California Regional Water Quality Control Board
Santa Ana Region

September 6, 2002

ITEMS: 13 & 14

Subject: Administrative Civil Liability Complaint No. RB8-2002-0064 and No. RB8-2002-0065 issued to John J. Justice and Ronald G. Taylor (two property owners on Shay Road in Bear Valley) for discharging wastes in violation of Cease and Desist Order No. 00-83, and the Waste Discharge Prohibition contained in the Water Quality Control Plan for the Santa Ana River Basin.

INTRODUCTION:

The matter before the Board is whether to affirm, modify, or dismiss Administrative Civil Liability Complaint No. RB8-2002-0064 and No. RB8-2002-0065, issued by the Executive Officer on August 2, 2002, to Mr. John Justice, and Mr. Ronald Taylor, two property owners in the Bear Valley waste discharge prohibition area. Staff alleges that these property owners are in violation of Cease and Desist Order No. 00-83. Copies of the complaints are included as Exhibit 2 of this report; a copy of Cease and Desist Order No. 00-83 is included as Exhibit 3 of this report.

DISCUSSION:

On October 6, 2000, the Board adopted Cease and Desist Order No. 00-83, which ordered four property owners in the Bear Valley area to comply with the Santa Ana Region Basin Plan prohibition against the continued use of subsurface leaching-percolation disposal systems in the Bear Valley area. The cease and desist order required compliance with the prohibition by October 6, 2001. The order directed the Executive Officer to file complaints for administrative civil liability for violations of the cease and desist order.

The Regional Board has prohibited the discharge of wastes from subsurface leaching-percolation systems within the Big Bear Lake (Bear Valley) area of the Santa Ana Region. This prohibition has been in effect since 1973 and is included in the current Basin Plan. The two properties which are the subject of this report are located south of Baldwin Lake on Shay Road, in the Big Bear Lake area of San Bernardino County (see vicinity map - "Attachment 1a" and parcel maps "Attachment 1b and 1c"). The properties are located in the southeast quarter of the south half of Section 7, Township 2N, Range 2E, San Bernardino Baseline and Meridian.

Currently, the two property owners are discharging waste to conventional onsite septic systems. The prohibition specifies exemption criteria for the use of new or existing onsite subsurface waste disposal systems. In order to be granted an exemption from the prohibition, geologic and hydrologic evidence must be presented that demonstrates that the continued use, operation, or maintenance of a septic tank,

cesspool, or other subsurface waste disposal system will not, individually or collectively, directly or indirectly, affect water quality. The evidence must be provided by the property owner, in the form of an engineering report that assesses compliance with the exemption criteria, the suitability of the site for subsurface disposal of waste, and the likely impacts of the discharge on water quality.

Prohibition exemptions ("Attachment A's") have never been issued to these two properties, which Board staff believes were developed in the late 1970's.

The Regional Board's Guidelines for Sewage Disposal from Land Developments, San Bernardino County's Onsite Wastewater Disposal Systems Percolation Standards, and the Uniform Plumbing Code, published by the International Association of Plumbing and Mechanical Officials, consider five feet of soil between the bottom of the disposal system and anticipated high groundwater in the disposal area as the minimum separation necessary to protect water quality and public health from wastes discharged by onsite, subsurface disposal systems. The reason for this criterion is that effluent from septic tanks or similar systems must percolate through a sufficient thickness of unsaturated soils to remove potential biological contaminants. The criterion is also intended to preclude effluent from surfacing. This is one of the criteria Board staff evaluate when considering requests for a prohibition exemption.

Based on information provided by the San Bernardino County Department of Environmental Health Services (SBCDEHS), these two Shay Road parcels each have a septic tank and a leach field subsurface disposal system. SBCDEHS staff report that the leach fields on the two parcels are approximately 5' below ground surface. Therefore, when groundwater levels rise higher than ten feet below ground surface, there is an insufficient separation between the leach fields and groundwater to conform to the Board's guidelines and to insure adequate treatment of waste discharges by natural processes. In addition, the potential for surfacing effluent, as a result of high groundwater and fine grained soils, could pose a public health hazard and a threat to surface water quality.

