

**STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION**

**STAFF REPORT FOR REGIONAL BOARD MEETING ON MAY 10-11, 2007
Prepared on April 20, 2007**

ITEM NUMBER: 4

SUBJECT: Proposed Cease and Desist Orders No. R3-2006-1008 (Charles and Norma Wilkerson) and R3-2006-1041 (William Moylan and Beverley De Witt-Moylan) for Discharges in Violation of Prohibition of Discharges from Individual Sewage Disposal Systems in the Los Osos/Baywood Park Area

SUMMARY

On January 22, 2007, a panel of the Central Coast Water Board (Water Board) conducted a hearing regarding proposed Cease and Desist Orders No. R3-2006-1008 and R3-2006-1041. The proposed Cease and Desist Orders address discharges that are in violation of the Water Board's Prohibition of Discharges from individual sewage disposal systems in the Los Osos/Baywood Park area. The Cease and Desist Orders are included here as Attachments 1 and 2.

This item summarizes the relevant issues from the panel hearing, including evidence regarding the discharges and whether the Cease and Desist Orders are the appropriate enforcement remedy regarding the discharges. There is evidence for the Water Board to reasonably infer that discharges are occurring, or are threatening to occur, in violation of the Prohibition. The proposed Cease and Desist Orders are appropriate because they implement the provisions of the Basin Plan by enforcing the prohibition against septic system discharges in the Los Osos/Baywood Park prohibition zone.

This item also responds to defenses and misconceptions raised during the panel hearing, including the burden of proof (which has been met by the Prosecution Team), residents being forced from their homes (which they are not), and due process (which the Water Board has provided).

The panel members reviewed the evidence submitted, heard oral testimony and public comment, and voted unanimously to recommend that the Water Board issue the Cease and Desist Orders as proposed by the Prosecution Team.

DISCUSSION

On January 22, 2007, a panel of the Central Coast Water Board (Water Board) conducted a hearing to gather evidence and hear argument regarding proposed Cease and Desist Orders (CDO) No. R3-2006-1008 and R3-2006-1041. Proposed CDO No. R3-2006-1008 names Charles and Norma Wilkerson and is for discharges from a subsurface disposal system located at 1273 12th Street, Los Osos. Proposed CDO No. R3-2006-1041 names William Moylan and Beverley De Witt-Moylan and is for discharges from a subsurface disposal system located at 1516 17th Street, Los Osos. The panel hearing was conducted pursuant to a Notice of Continued Hearing and Notice of Panel Hearing issued on December 28, 2006 as authorized by Section 13228.14 of the Water Code. Charles and Norma Wilkerson were represented by Shauna Sullivan; William Moylan and Beverley De Witt-Moylan appeared in person.

The Water Board Prosecution Team presented evidence that Charles and Norma Wilkerson reside at 1273 12th Street, Los Osos, and that William Moylan and Beverley De Witt-Moylan reside at 1516 17th Street, Los Osos, both residences being located within the boundaries of an area within which discharges from individual or community sewage disposal systems have been prohibited since November 1, 1988 pursuant to a discharge prohibition incorporated into the Water Quality Control Plan for the Central Coast Region (Basin Plan) by Water Board Resolution No. 83-13:

“3. Discharges from individual and community sewage disposal systems are prohibited effective November 1, 1988, in Los Osos/Baywood Park area depicted in the prohibition boundary map included as Attachment “A” of Resolution 83-13.”

[Basin Plan, page IV-67; “Attachment A” of Resolution No. 83-13 appears as Basin Plan Appendix A-30.]

The Prosecution Team contends that any person who owns property or resides within the area delineated in Basin Plan Appendix A-30 (Prohibition Zone) is discharging from individual subsurface sewage disposal systems (septic systems) in violation of the prohibition and proposes that such persons be required to cease and desist from such violations according to the terms of proposed Cease and Desist Orders. The Prosecution Team selected 45 properties within the Prohibition Zone at random, including the properties of Charles and Norma Wilkerson at 1273 12th Street, Los Osos and of William Moylan and Beverley De Witt-Moylan at 1516 17th Street, Los Osos, and notified the persons who own or occupy the selected properties on January 27, 2006 that the Prosecution Team would recommend the issuance of Cease and Desist Orders to the randomly selected property owners and occupants (Designated Parties).

The proposed Cease and Desist Orders now being recommended by the Prosecution Team for Charles and Norma Wilkerson and for William Moylan and Beverley De Witt-Moylan are substantially similar to Cease and Desist Orders issued by the Water Board to other Los Osos residents and property owners following hearings conducted by the Water Board on April 27 and 28, 2006, and on December 14 and 15, 2006. Twenty-three Designated Parties have accepted a Settlement Agreement offered by the Prosecution Team containing substantially similar provisions.

