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OPINION	:	No. 79-906
	:	
of	:	<u>January 25, 1980</u>
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SUBJECT: DRAINAGE FROM ABANDONED MINE; NOW STATE PARK—
Silt-bearing drainage from an abandoned mining pit which has been acquired by the state as a state historic park is subject to the provisions and regulations of the Porter-Cologne Water Quality Control Act, but is not subject to federal regulation under the Federal Clean Water Act.

The Honorable Russell W. Cahill, Director, Department of Parks and Recreation has requested an opinion on the following questions:

1. Is the silt-bearing drainage from an abandoned hydraulic mining pit which has been acquired by the state as a state historic park subject to the provisions and regulations of the Porter-Cologne Water Quality Control Act or the Federal Clean Water Act?
2. Does the fact that silt control or elimination measures in such an abandoned hydraulic mining pit would be inconsistent with the use of such land as a state historic park have a bearing on whether silt-bearing drainage from such pit is subject to the provisions and regulations of the Porter-Cologne Water Quality Control Act or the Federal Clean Water Act?

CONCLUSIONS

1. The silt-bearing drainage from an abandoned hydraulic mining pit which has been acquired by the state as a state historic park is subject to the provisions and regulations of the Porter-Cologne Water Quality Control Act, but is not subject to federal regulation under the Federal Clean Water Act.

2. The fact that silt control or elimination measures in such an abandoned mining pit would be inconsistent with the use of such land as a state historic park does not alter the conclusion that silt-bearing drainage from such pit is subject to the provisions and regulations of the Porter-Cologne Water Quality Control Act. Such fact, however, is a factor to be considered by the appropriate regional water control board in setting waste discharge requirements for the pit or in granting a waiver of such requirements.

ANALYSIS

The Department of Parks and Recreation has provided the following background information:

In 1965, the state acquired lands for Malakoff Diggins State Historic Park, near North Bloomfield, Nevada County. The land comprising the park unit contains an hydraulic mining pit abandoned in the late 1800's. Water from rain and melting snow drains into and out of the pit, carrying with it substantial amounts of silt produced as a result of the abandoned mining operations. The water bearing silt drains across other lands not within the park unit and into the South Fork of the Yuba River, a tributary of the Feather and Sacramento Rivers. Since acquisition of the lands by the state, the department has not altered the drainage pattern in any significant manner, nor has it altered in any significant manner the features of the park which might increase the amount of silt carried by the water draining through the park unit.

The park lands were acquired with funds provided in the Budget Act of 1963 (Stats. 1963, ch. 1050, § 2.25, item 406.8(r)), and at the urging of the Legislature which adopted a concurrent resolution relating to the project, which stated, in part

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“WHEREAS, This hydraulic pit is one of the largest and most colorful exhibits and examples of this phase of mining activity which is not now represented in the state park system; and

“WHEREAS, The townsite of North Bloomfield, originally known as Humbug, has extreme charm, few developments, and offers outstanding possibilities for development of public service facilities through concession agreement and the use of private capital; now, therefore, be it

“Resolved by the Assembly of the State of California, the Senate thereof concurring, That the Legislature of the State of California hereby establishes the Malakoff North Bloomfield Project as an official state park project and directs the Department of Parks and Recreation and the Division of Beaches and Parks to complete studies of the area, . . . ; and be it further

“

“Resolved, That the Department of Parks and Recreation and the Division of Beaches and Parks make every effort to acquire the property within the project through use of any funds which may be made available;” (Stats. 1963, res. ch. 172.)

The first question presented is whether the drainage from this mining pit, now within a state historic park, which drainage carries silt off the property and eventually into the South Fork of the Yuba River, is subject to the restrictions and controls of either state or federal water quality control laws. Our review of the pertinent statutes leads us to conclude that this drainage constitutes a waste discharge within the meaning of the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 *et seq.*)¹ (hereinafter “Porter-Cologne Act”) and is therefore reportable to and subject to the waste discharge requirements of the appropriate regional water quality control board under that Act. We further conclude that such drainage does not constitute a “discharge of pollutants” within the meaning of the Federal Water Pollution Control Act Amendments of 1972 (Pub. L. No. 92–500, 86 Stat. 816 (1972); 33 U.S.C. § 1251 *et seq.*) (hereinafter “Federal Clean Water Act”) and is therefore not subject to the permit requirements of section 402 of that Act.²

1. Porter-Cologne Water Quality Control Act

In 1969, the Legislature adopted the Porter-Cologne Act (§ 13020), with the objective, among others, “. . . that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state.” (§ 13000.) As pertinent here, the

¹ All code section references hereinafter are to the Water Code unless otherwise noted.

