matter is denied.

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 August 17, 1989.

AYE:	W. Don Maughan Darlene E. Ruiz Eliseo M. Samaniego
NO:	Edwin H. Finster Danny Walsh
ABSENT:	None
ABSTAIN:	None

Maureen Marché
Administrative Assistant to the Board