STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Revocation of the Grade V Wastewater Treatment Plant Operator Certificate Held by KABINE MARA.	ORDER NO. WQC 84- 5

BY THE BOARD:

By a letter dated December 13, 1983, the Office of Operator Certification (Office) of the State Resources Control Board (Board or State Board) notified Mr. Kabine Mara (or operator) that the Office was initiating proceedings to revoke the operator's Grade V wastewater treatment plant operator certificate. The operator requested a hearing on the matter and hearings were subsequently held by the State Board on May 2 and 23 and June 18, 1984.

I. BACKGROUND

A. Factual Setting

The City of Gilroy operates a domestic wastewater treatment plant for the Cities of Gilroy and Morgan Hill. The treatment facilities consist of bar screens, comminutors, and oxidation ponds. After treatment wastewater is discharged to a series of evaporation and percolation ponds. Gilroy also operates an industrial wastewater treatment facility for the treatment and disposal of agricultural wastes. Industrial wastes are discharged to percolation ponds, or agricultural processing ponds, located adjacent to the domestic wastewater percolation ponds.

The domestic wastewater treatment plant has a design capacity of 6.1 million gallons per day (mgd). In 1982 and 1983 the land disposal capacity of

the plant, however, was significantly less than the treatment capacity. In these two years the Gilroy area experienced unusually heavy winter rains. As a result of a combination of factors, including the excessive rainfall, high groundwater elevations, and poor percolation capability of soils in the area, the domestic percolation ponds were seriously overtaxed. The City of Gilroy responded to the situation by discharging domestic wastewater to Llagas Creek during the winter season in 1982 and 1983.

The discharge violated waste discharge requirements, Order No. 82-14, issued by the California Regional Water Quality Control Board, Central Coast Region (Regional Board) on February 19, 1982, to Gilroy and Morgan Hills. Order No. 82-14 required the City to confine its domestic wastewater to the percolation ponds. Specifically, Order No. 82-14 provided:

> "A. Discharge Prohibitions
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> 1. Discharge of treated or untreated wastewater to Llagas Creek or its tributaries is prohibited.
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> * * *
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> B. Discharge Specifications
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> 1. Wastewater shall be confined to the oxidation ponds, designated disposal areas, or reclamation system shown on Attachment 'A' without overflow or bypass to adjacent properties or drainageways.
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> 2. A minimum freeboard of one foot in all disposal ponds and two feet in treatment ponds shall be maintained."

In response to the illegal discharges of wastewater to Llagas Creek, the Regional Board's Executive Officer issued Violation Notice No. 83-03 on April 4, 1983, to the City of Gilroy. On July 15, 1983, the Regional Board

formally adopted a cease and desist order,[1] Order No. 83-36, against the City. After more information became available regarding the extent of the illegal discharges and participation by certain city employees, the Regional Board took additional enforcement action, including the adoption of Resolution No. 83-19 on November 18, 1983, referring the matter to the Attorney General for civil monetary remedies[2] and the adoption of a cease and desist order with a connection ban[3] Order No. 84-07, on January 20, 1984. The Regional Board also raised an issue regarding possible impropriety by Mr. David Hansen, former public works director for the City, with the State Board of Registration for Professional Engineers. Additionally, at the instigation of the Regional Board, criminal actions were instituted by the district attorney for Santa Clara County against David Hansen, Fred Wood, former City Administrator for the City of Gilroy, and Kabine Mara, former superintendent of the Gilroy wastewater treatment facilities, based upon the illegal discharges of wastewater from the Gilroy treatment facilities.

By a memorandum dated November 1, 1983, the Regional Board referred the matter of revocation of Kabine Mara's Grade V operator certificate to the State Board for investigation and appropriate action. In December 1983, the Office began proceedings to revoke Kabine Mara's Grade V certificate for a one-year period followed by five years of probation. To support revocation the

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[1] Cease and desist orders are authorized under Water Code Section 13301 for existing or threatened waste discharges which violate waste discharge requirements.

[2] See Water Code Section 13350(a).

[3] Water Code Section 13301 provides that a cease and desist order may restrict or prohibit the volume of waste which might be added to a community sewer system by dischargers who did not discharge into the system prior to the issuance of the order.

Office alleged that the operator, during the first part of the year in 1982 and 1983, participated in decisions as the superintendent of the Gilroy treatment facilities and ordered employees under his supervision to perform acts resulting in the discharge of domestic wastewater from the treatment facilities to Llagas Creek in violation of Order No. 82-14. In addition, the Office alleged that the operator denied under oath, in reports and documents submitted to the Regional Board under penalty of perjury and in sworn testimony in the case of Alfred R. Yarrington v. City Council of the City of Gilroy, Santa Clara County Superior Court Case No. 530712, that such discharges occurred.