A geotechnical investigation was performed on May 26, 1998 by Mr. Donn Swartzkopf, of Terra Geosciences. Mr. Swartzkopf is a certified engineering geologist and registered geophysicist. The report found that the depth to groundwater on Shay Road, where the subject properties are located, averaged approximately 3.4 feet below the ground surface at the time of this investigation. Small diameter bore holes were made in native fine grained silty sand (not road fill) adjacent to a 1,400 foot stretch of Shay Rd., fronting the properties.

All borings were excavated to a minimum depth of four feet and left to stand for at least two hours. All of the borings filled with water to the depths indicated below. The groundwater depths measured in these bore holes ranged from 2.5 feet to 3.7 feet below ground surface. The depths to water in the boreholes in front of Mr. Justice's property were 2 ft. 11 inches at the southeast corner, and 3 ft. at the southwest corner. In front of Mr. Taylor's property, depths to water in the boreholes (going from the southeast corner to the southwest corner) were 3 ft., 3 ft. 3 inches, 3 ft. 5 inches, and 3 ft. 7 inches. A borehole 100 feet north of the road on the

westernmost vacant lot into native soil encountered water at a depth of 3 feet 8 inches. In all cases, depth to groundwater was far less that the ten feet minimum requirement.

The report of this investigation also indicated that mottling[1] occurred uniformly in all borings at a depth of two feet. This indicates that in the past, groundwater was present during an extended length of time at a depth of two feet below ground surface. Mr. Schwarzkopf has maintained that the vast majority of geologists agree that the kind of rust colored mottling he observed in all of the borings indicates past groundwater levels. At a depth of two feet, it cannot be from snow or some other surface source.

A 3.4 foot separation between the ground surface and water table (and certainly a 2 foot separation) is insufficient to provide adequate treatment of domestic waste discharged from onsite disposal systems, and poses a situation where effluent could surface. As stated earlier, the Regional Board's Guidelines consider 5 feet of soil between bottoms of leach lines and anticipated high groundwater in the disposal area as the minimum separation necessary to protect water quality from wastes discharged by onsite, subsurface disposal systems. That would be about ten feet minimum groundwater depth for these properties, since their leach lines are about five feet deep. Discharges from onsite disposal systems without adequate separation from groundwater could cause degradation of groundwater quality and constitute a risk of contamination. If the discharged effluent surfaces, it can contaminate surface waters and cause a public health hazard.

Because of the properties' proximity to Baldwin Lake, inadequately treated wastewater from these septic systems, when commingled with groundwater, has a significant potential to affect the lake's near-shore quality and impair its beneficial uses. As a result, these two properties do not qualify for exemptions from the waste discharge prohibition. In a letter from Board staff dated November 19, 1998, all five of the property owners on Shay Road at that time were informed of this issue and of the probability of a cease and desist order if compliance with the prohibition was not achieved in a timely manner.

In 1999 Board staff, in cooperation Big Bear City Community Services District (BBCCSD), Big Bear Area Regional Wastewater Agency (BBARWA), SBCDEHS, and the National Heritage Foundation (NHF - controls lands south and east of Old Shay Road), held two informational meetings with the owner/occupants of the two subject Shay Road properties, along with three other owners at the time. The purpose of these meetings was to explain the reasons the owners of the developed lots could no longer continue to use their onsite subsurface waste disposal systems, to discuss compliance alternatives, and to outline implementation and enforcement scenarios.

[1] A distinctive streaking or spotting of various shades of color which a soil technician can identify as evidence of historically high groundwater.

BBCCSD provides water and sewer service in the area of Shay Road. Its gravity sewers terminate at the eastern end of Shay Road, just west of the four developed properties on Shay Road (see map – Attachment 1a). The four developed Shay Road properties utilize BBCCSD water service, and also have private wells for landscape irrigation and/or livestock watering. After evaluating several alternative sewer system designs, BBCCSD agreed to a small diameter pressure sewer, into which the waste would be pumped from each developed property. This was the least costly alternative. In 1999, BBCCSD informed the owners of the four developed properties, and the owner of the undeveloped lot, of the costs of the project, and invited them to petition the district to form an assessment district that would provide this sewer. BBCCSD staff indicated to Board staff at that time that if 60% of the five property owners (based on lot size) signed a petition requesting action by the district, they would then create the necessary assessment district, to enable construction of the required infrastructure. In addition, BBARWA offered to waive certain sewer connection fees to facilitate the project.