Having heard and considered the evidence and argument offered by the parties, including the written documentation submitted by the parties (and documents incorporated by reference) to the extent that such documents were determined to be admissible, either on December 14 and 15, 2006 or on January 22, 2007, the panel recommends that Cease and Desist Orders be issued to Charles and Norma Wilkerson and to William Moylan and Beverley De Witt-Moylan as proposed by the Prosecution Team. The recommendation is based on the following evidence and rationale.

1. Charles and Norma Wilkerson and William Moylan and Beverley De Witt-Moylan discharge or threaten to discharge domestic wastewater in violation of the prohibition against discharges from individual septic systems in the Prohibition Zone.

The Prosecution Team presented evidence that Charles and Norma Wilkerson, and William Moylan and Beverley De Witt-Moylan, respectively, own or occupy residences on properties within the Los Osos prohibition zone established by Resolution No. 83-13 of the Water Board and incorporated into the Regional Water Quality Control Plan for the Central Coast Region (Prohibition Zone). There is no evidence available to the Water Board that either property has a wastewater disposal system other than a subsurface sewage disposal system (septic system). There is no evidence of the existence of a community sewer, or that either property is equipped with an alternative waste disposal system, or is unoccupied. Based on this evidence it would be reasonable to infer that Charles and Norma Wilkerson and William Moylan and Beverley De Witt-Moylan have been discharging, are discharging, and will continue to discharge human waste and domestic wastewater from their respective residences through

subsurface disposal systems within the Prohibition Zone in violation of the prohibition against such discharges established by Resolution No. 83-13.

2. The proposed Cease and Desist Order recommended by the Prosecution Team is an appropriate remedy for violation of the discharge prohibition.

The proposed Cease and Desist Orders implement the provisions of the Basin Plan by enforcing the prohibition against septic system discharges in the Los Osos/Baywood Park prohibition zone. Property owners and residents of the Los Osos community have continued to discharge domestic sewage waste to septic systems in violation of the prohibition for many years, contributing to and exacerbating nitrate pollution in the ground water and in Morro Bay. Public entities have proven unable to resolve the water pollution problems attributed to the community's reliance on septic systems for sewage disposal by providing a community sewer system and community wastewater treatment facilities despite the imposition of a time schedule enforceable by the threat of civil liability in the event of failure. Accordingly, the Water Board must address the chronic water quality problems associated with septic systems in Los Osos at the source: by requiring individuals who are actually discharging domestic wastewater in violation of the prohibition against septic system discharges to stop their violations.

The proposed Cease and Desist Orders balance the need for individuals discharging to septic systems to stop discharging with the need to allow them time to find and implement alternative ways to dispose of domestic sewage and wastewater, either individually or as a community. The proposed Cease and Desist Orders include recognition of a legislative initiative that would allow the County of San Luis Obispo to assume responsibility for building the necessary infrastructure if the community accepts the responsibility to pay for it through tax assessments. The schedule incorporated into the proposed Cease and Desist Orders reflects the County's timeline for scheduling the necessary election and for subsequent design and construction of treatment facility.

In addition, the proposed Cease and Desist Orders include interim compliance measures based on sound septic system maintenance practices, together with reporting obligations that will ensure that persons subject to the proposed Cease and Desist Orders will be accountable to the Water Board for proper maintenance of their septic systems.

The Water Board needs the information that recipients of the proposed Cease and Desist Order are required to provide pursuant to Water Code Section 13267 in order to assess compliance with the Basin Plan and the terms of the proposed Cease and Desist Orders, and to ensure that pollutant loading within the prohibition area is minimized to the extent possible. Persons subject to the proposed Cease and Desist Orders should be required to provide this information because those Persons are the owners or operators of the septic systems. The technical report submitted by the Prosecution Team includes substantial evidence in support of this requirement. The persons who would be subject to the proposed Cease and Desist Orders have incurred little or no cost to comply with the Basin Plan prohibition since it was promulgated in 1983. The burden of any monitoring or reporting required by the proposed Orders is reasonable in light of the severe pollution that has resulted from operation of septic systems in the prohibition area, and the long history of violations of the prohibition in the Los Osos community.

The technical report required by Section A.2.b or 3 (as applicable) is necessary to determine that any alternative to connecting to a community wastewater collection and treatment system meets applicable legal requirements, including the septic system discharge prohibition, and to assess compliance with Paragraph A.1 of this Order.