The State Board conducted hearings on revocation of the operator's certificate in May and June 1984. Evidence on the following issues was introduced at the hearings:

> Did Mr. Mara fail to use reasonable care, judgment, or the application of his knowledge or abilities in the performance of his duties as a Grade V certified operator during the first part of the year in 1982 and 1983?
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> Did Mr. Mara willfully or negligently cause or allow the technical provisions of Order No. 82-14 of the California Regional Water Quality Control Board, Central Coast Region, to be violated?

B. Operator Certification Program

Chapter 9, Division 7, of the Water Code governs the classification of municipal wastewater treatment plants and the certification of plant operators and supervisors. The chapter requires the State Board to classify types of plants "for the purpose of determining the levels of competence necessary to operate them." Water Code Section 13626. Chapter 9 also mandates that "[s]upervisors and operators of municipal waste water treatment plants...possess a certificate of appropriate grade in accordance with, and to

the extent...required by" State Board regulations. Id. Section 13627. The regulations must address the training necessary to qualify a supervisor or operator for certification for each type and class of plant. Id. A "certificate" means "a certificate of competency...stating that the supervisor or operator has met the requirements for a specific classification in the certification program." Id. Section 13625(d).

The State Board has adopted detailed regulations governing classification of municipal wastewater treatment plants and operator certification in Subchapter 14, Chapter 4, Title 23 of the California Administrative Code. The regulations classify treatment plants according to the complexity of the treatment process and the magnitude of the design flow. 23 CAC Section 3675. The plant classifications, I through V, range from the least difficult to the most difficult to operate. Id.

The regulations specify the grade certificate which is required for operators and supervisors employed at each class of plant. Id. Section 3680. The regulations establish five grades of operator certificates and describe the education, training, and experience necessary to qualify for each grade. Id. Section 3700. A Grade V certificate is the highest level certificate issued by the State Board.

The regulations also contain provisions for the employment by an agency of an "operator-in-training" (OIT). An OIT can act in the capacity of any grade of certified operator without the required certification for that grade provided that the person has a reasonable chance of qualifying for that grade within three years of appointment to the OIT position. Id. Section 3686. An OIT must work under the direct supervision of a certified operator. Id.

The regulations provide for certificate revocation under specified circumstances. Id. Section 3691.[4] These include cases in which "reasonable care, judgment, or the application of the operator's knowledge or ability was not used in the performance of the operator's duties...or that the operator has willfully or negligently caused or allowed the technical provisions of the appropriate waste discharge requirements...to be violated." Id.

II. CONTENTIONS AND FINDINGS

The operator has raised a number of legal issues which this Board will address first. The Board will then consider whether the evidence introduced at the hearing is sufficient to support revocation.

A. Legal Issues

1. Statutory Authority

Contention: The operator contends that the State Board's regulation governing revocation of a certificate, Section 3691 of Title 23 of the California Administrative Code,[5] is invalid because it exceeds the scope of authority conferred by the Legislature upon the State Board in Water Code

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[4] Section 3691 provides:

> "The board may revoke or refuse to renew the certificate of an operator, following a hearing before the board or its designated representative, if it is found that the operator has practiced fraud or deception, or has submitted false or misleading information on the operator's application, that reasonable care, judgment, or the application of the operator's knowledge or ability was not used in the performance of the operator's duties; or that the operator is unable to perform the operator's duties properly or that the operator has willfully or negligently caused or allowed the technical provisions of the appropriate waste discharge requirements or NPDES permit to be violated."

[5] See fn. 4 supra.

Sections 13627[6] and 1058.[7] The operator argues that Water Code Section 13627 specifically authorizes only the issuance of certificates; consequently, in the absence of express statutory authority, the State Board lacks power to revoke certificates. In addition, the operator contends that the State Board lacks authority to revoke because the Legislature has failed to provide any standards or guidelines in Water Code Section 13627 under which the State Board could adopt regulations governing revocation.

