STATE OF CALIFORNIA
CENTRAL COAST WATER BOARD
Received
APR 4 2006
895 Aerovista Place, Ste. 101
San Luis Obispo, CA 93401-7906

Kathryn and Kenneth Kirtley
Senior Staff Counsel and Assistant Chief Counsel
State Water Resources Control Board
Office of Chief Counsel
P.O. Box 100
Sacramento, CA 95812

RE: [*Kathryn Kirtley] Comments for April 28, 2006, Central Coast RWQCB Hearing*

Dear Mr. Wyels:

On or about January 28, 2006, I received from the Central Coast Regional Water Quality Control Board ("RWQCB") a letter and a number of documents explaining that I was being prosecuted for violations of a septic system discharge prohibition. The letter stated that the prohibition took effect in 1988 and is contained in the Water Quality Control Plan for the Central Coast Region. The documents further informed me that the RWQCB would hold a hearing on this matter on March 23, 2006, and that any comments or evidence that I wished to submit had to be in the hands of the RWQCB on or before March 1, 2006. Thereafter, the RWQCB continued the Hearing to April 28, 2006, and the due date for these comments to April 5, 2006.

This letter represents my formal comments, which comments will be explained in full at the Hearing(s) by me and/or by my counsel or representatives. In addition, I am under the belief that the Los Osos Community Services District ("CSD") is submitting a number of documents in support of its comments on this matter. I hereby reserve the right to comment on those documents. In addition, the RWQCB information sent to me informed me that the RWQCB prosecution team would rely on a list of documents in its presentation. While the RWQCB team claims that it has made its documents available for my review, they have only been available at RWQCB offices during the work day. Because I am unable to get to the RWQCB offices during the work day, I have not had a chance to review the documents, but I reserve the right to comment at the Hearing on the documents and/or on any arguments based on them.

As a brief summary, it is my contention that the RWQCB has completely failed to investigate my property, knows nothing about the working of my septic system, has made no effort to determine whether and to what extent my system is operating illegally, and therefore lacks the proper foundation to issue a CDO against me. My property is located at the top of the hill on 8th and Ramona making my septic system much higher above the water table than many in Los Osos. My husband and I are the only occupants of the property and are at work all day Monday through Friday. I have not be able to attend to this matter in a more expedient manner as I had back to back surgeries in late February and am still recovering.

In addition, the manner in which this prosecution has been conducted violates my rights under both California law and the Constitutions of the United States and the State of California. In light of all of this, the RWQCB cannot legally issue a CDO against me.

I. This Prosecution Violates Both California Law and My Due Process Rights Under the State and Federal Constitutions

In researching the State Water Resources Control Board ("SWRBC") and each Regional Water Quality Control Board in the State, I can find no instance in which a CDO was ever issued against an individual homeowner. The SWRCB's own Enforcement Policy states that CDOs regularly involve "*extensive capital improvements*" beyond the scope of a single property. After looking at the SWRCB Policy as a whole, it is clear that the SWRCB does not consider a CDO to be an appropriate prosecution tool against private citizens, because citizens hold no discharge permits and have no control over sewage or stormwater collection and treatment.

In addition, the RWQCB, through the CDO process, is ***specifying the manner of compliance*** with by essentially forcing me to pump my septic tank. This is a clear violation of the Porter-Cologne Act, which forbids the RWQCB from issuing mandates about the method of compliance. According to Water Code § 13360 no "waste discharge requirement or other order of a regional board or the state board . . . shall specify the design, location, type of construction, or particular manner" of compliance with the Boards' requirements or orders. (Cal. Water Code § 13360(a)). I am certain that the RWQCB prosecution team will contend that the CDOs allow Los Osos residents to propose alternative means of compliance. But I lack the technical sophistication of the RWQCB, so it should be incumbent upon the RWQCB to explain to me what options I have, instead of making me search, in my free time, for ways to comply with the CDO. In failing to do this, the RWQCB's proposed Order is a *de facto* prescription of the manner of compliance.