² We have assumed for purposes of this opinion that the quantities of silt drained from the mining pit are sufficient to constitute “waste discharge” within the meaning of the Porter Cologne Act or a “pollutant” within the meaning of the Federal Clean Water Act.

mechanism for accomplishing this result is the operation of nine regional water quality control boards covering the entire state (§ 13200), each of which is directed to prepare and adopt regional water quality control plans for all areas of the region. These plans are to be in conformance with the legislative policies of the Porter-Cologne Act and any state policy for water quality control as set by the State Water Resources Control Board (§§ 13240, 13140.)

Section 13260, subdivision (a), provides, in part:

“Any person discharging waste or proposing to discharge waste within any region that could affect the quality of the waters of the state, other than into a community sewer system, . . . shall file with the regional board of that region a report of the discharge, containing such information as may be required by the board. No report need be filed when such requirement is waived pursuant to Section 13269.

Failure to file a report is a misdemeanor (§ 13261) and the board, through the Attorney General, may seek an injunction to compel compliance. (§ 13262.)

Section 13263, subdivision (a), provides in part:

“The regional board, after any necessary hearing, shall prescribe requirements as to the nature of any proposed discharge, existing discharge, or material change therein, except discharges into a community sewer system, with relation to the conditions existing from time to time in the disposal area or receiving waters upon or into which the discharge is made or proposed . . .”

A violation of the waste discharge requirements set by the regional board is subject to a cease and desist order by the regional board and to court injunction. (§ 13300 *et seq.*)³

The statutory definitions contained in subdivision (c), (d), and (e) of section 13050 are pertinent here:

³ An additional enforcement remedy available to the regional boards which might be pertinent in the case of abandoned mines is contained in Water Code section 13305. That section provides for the posting of property after a regional board determines that a condition of pollution or nuisance exists which has resulted from a nonoperating industrial or business location. After a hearing, the regional board may proceed to correct the situation, and the owner of the land is liable for the costs. (See legislative purpose of this section in Stats. 1960, ch. 482, § 33.)

“(c) ‘Person’ also includes any city, county, district, the state or any department or agency thereof. . . .

“(d) ‘Waste’ includes sewage and any and all waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of human or animal origin, or from any producing, manufacturing, or processing operation of whatever nature, including such waste placed within containers of whatever nature prior to, and for purposes of disposal.

“(e) Waters of the state means any water, surface or underground, including saline waters, within the boundary of the state.”

From these definitions and their legislative history we conclude that the reporting and waste discharge requirements of the Porter-Cologne Act, (1) apply to the State Department of Parks and Recreation and (2) apply to silt-bearing drainage from man-created hydraulic mining operations, in 1955, this office had occasion to examine the question of whether drainage from abandoned mining operations constitutes the discharge of waste over which a regional water pollution control board had jurisdiction under the Dickey Water Pollution Act, the predecessor to the Porter-Cologne Act. (26 Ops. Cal. Atty. Gen. 88 (1955).) We concluded that such drainage was subject to such regulation:

“We believe that the drainage of water which has picked up harmful materials from abandoned or inoperative mining operations, as described in the facts presented in the request for this opinion, is a ‘discharge’ as that term is used in the *Dickey Water Pollution Act*, since such water flows or issues out from the mines or ore dumps. But to be within the jurisdiction of a regional water pollution control board, the drainage must contain either sewage or industrial waste. Here it is obviously not sewage, but in our opinion it is industrial waste, to the extent that it contains materials which, but for the discontinued mining operations, either would not be present at all or would not be present in the amounts now found. These materials are a waste substance from a producing operation within the definition of the term ‘industrial waste’ in the act even many years after active mining ceased. There is nothing in the act which provides: that only wastes discharged concurrently with or immediately after a producing operation are within the control of a regional water pollution control board. It is the release of the harmful material which constitutes the discharge (*Magnolia Petroleum Co. v. Ford* (1938) 183 Okla. 14, 79 P. 2d 588, 589).

“ . . . It is immaterial that the mining operations may have terminated before either [the fee owner or mining interest owner) purchased his present

interest because the discharge for which they are accountable is the existing and continuing drainage from their holdings, nor the now discontinued mining.” (26 Ops. Cal. Atty. Gen. at 90–91.)