Finding: A review of the applicable case law and rules of statutory construction lead us to the conclusion that the State Board possesses the implied power under Water Code Section 13627 to revoke a certificate and

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[6] Section 13627 provides:

> "(a) Supervisors and operators of municipal waste treatment plants shall possess a certificate of appropriate grade in accordance with, and to the extent recommended by the advisory committee and required by regulations adopted by the state board. The state board shall develop and specify in its regulations the training necessary to qualify a supervisor or operator for certification for each type and class of plant. The state board may accept experience in lieu of qualification training. In lieu of a properly certified waste water treatment plant operator, the state board may approve use of a water treatment plant operator of appropriate grade certified by the State Department of Health Services, where water reclamation is involved.
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> "(b) A person employed as a municipal waste water treatment plant supervisor or operator on the effective date of regulations adopted pursuant to this chapter shall be issued an appropriate certificate provided he meets the training, education, and experience requirements prescribed by regulations."

[7] Section 1058 states:

> "The board may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under this code."

that the Legislature has provided sufficient standards to guide this agency in the adoption of rules covering revocation. Therefore, we conclude that Section 3691 is a valid exercise of the State Board's rule making power.

a. Authority to Revoke

It is firmly established that the right of every person to engage in a legitimate employment, business or vocation is an individual freedom secured by the due process provisions of the federal and state constitutions. See, e.g., Schware v. Bd. of Bar Examiners, 353 U.S. 232, 238-39 (1957); Brecheen v. Riley, 187 Cal. 121, 124-25, 200 P. 1042 (1921). This right is not unrestricted, however, but is subject to the State's police power to prescribe reasonable regulation for the purpose of achieving governmental objectives such as public safety, health, morals and welfare. Doyle v. Bd. of Barber Examiners, 219 Cal.App.2d 504, 509, 33 Cal.Rptr. 349 (1963).

The power to license a business or occupation derives from the state's police power. See, e.g., Rosenblatt v. California State Bd. of Pharmacy, 69 Cal.App.2d 69, 72-73, 158 P.2d 199 (1945). The power of the state to license carries with it the power to prescribe reasonable conditions precedent and includes the power to revoke. Stewart v. County of San Mateo, 246 Cal.App.2d 273, 283, 54 Cal.Rptr. 599 (1966) (revocation of license to operate private petrol service); cf. Sheehan v. Div. of Motor Vehicles, 140 Cal.App. 200, 203, 35 P.2d 359 (1934) (revocation of license to operate motor vehicle).

In this case the Legislature in Water Code Section 13627 has delegated to the State Board the power to license, i.e. certify, wastewater treatment plant operators. It is clearly within the authority of the Legislature to provide for revocation of such certificates. The issue is

whether, since Water Code Section 13627 is silent on revocation, the authority of the State Board to revoke should be implied.

It is well settled in California that administrative agencies possess implied as well as expressed powers. E.g., Dickey v. Raisin Proration Zone No. 1, 24 Cal.2d 796, 810, 151 P.2d 505 (1944); Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 334, 253 P. 726 (1927); 2 Cal.Jur.3d Section 39, pp. 255-258 and cases cited therein. As the court stated in Dickey v. Raisin Proration Zone No. 1, supra, "governmental officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may fairly be implied from the statute granting the powers." 24 Cal.2d at 810. Powers will be implied in an express grant of power if they are necessarily or reasonably incident to the powers granted. E.g., California Drive-In Restaurant Assoc. v. Clark, 22 Cal.2d 287, 302-303, 140 P.2d 657 (1943); Crawford v. Imperial Irrigation Dist., supra.

A number of cases illustrate this principle. In Ferdig v. State Personnel Board, 71 Cal.2d 96, 77 Cal.Rptr. 224, 453 P.2d 728 (1969), for example, the authority of the State Personnel Board to revoke a civil service appointment improperly made was upheld even though the statutes governing separation from state civil service did not apply to the case in question. The court held that while jurisdiction to revoke under the circumstances "does not appear to have been conferred upon the Board in so many words by the express or precise language of constitutional or statutory provision, there can be no question that it is implicit in the constitutional and statutory scheme which empowers the Board to administer and enforce the civil service laws." 71 Cal.2d at 106. Similarly, in California Drive-In Restaurant Ass'n v. Clark, 22 Cal.2d 287, 140 P.2d 657 (1943), the court upheld the validity of a regulation

adopted by the Industrial Welfare Commission which prohibited employers from including tips received by employees as part of their legal minimum wage. The court found that the commission had the implied authority to adopt the regulation in order to make effective the agency's statutory authority to set minimum wages. 22 Cal.2d at 302-303.