Also, I understand that there were comments at the RWQCB's Administrative Civil Liability hearing for the CSD which make it clear that the RWQCB is *not* an unbiased, neutral forum for this Hearing. At the CSD's hearing, Chairperson Young stated the intention of the RWQCB to pursue individual enforcement actions. Other members of the RWQCB joined Chairperson Young in stating, for the record, their opinion that individual enforcement actions needed to be taken. I have been told that Board Member Shallcross went so far as to state that individual enforcement actions would change the political will of the people. This statement shows that the RWQCB has an improper purpose to the entire CDO process. Prosecution, even administrative prosecution, undertaken to bend the political will of the electorate is so clearly improper that it is difficult to imagine how any CDO issued pursuant to such prosecution could be upheld by a court.

It is clear, both in light of the evident bias of on the part of the RWQCB and in light of the manner in which the prosecutions were initiated, that the issuance of CDOs will violate my legal and constitutional rights. I therefore ask that the RWQCB cease this prosecution, or, in the alternative, recuse itself from hearing this matter and allow a truly neutral party to render a decision.

II. The CDOs are Based on Faulty Scientific and Environmental Analyses

As I understand it, the CSD is challenging the scientific underpinnings of Resolution 83-13 and the issuance of CDOs to me and to others based on Resolution 83-13. I join in their challenge to Resolution 83-13 and this prosecution based on Resolution 83-13. In the interest of not being duplicative, I will not submit documents in support of my joinder, but instead reserve the right to comment on the CSD's documentation and to comment on the RWQCB's documentation.

It is worth noting, however, that at the time Resolution 83-13 was adopted, it was recognized that the Prohibition Zone was not a scientifically precise area of discharge/pollution, but the RWQCB Staff's best guess based solely upon information available at that time. But that means that there is *no actual scientific evidence supporting the current prosecutions*, just a guess from 1983.

Most importantly, and as stated in brief above, there is absolutely *zero evidence* offered by the RWQCB to show that my septic tank has violated Resolution 83-13. It is abundantly clear that the RWQCB has failed completely to develop any scientific evidence with regard to my property or any other individual property. In the more than 20 years since Resolution 83-13 was adopted, the RWQCB never collected site-specific or property-specific information, but it now seeks to prosecute based not on site-specific information but based on some presumption that the prosecution team's evidence must apply equally to every property targeted for prosecution. Without actually studying the individual properties, the RWQCB instead is initiating a new form of prosecution in the State of California – ***prosecute by implication***. This runs counter to the Prosecution Team's claim that the purpose of the CDOs is the actual protection of groundwater and instead serves to support the idea that the RWQCB has politically-motivated reasons for prosecution me and other Los Osos residents.

Specifically, my septic system and other septic tanks currently in use in Los Osos are approved, legal, septic systems. Most of our systems were placed in use prior to Resolution 83-13. At not time has the RWQCB, the County of San Luis Obispo, or the CSD ever inspected my septic system to determine whether it is faulty or whether it is working as it is *designed to work* and leaching liquids into a leach field in the upper aquifer for additional natural treatment. If my septic system and other septic systems are working *as designed and permitted by the government*, then they cannot be the subject of this enforcement hearing. Yet the RWQCB initiated this action without even trying to find out whether the environmental characteristics – depth of aquifer, proximity of leach

field to streams, proximity of leach field to other leach fields, etc. – of *my property or my septic system* lead to the need to revoke my septic permit and to require pumping.

III. The RWQCB Violated My Due Process Rights Throughout the CDO Process

In addition to these scientific concerns and the probability that this entire process is of questionable validity because of them, specific actions taken during the process increase the illegality of the prosecutions and the probability of invalidation. Specifically, the manner in which the prosecution team went about initiating the prosecution was designed to intimidate, harass, and confuse me and the other residents of Los Osos. This flies in the face of our American system of justice and any conception of governmental fairness.

In the letter dated Friday, January 27, 2006, the RWQCB illegally demanded that I turn over specified information to the RWQCB within 5 business days of receipt of the letter or face $1000 per day fines. The request for information was purportedly made pursuant to Water Code Section 13267. But that Section deals with **technical or monitoring program reports**, not general information like the tenant reports requested by the RWQCB. Therefore, and contrary to what the RWQCB indicated in that first letter, there was no legal ground to assess or threaten to assess a $1000 per day fine pursuant to Section 13268. Clearly, the RWQCB, with its vast knowledge of the Water Code, had to know that Section 13267 and Section 13268 could not apply to the information it sought. Just as clearly, the RWQCB made reference to the statutes in its letter as a means by which to frighten and confuse me, and make my resistance to the CDOs an ineffective formality.