In 27 Ops. Cal. Atty. Gen. 182, 183–185 (1956), we concluded that, among other materials, earth from tractor trails or other areas denuded of protective vegetation by logging operations constitutes industrial waste for purposes of the Dickey Act, and that the present owner of the land is subject to the waste discharge requirements. (See also 37 Ops. Cal. Atty. Gen. 163, 164 (1961); 32 Ops. Cal. Atty. Gen. 139, 140–141 (1958); 27 Ops. Cal. Atty. Gen. 217, 218–219 (1976); 16 Ops. Cal. Atty. Gen. 125, 130–131 (1950).)

The Court of Appeal in *People v. New Penn Mines, Inc.* (1963) 212 Cal. App. 2d 667, 673–674, held that drainage from mines was subject to regional water pollution control board regulations:

“The Dickey Act defines industrial waste as liquid or solid waste substance, not sewage, from any producing, manufacturing or processing operation of whatever nature. (Wat. Code, § 13005.) Mine wastes, such as ore tailings and refinery runoff, fall within this definition. In one sense the owner or person responsible for an inactive or abandoned mine is not actively ‘discharging’ industrial waste. Yet, when surface water or some other mechanism causes drainage of accumulated mine wastes into a stream or other water body, a condition of pollution or nuisance, actual or threatened, may occur. The drainage then falls within the administrative sphere and within the enforcement powers of the regional and state water pollution control boards. (Wat. Code, § 13053; 26 Ops. Cal. Atty. Gen. 88; 27 Ops. Cal. Atty. Gen. 182.) . . .”(See also *Henderson v. Western Precipitating Co.* (1935) 10 Cal. App. 2d 18, 20–21.)

The definitions and the authority of the regional water quality control boards are no less broad under the Porter-Cologne Act. Indeed, the legislative history of the Porter-Cologne Act clearly indicates that the previous Attorney General opinions on dirt run-off, mine tailing run-off and the responsibility of the present owner were intended to be incorporated in the definition of “waste” under the Porter-Cologne Act. Section 36 of the bill that enacted the Porter-Cologne Act (Stats. 1969, ch. 482) provided:

“This act is intended to implement the legislative recommendations of the final report of the State Water Resources Control Board submitted to the 1969 Regular Session of the Legislature entitled ‘Recommended Changes in Water Quality Control,’ prepared by the Study Project-Water Quality Control Program.”

The cited report, which recommended most of the sections of the Porter-Cologne Act as enacted, including section 13050(d), made this note at pages 23–24 about the definition of “waste” in that section:

“ . . .

“The proposed new definition of waste is intended to be as all inclusive as the present definition of ‘sewage’ and ‘other waste.’ The proposed new definition also adds a specific reference to gaseous or radioactive substances, each of which is included in the definition of ‘wastes’ in the ‘Suggested State Water Pollution Control Act.’

“The present definitions of ‘sewage’ and ‘industrial waste’ or ‘other waste’ have been interpreted in Opinions of the Attorney General to include the following:

“1. Drainage Into surface streams or lakes of water from inoperative or abandoned mine tunnels that have leached through ore dumps and tailings and contains harmful materials which, but for the mining operations, would not be present at all or in the amounts now found. 26 Ops. Cal. Atty. Gen. 88 (1955).

“2. The current drainage, flow, or seepage into waters of the state of harmful concentrations of all the following listed materials constitutes the discharge of waste over which a regional board has jurisdiction:

“b. Earth eroded from tractor trails and other areas which have been denuded of protective vegetation by logging operations;

“

“e. . . . 27 Ops. Cal. Atty. Gen. 182. (1956)

”3. . . . [Opinion, 43 Ops. Cal. Atty. Gen. 302 (1964) concerning discharge of water from a hydroelectric plant].

“It’s intended that the proposed definition of waste will be interpreted to include all the materials, etc., which the Attorney General has interpreted to be included in the definitions of ‘sewage,’ industrial waste,’ and ‘other

waste.’’’⁴ (Emphasis added,)

Moreover, we are informed that for many years the State Water Resources Control Board and several of the regional water quality control boards have treated run-off from abandoned mines as being waste and within their jurisdiction. These agencies have set waste discharge requirements for abandoned mines and for silt from a variety of sources. Construction of a statute by those charged with its administration and enforcement is entitled to great weight, and courts will generally not depart from such interpretation unless clearly erroneous. (*Misasi v. Jacobsen* (1961) 55 Cal. 2d 303, 308; *Richfield Oil Corp. v. Crawford* (1952) 39 Cal. 2d 729, 736.)

