State Water Resources Control Board

Dan Skopec
Acting Secretary

Office of Chief Counsel
1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ http://www.waterboards.ca.gov

Arnold Schwarzenegger
Governor

TO: Jeffrey S. Young, Chair
Central Coast Regional Water
Quality Control Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401

Lori T. Okun

FROM: Lori T. Okun
Senior Staff Counsel
OFFICE OF CHIEF COUNSEL

DATE: April 19, 2006

SUBJECT: RESPONSE TO COMMENTS REGARDING CDOS R3-2006-1003, R3-2006-1024 AND R3-2006-1029

This memorandum responds to legal issues raised in the above-referenced responses to comments. The contentions and responses are attached.

Some of these commenters raised some of the same issues as those that the Los Osos Community Services District raised in its comment letter. Those comments and responses are not repeated here.

Attachment

cc: All w/attachment & via e-mail only

Roger Briggs
Michael Thomas
Harvey Packard
Matt Thompson
Central Coast Water Board

John Richards, OCC
State Water Board

Response to Legal Arguments in Responses to CDOs R3-2006-1003, R3-2006-1024 and R3-2006-1029

The following responds to legal issues raised in the above-referenced responses to comments. Some of these commenters raised some of the same issues as those that the Los Osos Community Services District (CSD) raised in its comment letter. Those comments and responses are not repeated here.

Contention: The County allowed homes to be built.

The discharge of waste is a privilege, not a right. (Ca. Wat. §13263.) The County does not have jurisdiction to allow continued use of septic tanks after the Water Board prohibits their use, whether or not the County issued permits for the systems. (*See also,* Ca. Wat. §13280-13283.) The Water Code specifically allows discharge prohibitions for existing systems. (Ca. Wat. §13280.)

Contention: Various homeowners claim they did not know septic tank discharges were illegal and/or that the Basin Plan prohibition only applies to septic systems installed after 1988 and/or that realtors failed to warn buyers that septic system discharges were illegal.

It is unfortunate that realtors have not provided more complete information about the prohibition, but the disclosure forms that Mr. Shipe provided refer to an assessment for construction of a sewer system. Any homeowners who received this disclosure had notice and could have conducted additional inquiry.

However, even where realtors provided no notice or the discharger bought the home before 1983, the lack of notice is not a defense. Ignorance of the law does not excuse violations, even where a particular defendant lacks the legal research skills to find the law. (*People ex rel. State Air Resources Bd.* v. *Wilmshurst* (1999) 68 Cal.App.4th 1332, 1346.)

The Basin Plan prohibition is not limited to post-1988 (or post-1983) systems. The prohibition applies to discharges, not installation of systems. The prohibition states, "Discharges from individual and community sewage disposal systems are prohibited effective November 1, 1988, in the Los Osos/Baywood Park area ..." Nothing in this language limits the prohibition to systems installed after 1988. Relatively few systems post-date 1988 because of the County's building moratorium. The Water Board has never taken the position that continued discharges from older tanks will be allowed.

Contention: Required pumping of septic tanks violates the Porter-Cologne Water Quality Control Act.

Porter-Cologne does not address tank pumping. Although there are various references to the importance of water recycling[1], nothing in Porter-Cologne expresses a policy favoring

[1] *See, e.g.,* Sections 13142 subd. (a), 13142.5 subd. (e), 13241 subd. (f).

allowing continued illegal discharges of polluted wastewater in order to make recycled water available, where no treatment facilities exist.

Contention: The CDOs were not served by registered or certified mail and mailing delays resulted.

Service by registered mail is not required. If the CDOs are adopted, they must then be served by personal service or registered mail. (Wat. Code §13303.) The Water Board Chair addressed the mail delays by continuing the hearing for over a month.

Contention: There is no affordability study for septic tank pumping.

An affordability study is not required. Prosecution Staff provided some cost information to demonstrate that these interim measures are reasonable in light of the need to protect water quality, but the statute and the Enforcement Policy do not require this. The Basin Plan has required a complete discontinuance of discharges since 1988. This prohibition is not rendered moot by the vast cost increases that have resulted from delays in constructing a treatment plant.

Contention: The State Water Board's Water Quality Enforcement Policy (2002) requires action to be taken as soon as possible so these "stale" actions are prohibited.

The Water Board has not taken individual enforcement actions in the past, but instead preferred to work with the County or the CSD in their attempts to build a treatment plant. When the CSD halted a permitted, funded treatment plant project in October 2005, it became apparent that the only way to obtain compliance is by enforcing the prohibition against all dischargers, not just the CSD. The Enforcement Policy does not prohibit the Water Board from taking enforcement action against ongoing discharges, such as these. In a case where a violation occurred a long time ago and was then corrected, the doctrine of laches might (but would not necessarily) bar enforcement. This is not such a case.

The Enforcement Policy suggests prompt action because it avoids or mitigates additional environmental harm. (*Enforcement Policy,* pp. 1, 4.) This policy supports issuance of the CDOs, and including interim compliance measures.

Contention: CSD delays in complying with TSO 00-131 were beyond the CSD's reasonable control.

Delays in constructing the community treatment plant are irrelevant. These actions are necessary because there is no treatment plant. It is undisputed that the community has no treatment plant proposal at this time.

Prior delays in compliance, such as third party lawsuits, may have been beyond the CSD's (or County's) control. The current absence of a project was caused by the CSD stopping construction, not by third party lawsuits or delays at the Coastal Commission.

Far from being beyond individual dischargers' control, their own discharges are uniquely within their control. Frequent pumping, holding tanks or other alternatives can be readily implemented by individuals.

Contention: Water Code sections 1831-1835 prevent these actions.

Water Code sections 1831-1835 apply to water rights proceedings only. The relevant statutes for these actions are Water Code sections 13300-13308.