Only one of the five property owners at the time returned the petition, and since a majority vote of the property owners was required to form the assessment district, BBCCSD did not proceed with the project. Neither of the two owners that are the subject of this action returned the petition.

Only after these efforts had failed did staff recommend enforcement action. On October 6, 2000, with the adoption of Cease and Desist Order No. 00-83, the Board ordered the four property owners (Mr. Justice, Mr. Taylor, Neal McNeal, and David Gilchrist) living at the time on Shay Road, to comply with the waste discharge prohibition contained in the Basin Plan, and cease discharge to their subsurface disposal systems by October 6, 2001.

During the subsequent months, only one property owner, Neal McNeal, indicated a willingness to comply with the cease and desist order. Mr. McNeal initiated an unsuccessful second attempt to bring a sewer main onto the frontage road to provide sewer hookups for the four properties. The other residents again chose not to participate. BBCCSC had agreed to allocate up to $40,000 of the district's sewer reserve funds to finance installation of a sewer force main on Shay Road, and be reimbursed from each owner when they hooked up. BBCCSD received a reasonable bid of $47,465 from a local contractor in 2001 for the work to extend the sewer down Shay Road. BBCCSD abandoned the project because the bid exceeded the $40,000 limit they had placed on the project, and because they concluded they would not receive support from 3 of the 4 residents.

On August 28, 2001, Board staff received a limited phase II soil investigation report dated July 30, 2001, prepared by Geosec on behalf of Mr. Taylor, Mr. Justice and Mr. Gilchrist. The report stated that there was no contamination or risk of same from their septic systems, based on groundwater elevation data from 1991 and 1992, and recent borings near their septic systems.

On September 18, 2001, Board staff sent letters to the four residents requiring a plan of compliance with the cease and desist order, which was to have been complied with by

October 6, 2001. Staff informed Mr. Taylor, Mr. Justice, and Mr. Gilchrist that we did not agree with their contention of no contamination or risk based on the Geosec report.

We received a response from Mr. McNeal, with a plan to cap off his leach lines by October 6, 2001. On September 26, 2001, we received a letter from Mr. Taylor, Mr. Justice, and Mr. Gilchrist which stated that the July 2001 Geosec report constituted compliance with the CDO, "whether or not you agree with the engineer's conclusions."

On November 16, 2001, Board staff wrote back to Mr. Taylor, Mr. Justice, and Mr. Gilchrist, stating that submission of the geotechnical report alone did not constitute compliance with the CDO. We reminded them that the only means by which the report could lead to compliance with the CDO would be if the technical information in the report justified an exemption from the waste discharge prohibition. The report did not present geologic or hydrologic evidence that the septic tanks would not affect water quality, because it did not address the high groundwater documented in the Terra Sciences report.

The data in the report consisted of:

(1) Analysis of six soil samples taken in July 2001 (one background sample, and five taken in the area of the three property septic tanks) and analyzed for certain parameters.

(2) Water level measurements from six wells on or near the three properties showing that between September 1991 and December 1992, groundwater was at a depth of between 10 and 30 feet below ground surface.

The water level data represent an 18 month period almost ten years ago, following one of the worst droughts in Southern California this century. The Geosec report failed to mention more recent data, such as the study done on Shay Road in late May 1998, which showed water at shallow depths as high as 3 three feet below ground surface, and soil conditions indicating that groundwater had been present as shallow as two feet below ground surface. As stated above, five feet of separation between leach lines and groundwater is considered the minimum necessary to protect water quality and public health.

Staff does not believe that the soil samples from five borings taken in the area of the three septic tanks on Shay Road conclusively demonstrate an absence of past contamination, or no risk of future contamination. The historical high groundwater level (two feet bgs) is the limiting factor in this instance.

The information in the Geosec report does not negate or contradict the fact that historical groundwater levels as high as two feet below ground surface have been established as recently as May of 1998. This is the most important salient fact with respect to contamination risk from the septic systems in this area. We are also in possession of anecdotal information from local residents about saturated surface conditions, septic system problems, and high groundwater in resident wells on this section of Shay Road dating back to 1983.