We thus conclude that drainage from the abandoned hydraulic mining pit in Malakoff Diggins State Historic Park is subject to waste discharge requirements by the appropriate regional water quality control board unless a waiver is obtained pursuant to section 13269.⁵

2. The Federal Clean Water Act

The Congress has traditionally left primary responsibility for the control of water pollution to the states. (*State of Minn. by Spannaus v. Hoffman* (8th Cir. 1976) 543 F.2d 1198, 1200.) The Federal Clean Water Act, as contained in the Federal Water Pollution Control Act Amendments of 1972 (Pub. L. No. 92-500, 86 Stat. 816 (1972) § 33 U.S.C.A. § 1251 *et seq.*) as amended by the Clean Water Act of 1977 (Pub. L. No. 95-217, 91 Stat. 1566) made two significant changes in this policy. This Act placed restrictions on the discharge of pollutants (“effluent limitations”) from “point sources, and instituted a

⁴ Even without this evidence of legislative intent to adopt specific opinions of the Attorney General as part of legislation, a rule of statutory construction would be applicable: It is presumed that an interpretation of a statute in an opinion of the Attorney General has come to the attention to the Legislature, and if that interpretation were contrary to the intent of the Legislature, the Legislature would have adopted corrective language in amendments on the subject. (*California Correctional Officers’ Assn. v. Board of Administration* (1978) 76 Cal. App. 3d 786, 794.)

⁵ Section 13269 provides:

“The provisions of subdivisions (a) and (b) of Section 13260, subdivision (a) of Section 13263, or subdivision (a) of Section 12364 may be waived by a regional board as to a specific discharge or a specific type of discharge when such waiver is not against the public interest. Such waiver shall be conditional and may be terminated at any time by the board.”

We express no opinion herein as to whether the criminal enforcement penalties of the Porter-Cologne Act would be applicable to a state agency or officer, or to a current owner of an abandoned mine. (§§ 13261, 13265.)

discharge permit system denominated the National Pollutant Discharge Elimination System, to effect the effluent limitations. (See *EPA v. State Water Resources Control Board* (1976) 426 U.S. 200, 204; *State of Minn. by Spannaus v. Hoffman, supra.*)

Section 301(a) of the Federal Clean Water Act sets the basic policy:

“Except as in compliance with this section and sections 302, 306, 307, 318, 402 and 404 of the Act, the discharge of any pollutant by any person shall be unlawful.”⁶

As with the Porter-Cologne Act, the definitions contained in section 502 of the Federal Clean Water Act (33 U.S.C. § 1362) are important:

“

“(5) The term ‘person’ means an individual, corporation, partnership, association, *State*, municipality, commission, or *political subdivision of a State*, or any interstate body.

(6) The term ‘pollutant’ means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and *industrial*, municipal, and agricultural waste discharged into water . . .

“

“(12) The term ‘discharge of a pollutant’ and the term ‘discharge of pollutants’ each means (A) any addition of any pollutant to navigable waters *from any point source*. (B) any addition of any pollutant to the waters of the contiguous zone or the ocean *from any point source* other than a vessel or other floating craft.

⁶ Subdivision (b) of section 301 and sections 307 and 318 cited in subdivision (a) establish deadlines for limiting pollutant discharges and standards for discharges. Section 402 creates a permit and license system for discharges, the National Pollutant Discharge Elimination System, which is to be administered in each state by that state if it qualifies. California has qualified and issues point source discharge permits for the federal government, incorporating the mechanism used by the regional water quality control boards. (§ 13370 *et seq.*) Section 404 requires a permit from the Corps of Engineers for dredging or filling navigable waters.

“

“(14) The term ‘point source’ means any *discernible, confined and discrete conveyance*. including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

“” (Emphasis added.)