Resolution 83-13, the basis of this prosecution, was drafted with a local population of nearly 27,000 persons as the presumption for its scientific analysis. Yet Los Osos has only grown to 15,000 persons. This raises some problems. Primarily, Resolution 83-13 is either based on scientifically indefensible positions with regard to the permissible growth in the area, or in the alternative, it relies on *outdated* science which has no practical application to the facts in the Los Osos area. In either the case, the Resolution cannot possibly be the basis for the RWQCB issuing legally-defensible CDOs against me and the other 44 residents being prosecuted.

Resolution 83-13 also permitted the construction of 1150 new housing units in the Los Osos/Baywood Park area until the discharges prohibited in that Resolution are ceased. Yet the RWQCB never explained why, if 1150 additional units were to be built, how the additional units would not negatively impact the environment. This is results in an incomprehensible position by the RWQCB – first the RWQCB states that pollution is rampant, then the RWQCB states that more building will be allowed, and now the RWQCB is prosecuting both those persons who were here when Resolution 83-13 was put into place and those who were allowed to build despite what the RWQCB now states are massive problems with the groundwater.

Recently, I and other residents of Los Osos became frustrated with prior CSD leadership. That leadership, apparently acting in good faith, moved forward with plans to satisfy the requirements of Resolution 83-13 and subsequent documents issued in light of the Resolution through a sewage treatment facility and ponding system. I supported these moves, and indeed, I and most residents have always supported the construction of *some* sewer system and treatment facility in Los Osos. But in a betrayal of our trust, the former CSD leadership also moved forward with plans to build a sewage treatment facility at a location in the middle of Los Osos, right next to a school, churches and parks. I and other residents, exercising our rights to free speech and to recall elected officials, did recall three CSD board members who favored the in-town sewage treatment plant and adopted an initiative to prohibit the siting of such a plant in the middle of the town.

Nearly four months later, the RWQCB initiated this prosecution of individual property owners. The RWQCB did not attempt to determine which properties, if any, *actually pollute* the groundwater or surface water in Los Osos or which properties are the most egregious polluters. Instead, the RWQCB acted irrationally and without substantial justification in just randomly choosing property owners to be the subject of this Hearing. Also, and as stated above, the first letter I received included an illegal attempt to force me to turn over information to the RWQCB to *assist the RWQCB* in its prosecution of me and of others. This attempt was supported by the RWQCB's threat of a $1000 per day fines which the RWQCB had no power to assess. The information that was demanded of me is subject to the Fifth Amendment privilege against self-incrimination.

Not only did the RWQCB attempt to *fine away the Fifth Amendment*, but the threatened fines, massive for an individual like me, instilled *fear* in the community. That fear was multiplied by the manner in which the RWQCB manipulated the information available to the individuals. The RWQCB did so in three ways: (1) failure to provide any list of the persons targeted for prosecution; (2) the dissemination of a list of thirty-four (34) documents supporting the RWQCB's prosecution without granting ready access to these documents to people like me who cannot get to the RWQCB offices during the business day; and (3) the approximately five-week time period in which I and other citizens, acting with very limited and rudimentary scientific knowledge, were required to respond to the RWQCB.

The first manipulation by the RWQCB – failing for over a month to provide a list of the other residents targeted for prosecution – violated my rights in two ways. First, I had no means by which to determine whether the CDO procedure is actually "random" or whether prosecution is being undertaken as a means by which to get back at me and other residents of Los Osos for exercising our Constitutional rights in an election. Also, the RWQCB's failure to release the identities made it impossible or highly-difficult for us to jointly represent our interests. It is only in the last few weeks that we have found each other and started trying to work together. Before this, we were left without any way to share funds and resources and create any meaningful rebuttal to the RWQCB's prosecution.