Also, whether or not the water filling the boreholes is "perched" groundwater does not negate the fact that these septic system leachlines could be distributing untreated wastes to waters of the state. Perched water often has contact with deeper aquifers, and is often indistinguishable from them.

In our November 16, 2001 letter, we reiterated our request for a plan of compliance (with specifics and a schedule) to be given to us by December 19, 2001, along with any extenuating circumstances warranting an extension beyond October 6, 2001. We received no response to this letter. We did not hear directly from Mr. Justice or Mr. Taylor until August 8, 2002, when Mr. Justice called Board staff about our letter dated August 2, 2002 relating to today's item.

It is our understanding that Mr. Gilchrist is no longer the owner of the property at 1617 Shay Road. We recently contacted the new owner, Mr. Robert Nuccio, to begin the process of bringing him into compliance with the cease and desist order. Because Mr. Nuccio was not named in CDO No. 00-83, he is not subject to this action.

Mr. McNeal is not subject to this action because he has continually tried to find a solution to the problem. He is currently attempting to receive a final design approval from the San Bernardino County for a raised mound system on his property, if all efforts to build a sewer line extension fail.

On December 14, 2001 a petition was sent to the State Board by Mr. Justice, Mr. Taylor, and Mr. Gilchrist, requesting that the CDO be revoked based on faulty and insufficient hydrologic and regulatory justification. The State Board rejected the petition at that time because it was not received within thirty days of the issuance of the cease and desist order.

On August 2, 2002, the Executive Officer issued Administrative Civil Liability (ACL) Complaint No. 2002-0064 to Mr. John K. Justice of 1669 Shay Road, and ACL Complaint No. 2002-0065 to Mr. Ronald Taylor of 1635 Shay Road. Both complaints cited 300 days of violation of Cease and Desist Order 00-83 between the deadline for compliance with Cease and Desist Order No. 00-83, and the issuance of the complaints on August 2, 2002.

The maximum liability that could be assessed for the violation cited is $600,000, which is based on ten dollars for each gallon discharged over the period of the violation (200 gallons of waste per day over 300 days). In the complaints, the Executive Officer proposed an assessment of $30,000 against each of the property owners for the cited violation. The Executive Officer has proposed to suspend the entire $30,000 if the property owners connect to the local sewer, and suspend $20,000 if they install holding tanks or acceptable alternative disposal systems.

To qualify for either suspension amount, work on the selected project must be completed by March 30, 2003. The Executive Officer may extend this deadline on a case-by-case basis if extenuating circumstances warrant additional time.

California Water Code Section 13327 requires that the Regional Board consider a number of factors before imposing administrative civil liability. These factors are listed below, together with relevant discussion.

1. Nature, circumstance, extent and gravity of the violation.

   The two property owners identified above are alleged to have violated Cease and Desist Order No. 00-83, in that they have failed to comply with the Bear Valley waste discharge prohibition by eliminating the subsurface discharge of waste on their respective properties. The Regional Board adopted the Bear Valley waste discharge prohibition based on findings that subsurface waste disposal system use in the area was causing a public health hazard and was threatening to affect water quality. Failure to comply with the prohibition results in the continuation of these conditions.

   Over the past several years, several hundred people in the Big Bear Area have complied with the waste discharge prohibition by hooking up to the local sewer.

   As mentioned before, Mr. Robert Nuccio, the new owner of the Gilchrist property, is not subject to this action because he was not named in CDO No. 00-83. Mr. McNeal is also not subject to this action because he has continually tried to find a solution to the problem, and is currently attempting to receive a final design approval for a raised mound system.

2. Whether the discharge is susceptible to cleanup and abatement

   Past Discharges of waste in violation of the Bear Valley waste discharge prohibition and in violation of Cease and Desist Order No. 00-83 are not susceptible to cleanup. Abatement of the conditions which resulted in the waste discharge prohibition, violation of which led to the cease and desist order, can be achieved by ceasing the discharge of wastes to subsurface disposal systems.

3. Ability to pay the proposed assessment

   Based on the relative value of the properties on Shay Road, Board staff believe the property owners have the financial resources necessary to comply with the cease and desist order. One home on Shay Road is currently listed for sale at $850,000, and another at $590,000.

   If Board staff is mistaken on this point, San Bernardino County has loan programs available for low income property owners to facilitate code required improvements to owner-occupied homes.