Therefore the proposed Cease and Desist Orders will promote compliance with the Basin Plan without imposing unreasonably burdensome obligations on recipients.

Defenses and Misconceptions

Charles and Norma Wilkerson and William Moylan and Beverley De Witt-Moylan raised several contentions challenging the Water Board's authority to issue the proposed Cease and Desist Orders, or purporting to show that the proposed Cease and Desist Orders were not an appropriate remedy for the alleged violations. None of the defenses, contentions, or objections articulated by Charles and Norma Wilkerson or by William Moylan or Beverley De Witt-Moylan, or by any of the other Designated Parties who submitted documents in response to the Prosecution Team's proposal that the Water Board issue Cease and Desist Orders relieve the Los Osos property owners or residents of the consequences of their reliance of septic systems for domestic waste disposal, or preclude the Water Board from issuing Cease and Desist Orders against them.

The Prosecution Team has satisfied the Burden of Proof needed to justify the issuance of Cease and Desist Orders under Section 13301 of the Water Code

A common misconception among Designated Parties is that the Prosecution Team must prove that the Designated Parties' use of septic systems has caused, is causing, or threatens to cause conditions of pollution; in some cases the contention was that the Prosecution Team would have to prove that each individual septic system discharge was causing pollution. This is an incorrect interpretation of the burden of proof needed to support a Cease and Desist Order.

In order to issue Cease and Desist Orders, the Water Board must find only that "a discharge of waste is taking place, or threatening to take place, in violation of ... discharge prohibitions prescribed by the regional board...." [W.C. 13301] The finding must be supported by a preponderance of the evidence in the record.

The discharge prohibition applicable to residents and property owners in Los Osos is a blanket prohibition against any and all discharges from individual or community sewage disposal systems within the Prohibition Zone. Thus, it is not necessary for the Prosecution Team to present evidence, or for the Water Board to find, that discharges from a particular septic system is causing or threatening to cause conditions of pollution in the ground water underlying Los Osos.

The Water Board determined in 1983 that ground water underlying Los Osos was polluted, and that discharges of domestic wastewater from septic systems caused or contributed to the prevailing conditions of pollution (Resolution No. 83-13). Based on this determination, the Water Board prohibited discharges from septic systems after 1988. Accordingly, the Water Board does not need to re-examine the issue of whether or not a particular septic system is causing or contributing to the ambient pollution in the Los Osos area in order to issue Cease and Desist orders under Section 13301 of the Water Code. To satisfy the threshold criterion for the issuance of a Cease and Desist Order, it is sufficient for the Water Board to determine that a septic system within the boundaries of the Los Osos/Baywood Park prohibition Zone is being used for sewage disposal.

Finally, the Water Board is entitled to draw reasonable inferences from the evidence in the record to make the determination: it is reasonable to infer that, in the absence of a community sewage collection and treatment system or other sewage disposal alternatives, persons who reside in, or own, homes located within the prohibition zone are discharging their domestic wastewater (including sewage) via on-site septic systems.

Los Osos Residents and Property Owners will not be forced from their homes, or lose their properties, due to the lack of alternatives to septic systems

Some Designated Parties contend that the proposed Cease and Desist Orders will force them from their homes unless the County or Community Services District completes a sewage collection system and treatment plant; they fear that their homes may be condemned because no alternative means of

sewage disposal are available. For example, Designated Parties cited evidence that the San Luis Obispo County Health Department has rejected proposals for the use of composting toilets.

First, nothing in the proposed Cease and Desist Orders currently recommended by the Prosecution Team, or those previously issued to other Designated Parties, requires Designated Parties to leave their homes, either now or if Designated Parties subject to a Cease and Desist Order are eventually required to cease and desist discharges from septic systems; there is no substantial evidence that the County would, inevitably, condemn homes in Los Osos in the event that deadlines in the proposed and issued Cease and Desist Orders are not met.

Rather than being forced from their homes, dischargers in the Prohibition Zone who are named in a Cease and Desist Order would be subject to administrative liability for not complying with the requirements of the Cease and Desist Order. In the case of non-compliance, the Prosecution Team may recommend that the Water Board assess liability pursuant to Sections 13268 or 13350 of the California Water Code. Any proposal for such an assessment would entail the issuance of Complaints setting forth allegations of violation and the conduct of hearings. When assessing liability, the Water Board must consider, among other things, the nature, circumstance, extent, and gravity of the violation, whether the discharge is susceptible to cleanup or abatement, and with respect to the violator, the ability to pay, the degree of culpability, economic benefit or savings resulting from the violation, and other matters as justice may require (W.C. 13327). The Water Board would weigh the evidence about each of these factors before imposing civil liability. While the Water Board could impose the maximum liability of \$5,000 per day for violation of a Cease and Desist Order [W.C. 13350(e)(1)], the Water Board has unrestricted discretion to impose liability at lower amounts. (Only where a Cleanup and Abatement Order has been issued would the Water Board be required to impose at least \$500 per day, and even that minimum liability is subject to reduction if the Water Board makes express findings justifying a lesser amount. [W.C. 13350(e)(1)(A) and 13350(f).]) The Water Board has ample authority to assess liability, or not, according to the circumstances of the violations. Claims that the Water Board will assess liability such that people must abandon their homes are without merit.