The Prosecution Team sent out the list of 34 documents that support its position in this matter. While the documents have supposedly been available for review at the RWQCB offices during normal business hours, I and other individuals targeted for enforcement have not had copies of or unfettered access to the documents to try to understand them and find a way to counter them on our own time. Unlike the RWQCB, this is not our job, and I for one cannot spend all day, every day, looking at this kind of information or take time off to go to the RWQCB offices and sit and look at the documents there. Because the RWQCB has failed to let me review its evidence, I have had no chance to have that evidence or the conclusions based on it subjected to any testing or analysis. In essence, the RWQCB has told me that I have to rebut scientific information without knowing what evidence I must rebut.

Conversely, the RWQCB has granted itself the privilege of receiving all comments made by the Designated Parties – as well as all of the evidence those parties can collect in their own behalves – one month before the Hearing. The Prosecution Team will therefore have access to *all* of the relevant information, while I and the other citizens will only know what information each of us provided. It is indisputable that this unequal access to information will result in a Hearing which is prejudiced in favor of the prosecution team. This violates due process and equal protection and casts further doubt on this whole prosecution.

Even if the RWQCB gave each of us all of the scientific and technical information it had at the outset of this matter, I would have had a mere nine weeks to attempt to understand it and respond to it, and I would have had to do so using all of my free time and quite a bit of my own money. Conversely, the RWQCB is a government agency with state resources and a large staff dedicated to prosecuting me and others. Still, it took them nearly four months – following the election, at which time Mr. Briggs indicated a desire to begin enforcement – to start this prosecution. Once again, this is a violation of my due process and equal protection rights.

The prosecution team never attempted to target the most egregious violators of Resolution 83-13. Indeed, the RWQCB has never actually made any scientific study of my property or any other property in Los Osos. RWQCB personnel have admitted that they have no experience in dealing with a large group of targeted persons and that they are going through "on-the-job" learning. This on-the-job learning may well result in I and some other members of the community facing immediate orders to begin septic pumping at a cost of thousands of dollars per year. Meanwhile, other residents will face no such order for months or years to come. Indeed, if the on-the-job learning by the RWQCB results in a shift in enforcement mentality, some residents could wind up not being subject to any order – while the targeted residents continue to face thousands of dollars in mandated costs per year.

In addition, the fact that I and 44 other residents will be subject to a single hearing with a single presentation by the prosecution team is evidence of the RWQCB's intent to treat this as a "one-size-fits-all" enforcement. How can this possibly be equitable, when each property has a different septic system, has different environmental factors at play

and must be treated as a stand-alone case? Once more, a violation of the due process and equal protection principles espoused by our federal and State constitutions exists to cast doubt on the legality of this enforcement process in general and this hearing in particular.

As a final matter, Section 4477 of the California Government Code prohibits all state agencies from entering into contracts of $5000 or more for the purchase of supplies, equipment, or services from *any nongovernmental entity who is the subject of a CDO*. It is very clear that the CDOs are not meant to address individual homeowners but entities in the business of stormwater or sewage treatment – of course, as stated elsewhere in these comments, the use of CDOs against individuals is unprecedented.

In this case, use of CDOs will cause financial havoc for at least one resident of Los Osos whose home-based business depends in large part on governmental contracts – and possibly more residents and property owners. The extraordinary use of CDOs to compel us to vote in a manner consistent with the RWQCB's thinking results, in these instances, in not only massive costs to all of us, but an extreme detriment to those with businesses that contract with the State. This amounts to government compulsion, and cannot be sustained by any court.

VI. Summary of Comments

I do not have a great understanding of the scientific evidence at issue here. But I do know that Resolution 83-13 was based on limited science, and that the RWQCB has made no efforts to update that science to reflect the current reality in Los Osos. I also know that the RWQCB has never investigated my property to determine whether I am actually violating the law. In addition, the due process and equal protection violations by the RWQCB cast further doubt on the intentions of the RWQCB in prosecuting me – particularly when viewed in the context of the weak science supporting the prosecution team's position. In light of what I have been told about the RWQCB's statements at the CSD hearing, I can only presume that this prosecution is politically-motivated and that the RWQCB cares less about water quality than it does about getting its way.

I look forward to the Hearing and to an opportunity to fully and fairly be heard and rebut the Prosecution Team's misguided efforts.

Sincerely,

Kathryn Kirtley

Kathryn Kirtley