There is little doubt that the Department of Parks and Recreation, as part of the state, is a person within the Federal Clean Water Act and that silt constitutes a pollutant within the meaning of that Act.⁷ The key issue is whether the discharge of silt bearing water from the hydraulic mining pit is from a “point source.”⁸

It is our view that flow or overflow of waters from a mining pit, undirected by pipes, ditches, or similar “discernible, confined and discrete conveyance” does not constitute discharge from a point source. The Congress intended by the Federal Clean Water Act to leave the control of pollution from runoff, that is nonpoint discharges, to state control. This includes siltation from mines:

“One of the most significant aspects of this year’s hearings on the pending legislation was the information presented to the degree to which nonpoint sources contribute to water pollution. Agricultural runoff, animal waste, soil erosion, fertilizers, pesticides and other farm chemicals that are a part of runoff, construction runoff and *siltation from mines* and acid mine

⁷ We have no question that “silt” constitutes a “pollutant” within the meaning of subdivision (b) of section 502. At the very least silt is a form of “rock” or “sand,” being only a fine grade of sand. Webster’s Second New International Dictionary (1961) page 2338 defines silt as “unconsolidated or loose sedimentary material whose constituent rock particles are less than 1/16 millimeter in diameter. Silt may grade into clay, with particles generally less than 1/256 millimeters in size.” The Random House Unabridged Dictionary (1966) page 1327, defines silt as “earthy matter, sand, or the like carried by moving or running water and deposited as a sediment.” (See also, Hynes, *The Ecology of Running Waters* (1970) pp. 23–26; Leet & Judson, *Physical Geology* (2d ed. 1958) p. 459.)

⁸ In light of our conclusion of this issue, we need not decide whether the discharge in question is into “navigable waters of the United States.” (§ 502(7). Federal Clean Water Act.) We note, however, that the drainage system from this pit is over lands of others to the South Fork of the Yuba River which in turn flows into the Feather River and then into the Sacramento River. The latter unquestionably constitutes navigable waters of the United States.

drainage are major contributors to the Nation's water pollution problem . . .” (Sen. Rep. No. 92–414, 2nd Sess.; 1972 U.S. Code Cong. & Admin. News, p. 3705 (emphasis added); see also *Id.* at p. 3744.)

The states are to handle runoff of nonpoint source pollution through areawide waste treatment management plans pursuant to section 208 of the Federal Clean Water Act. (See Sen. Rep. No. 95–370, 1st Sess., p 8.) As a consequence, we conclude that the type of discharge from the Malakoff Diggins State Historic Park is not subject to regulation under the Federal Clean Water Act, but as noted above is subject to control by the regional water quality control board.

3. Corrective Action

The Director of the Department of Parks and Recreation has also asked whether the water discharge from the hydraulic mining pit would be subject to federal or state water quality control and regulation if it is assumed that corrective action would be inconsistent with the use of the land as a state historic park. As noted, the department is a person within the meaning of the Porter-Cologne Act, and the discharge in question is subject to regulation under that Act. The only blanket exemptions from regulation of water discharges are those into a community sewer system. (§ 13260 (a).) There is no exemption for any public or state agencies or for any particular use by such agency. Further, although the Legislature by the concurrent resolution of 1963 urged the department to acquire this particular land, we find no directive therein to override the statewide policy and control set forth in the Porter-Cologne Act or its predecessor the Dickey Act. Thus, we conclude that the fact that corrective action is inconsistent with the purposes of state historic park does not exempt the waste discharge from regulation under the Porter-Cologne Act.

Section 13269, however, does authorize the regional water quality control boards to waive the requirements of reporting and waste discharge requirements as to a specific discharge or type of discharge if such waiver is not against the public interest. In 57 Ops. Cal. Atty. Gen. 19 (1974), we concluded that the State Water Resources Control Board and the regional water boards were legally obligated, in formulating water quality control quality policy and waste discharge requirements, to consider the effects of waste discharge on factors of the environment other than those strictly related to water quality. This obligation springs from the enactment of the California Environmental Act of 1970 (Pub. Resources Code, § 21000 *et seq.*) and other legislative expressions of concern for the protection of the environment. Public Resources Code section 21060.5 defines environment to mean “ . . . the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals. flora, fauna, noise, *objects of historic or aesthetic significance.*” (Emphasis added.) Similarly, Government Code section 12605, part of an article authorizing the Attorney General to bring actions to

protect the environment, defines natural resource to include historic sites.⁹ Thus, the regional board that will either set the waste discharge requirements or grant a waiver for Malakoff Diggins State Historic Park should and must consider all environmental factors, including the fact, if established, that action to control or eliminate silt from the discharge is inconsistent with the maintenance of the land as a state historic park.

⁹ Government Code section 12605 provides:

“As used in this article, ‘natural resource’ includes land, water, air, minerals, vegetation, wildlife, silence, historic or aesthetic sites, or any other natural resource which, irrespective of ownership contributes, or in the future may contribute, to the health, safety, welfare, or enjoyment of a substantial number of persons, or to the substantial balance of an ecological community.”