Water Board Proceedings for Consideration of Proposed Cease and Desist Orders for Individuals in the Los Osos Prohibition Zone Provided an Appropriate Level of Due Process Under the Circumstances.

“Due Process” requires the government to notify persons of proposed actions that will affect them, and requires the government to provide affected persons with a reasonable opportunity to respond to the proposed action. The level of “due process” that is appropriate depends upon the nature of the interests that will be affected: proceedings that affect fundamental rights (life, liberty, property rights) entail more procedural guarantees than proceedings that affect lesser interests.

While the proposed Cease and Desist Orders at issue in the current proceedings affect property interests, the interests involved are not fundamental property rights: while discharges of waste are an inevitable consequence of living, there is no right to discharge waste. Discharges of waste that could affect the quality of the waters of the state are subject to stringent regulation and, in many cases, prohibitions. Therefore, proceedings to establish or enforce conditions, including prohibitions, on discharges or disposal of waste do not entail the same level of due process as proceedings affecting essential entitlements, such as welfare. The Water Boards’ adjudicative proceedings are conducted pursuant to Chapter 4.5 of the California Administrative Procedure Act (Gov’t Code Sec. 11400, *et seq.*) and Chapter 1.5, Rules of Practice and Procedure, commencing with Section 647, of the regulations promulgated by the State Water Resources Control Board in Division 3 of Title 23 of the California Code of Regulations rather than more formal rules for administrative hearings under Chapter 5 of the California Administrative Procedure Act (Gov’t Code Sec. 11500, *et seq.*).

The Water Board’s Prosecution Team notified persons who live in or own 45 randomly selected properties inside the Los Osos prohibition zone that it would seek the issuance of Cease and Desist

Orders directing them to stop discharging sewage to septic systems in the prohibition zone by a proposed deadline, and directing them to take prescribed measures to mitigate the impact on water quality associated with the discharges in the interim. Persons subject to the proposed Cease and Desist Orders were notified that hearings would be conducted, and were given the opportunity to submit evidence and arguments in response to the proposed Cease and Desist Orders. Many of the persons subject to the proposed Cease and Desist Orders submitted documentation to the Water Board. The Water Board allowed the parties to the proceedings to rely on evidence and argument submitted by other parties, including the Los Osos Community Services District, which, while not subject to any of the proposed Cease and Desist Orders, was allowed to participate in the proceedings as a Designated Party on behalf of its constituents who were.

While the Water Board ultimately excluded many documents from the record because they were not relevant to the material issues that the Water Board would have to address in considering the proposed Cease and Desist Orders, or for other reasons, and refused to compel the testimony of witnesses who were not shown to have information relevant to the matters at issue in the proceedings, the Water Board did accept and consider a substantial volume of documentary evidence submitted by the Designated Parties. In addition, the Water Board afforded the Designated Parties a great deal of latitude in presenting their responses to the proposed Cease and Desist Orders at the hearings conducted in April, May, and December 2006. Designated Parties had the opportunity to present testimony, to cross-examine the Prosecution Team, and to present their arguments in opposition to the proposed Cease and Desist Orders. The Prosecution Team did provide an opportunity for Designated Parties to depose Roger Briggs before he became unavailable.

Complaints that Designated Parties were prejudiced by modifications to the proposed Cease and Desist Orders recommended by the Prosecution Team, or by changes to the documentation presented in support thereof as a result of the replacement of counsel for the Prosecution Team, are without merit. The changes made to the proposed Cease and Desist Orders by the Prosecution Team were made in response to objections raised by Designated Parties and, in each instance, reduced the impact of the proposed Cease and Desist Orders to accommodate changing circumstances relating to the ability of public entities to provide a viable alternative for sewage disposal for the Los Osos community. Such changes did not alter the fundamental issues presented to the Water Board, or increase the burden on Designated Parties to respond. Adjustments to a proposed order that alleviate objections should narrow the scope of proceedings and relieve parties of the need to address those aspects of the proposed order. The Water Board routinely deferred scheduled proceedings to extend the time that Designated Parties would have to review Prosecution Team documents, most of which have been available to the Designated Parties and to the public in the files of the Water Board since the inception of these proceedings, and were posted on the Water Board's web site for at least two months before the hearings were conducted in December.