   Board staff believes that financial inability to comply or to pay the proposed assessment can best be demonstrated by a property owner applying for, and being approved for, a County sponsored home improvement loan. If a property owner is eligible for a loan, or for an outright grant, staff would conclude that person does not

have the financial ability to comply or to pay the proposed assessment. We have received no information from the property owners indicating that they were unable to expend the funds necessary to comply with the cease and desist order.

4. Effect on ability to remain in business

   Board staff does not believe that this factor is relevant in the matter before the Board.

5. Voluntary cleanup efforts undertaken

   Board staff does not believe that this factor is relevant in the matter before the Board.

6. Prior history of violation

   Board staff does not believe that this factor is relevant in the matter before the Board.

7. Degree of culpability

   The property owners named in Complaints No. RB8-2002-0064 and No. RB8-2002-0065 are culpable for violation of Cease and Desist Order No. 00-83. They have received ample notice of all Bear Valley waste discharge prohibition enforcement proceedings, up to and including the issuance of Complaint No. RB8-2002-0064 and No. RB8-2002-0065. They have had ample opportunity to comply.

8. Economic savings

   Economic savings have been realized by Mr. Justice and Mr. Taylor by not complying with the CDO deadline of October 6, 2001. They have realized savings since they have not incurred the costs of constructing sewer connections, holding tanks, or acceptable alternative treatment systems.

   The following two scenarios relating to the sewer were developed based on the fact that to meet BBCCSD requirements, at least three owners would have to participate in order to establish an assessment district. That would result in either three or four owners participating.

Estimated cost savings per residence if four owners participate in sewer project

We estimate the basic savings to each property owner to be at least $22,182, for mainline extension construction, BBCCSD fees, BBARWA fees, and laterals to the main line. This is based on a bid of $47,465 received by BBCCSD in 2001 plus 15%. Lateral construction costs to the main line would vary slightly depending on the distance from the main line to each respective home, and possibly other factors. If an assessment district were approved, an additional $2,000 would be incurred for BBCCSD administration fees, bringing the cost to $24,182 per owner. If these costs are spread out by the assessment district over 15 years at 6% interest, the total cost would come to $37,350 per owner over that period.

Estimated cost savings per residence if three owners participate in sewer project

We estimate the basic savings to each property owner to be at least $26,731, for mainline extension construction, BBCCSD fees, BBARWA fees, and laterals to the main line. This is based on the same bid of $47,465 received by BBCCSD in 2001 plus 15%. Again lateral construction costs to the main line would vary somewhat depending on distance to the line and other factors. If an assessment district were approved, an additional $2,666 would be incurred for BBCCSD administration fees, bringing the cost to $29,397 per owner. If these costs are spread out by the assessment district over 15 years at 6% interest, the total cost would come to $45,405 per owner over that period.

Estimated cost savings per residence for holding tanks or alternative systems

Holding tank construction costs would run at least $5,000 for installation, plus ongoing pumping costs, which can run several hundred dollars a month. Alternative treatment systems such as mound systems could probably not be built for less than $10,000, and could easily cost over $20,000 if all design and work is done by licensed engineers and contractors.

RECOMMENDATIONS:

1. Staff recommends that the Board affirm Administrative Civil Liability Complaint Nos. RB8-2002-0064 and RB8-2002-0065.

2. Staff recommends that the Board direct the Executive Officer to initiate collection proceedings should the property owners fail to pay the assessment on a timely basis.

Comments were solicited from the following parties:

Regional Board
State Water Resources Control Board – Office of the Chief Counsel, Jorge Leon
State Water Resources Control Board – Division of Water Quality
Lawyers for Clean Water
San Bernardino County Environmental Health Services – Dan Avera
Big Bear City Community Services District (BBCCSD) – Gary Cecil
Big Bear Area Regional Wastewater Agency (BBARWA) – Steve Schindler
Orange County Coast Keeper, Garry Brown
Downey Savings and Loan – Gordon Calac (REO manager)
National Heritage Foundation – Robert Lindblad
San Bernardino County Water Sanitation - William Smillie
Mr. John K. Justice, property owner
Mr. Ronald Taylor, property owner
Mr. Neal McNeal, property owner
Mr. Robert Nuccio, property owner

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