Designated Parties have objected to the process by which the Prosecution Team selected the initial 45 persons to receive proposed Cease and Desist Orders; Designated Parties challenged the validity of the random selection process used by the Prosecution Team. In fact, the Prosecution Team is under no obligation to make a random selection of alleged violators in an enforcement action involving multiple parties. The Prosecution Team could have initiated enforcement against every property within the Prohibition Zone simultaneously. (This would have complicated the logistics of the hearing process, but would have avoided perceptions of possible selective prosecution or inequity that have been raised in parties' responses and interested persons' comments; the Advisory Team and the hearing panel recommend that the Prosecution Team consider simultaneous action against all remaining property owners and residents of the Prohibition Zone if the Prosecution Team decides to pursue any subsequent enforcement proceedings against individuals discharging to septic systems in the Prohibition Zone.) The Prosecution Team could have made a selection by neighborhood, street, alphabetical order, estimated concentration of nitrates in underlying groundwater, proximity to Morro Bay, or any other approach that would have allowed the Prosecution Team to divide the total population of persons potentially subject to Cease and Desist Orders into groups for enforcement

action. The means by which the Prosecution Team exercised its prosecutorial discretion under the circumstances of the Los Osos community does not suggest that the selection was motivated by invidious discrimination. In fact, the Prosecution Team presented credible evidence that the selection was undertaken in a scrupulously random manner.

Designated Parties have intimated that the Water Board has ulterior motives that have caused it to promote a project that is, in fact, contrary to the best interests of the Los Osos community; this scenario includes vague and unsubstantiated allegations of collusion between Water Board members and Water Board staff and un-named development interests. In fact, Water Board staff did approve of the treatment project proposed by the Los Osos Community Services District for the "Tri W" site, as that project went through substantial review and approval processes by other agencies, including CEQA review. Water Board staff's approval was based on supporting a project that would have resolved sewage disposal issues in Los Osos in a manner consistent with the Basin Plan prohibition against discharges to septic systems.

The Water Board is precluded by Section 13360 from prescribing the manner by which persons may comply with its orders. The Water Board could not, and cannot, dictate to the Los Osos community, or to individuals who live in the prohibition zone, how to comply with the prohibition, nor which project to build to eliminate proscribed discharges. The Water Board can, however, recognize the fact that a particular project, proposed by the community, or individuals therein, will result in compliance, and may therefore agree with the proposal, whether or not it would be the "best" or "optimum" or "most cost effective" project that could have been proposed. The proposal of the Los Osos Community Services District to build a treatment facility at the Tri W site was a proposal that would have allowed the Los Osos community to stop violating the Water Board's discharge prohibition. It may or may not have been the project that the individual Water Board members, or the Water Board as a whole, would have preferred, but it was a viable project that would have solved the water quality problem that caused the Water Board to promulgate the prohibition against septic system discharges in 1983. The Water Board was justifiably dismayed by the decision of the Los Osos Community Services District to abandon a project that, despite whatever drawbacks it might have had, would have eliminated septic system discharges and brought the Los Osos community into compliance with the Basin Plan prohibition. The Water Board does not favor the Tri W project over any other alternative; it would endorse any valid project that offers the likelihood of bringing the Los Osos community into compliance with the Basin Plan. However, in the absence of any alternative that has negotiated the requisite planning and regulatory and funding process successfully, the Tri-W project appears to be the most expedient way for the Los Osos community to eliminate discharges from individual septic systems.

RECOMMENDATION OF THE HEARING PANEL

Based upon the analysis presented above, the hearing panel recommends that the Central Coast Water Board find that Charles and Norma Wilkerson have violated the prohibition against discharges in the prohibition zone and issue proposed Cease and Desist Order No. R3-2006-1008 (Attachment 1). The hearing panel also recommends that the Water Board find that William Moylan and Beverley De Witt-Moylan have violated the prohibition against discharges in the prohibition zone and issue proposed Cease and Desist Order No. R3-2006-1041 (Attachment 2).

ATTACHMENTS

1. Proposed Cease and Desist Order No. R3-2006-1008 (Charles and Norma Wilkerson)
2. Proposed Cease and Desist Order No. R3-2006-1041 (William Moylan and Beverley De Witt-Moylan)