A number of cases have found an implied power to revoke a business license under an enactment authorizing issuance of the license. To illustrate, in Metropolitan Milk and Cream Co. v. City of New York, 113 A.D. 377, aff'd 186 N.Y. 533 (1906), the court concluded that the board of health of the Department of Health of the City of New York had the implied authority to revoke permits to sell milk under a provision of the city's sanitary code authorizing the board to issue such permits. In rejecting the permittee's contention that the permits were irrevocable, the court stated:

> "[T]o sustain the contention of the plaintiff we must hold that such a permit thereby becomes irrevocable and authorizes the person to whom it was granted to continue forever to sell milk, although the conditions under which the permit was issued were continually violated, the provisions of the Sanitary Code in relation to milk sold disregarded...The sole authority that the health board would have, if this contention were correct, would be to prosecute the person selling the poisonous article in the shape of milk, fine it, and in the meantime such person could go on poisoning the people under a permit or license from the health authorities, a proposition which is so unreasonable that a mere statement is sufficient to refute it...To hold that a permit once granted is irrevocable would be to totally defeat the object of the statute in requiring such a permit...." 113 A.D. at 381-82. (Emphasis added.)

A California court reached a similar conclusion in Vincent Petroleum Corp. v. Culver City, 43 Cal.App.2d 511, 111 P.2d 433 (1941). In

this case city ordinances required anyone who desired to drill for oil within city limits to obtain a permit. City officials revoked plaintiff's permit for failure to comply with the ordinance granting the permit. In upholding revocation of the permit, the court noted that:

> "there are many other cases holding to the same effect, that, so far as the power of revocation is concerned, it is immaterial that the licensing ordinance contains no express provision permitting revocation; that the power to revoke licenses of businesses subject to the police power is necessarily implied." 43 Cal.App.2d at 518."[8]

There are no California cases which specifically address the question of whether an administrative agency authorized to issue professional licenses has the implied authority to revoke such licenses.[9] In general, professional licenses in this state are issued by boards and bureaus under the Department of Consumer Affairs, and these boards possess specific statutory authority for revocation. See, e.g. Bus. & Prof. Code Sections 490, (general revocation provision for conviction of a crime), 1000-10 (chiropractors), 1670 (dentists).

The most analagous case to the matter under consideration here is Yeoman v. Department of Motor Vehicles, 273 Cal.App.2d 71, 78

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[8] There is also a line of cases holding that the express power to license a business or occupation carries with it the implied power to revoke a license improperly issued in the first instance. See, e.g., Kudla v. Modde, 537 F.S. 87, 89 (E.D. Mich. 1982), aff'd 711 F.2d 1057 (6th Cir. 1983). In this case the plaintiff argued that his Class "C" refrigeration license was improperly revoked by the city because none of the grounds specified for revocation in the applicable city ordinance applied. The court, however, found an implied authority to revoke.

[9] There is at least one out-of-state case which implies that an administrative agency, in a proper case, would have such authority. In State Board of Cosmetology v. Maddux, 162 Col. 550, 428 P.2d 936 (1967), the Colorado Superior Court concluded that the State Board of Cosmetology had the inherent power to revoke or suspend a license to operate a beauty college without explicit statutory authority to revoke.

Cal.Rptr. 251 (1969). In this case the court concluded that the Board of Education had the implied authority to adopt regulatins providing for the revocation of school bus driver certificates. The Board of Education possessed the statutory authority to "adopt reasonable regulations relating to the construction, design, operation, equipment, and color of school busses." Pursuant to this authority the board enacted regulations providing for the issuance and revocation of school bus driver certificates. The regulations governing revocation were challenged on the ground that they exceeded the authority granted by the Legislature to the Board to adopt reasonable regulations with respect to the driving of school buses. The court rejected this challenge stating:

> "It was also within the power of the Legislature to delegate to Board the power to adopt all necessary regulations for the operation of buses for the transportation of pupils in the public schools....
>
> The power to adopt rules for licensing such school bus drivers carries with it the power to adopt and enforce rules for the suspension or revocation of such licenses." 273 Cal.App.2d at 77.[10]

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[10] Stewart v. County of San Mateo, 246 Cal.App.2d 273, 54 Cal.Rptr. 599 (1966), although not entirely on point, provides further support for the conclusion that a legislative enactment conferring express licensing authority must be construed to confer an implied power to revoke such licenses. In Stewart the court upheld an ordinance adopted by the County of San Mateo, authorizing revocation of a permit to operate a private patrol service, against a challenge that the state had preempted the field of conducting disciplinary proceedings against state-licensed private patrol officers. In this case, the State, through the Private Investigator and Adjuster Act, had enacted a comprehensive scheme of legislation for the licensing, regulation and disciplining of private patrol officers. The Act, however, contained provisions allowing local governments to impose local regulations upon street patrol special officers, to refuse registration to any person of bad moral character, and to "impose such reasonable additional requirements as are necessary to meet local needs...." The court concluded that these provisions must be construed to authorize the county to revoke licenses, stating that:

(CONTINUED)

The Yeoman case indicates that the power to issue an occupational license carries with it the implied power to revoke the license. As in the Yeoman case, the Legislature has delegated to the State Board the general power to "make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties" under the Water Code and the specific authority to adopt regulations for the certification of wastewater treatment plant operators and supervisors. Water Code Sections 1058 and 13627. The power to adopt rules for certification must be deemed to include the implied power to revoke such certification.

The conclusion that the power conferred by Water Code Section 13625 to issue certificates to wastewater treatment plant operators includes the implied power to revoke such certificates also follows from well-established rules of statutory construction. As the court stated in California School Employees Ass'n v. Jefferson Elementary School Dist.; 45 Cal.App.3d 683, 691-92, 119 Cal.Rptr. 668 (1975):

> "It is a cardinal principle that the primary rule of statutory construction to which every other rule must yield is that the intention of the Legislature should be given effect; and the language of any statute and provision therein may not be construed so as to nullify the will of the Legislature or to cause the law to conflict with the apparent purpose the lawmakers had in view (citations omitted)."

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[10] (FOOTNOTE CONTINUED)

> "by preserving in the local government the right to refuse registration to a private patrol operator, the Legislature must have intended that such registration, once given, could be taken away in the form of revocation of the private patrol operator's permit.
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> "The power to license includes the power of revocation, and it is immaterial that the licensing ordinance contains no express provision permitting revocation." 246 Cal.App.2d at 283.

Ambiguity in a statute is not always a necessary condition precedent to statutory interpretation for "'[t]he literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole.'" County of Sacramento v. Hickman, 66 Cal.2d 841, 849, fn. 6, 59 Cal.Rptr. 609, 428 P.2d 593 (1967). Courts will not blindly follow the letter of the law when its purpose is apparent to consequences which are inconsistent with that purpose, particularly when the results of a literal interpretation, if adopted, would be absurd. Jordt v. California State Bd. of Educ., 35 Cal.App.2d 591, 594, 96 P.2d 809 (1939).

Statutory provisions governing wastewater treatment plant operators were first enacted into Chapter 9, Division 7 of the Water Code in 1969 with the passage of the Porter-Cologne Water Quality Control Act, Water Code Sections 13000 et seq. (Porter-Cologne Act). Stats. 1969, c. 482. In 1972 Chapter 9 was repealed and replaced by a more detailed and comprehensive Chapter 9 covering the same subject matter. Stats. 1972, c. 1315.

The 1969 statutory provisions required the State Board to "classify types of treatment plants for the purpose of determining the levels of competence necessary to operate them" and to "develop and specify in its regulations the training necessary to qualify an operator for each level of competence for each type of plant." Stats. 1969, c. 482, p. 1079, Section 18, formerly Water Code Sections 13626 and 13627. The legislative history of these provisions emphasizes the shortage of technically trained and qualified operators to run wastewater treatment plants constructed with the aid of

billions of dollars of state and federal funds. Final Report of the Study Panel to the State Board, Study Project, Water Quality Control Program, pp. 28-29. (March 1969) (Final Report). The provisions were intended to authorize the State Board "to assure that the operation of plants constructed with state or federal financial assistance will be operated [sic] at the highest level of technical competence commensurate with the nature of the facilities." Final Report at p. 29.

The current Chapter 9, added to the Water Code in 1972, in addition to authorizing the State Board to establish training requirements for operators, contains express provisions for the issuance of "certificate[s] of appropriate grade in accordance with...regulations adopted by the state board." Water Code Section 13627(a). Certificates must be renewed biennially, "subject to compliance by applicants with renewal requirements prescribed by regulations." Id. Section 13628.

The provisions of Chapter 9 must be read in harmony with the policy provisions of the Porter-Cologne Act. Chapter 1, Division 7 of the Water Code. Water Code Section 13000 contains a legislative declaration that "the waters of the state shall be protected for use and enjoyment by the people of the state" and that "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable...." The section further states that "the health, safety and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state; that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation originating inside or outside the boundaries of the state...." (Emphasis added.)

Chapter 9 evidences a legislative intent to authorize the State Board to regulate wastewater treatment plant operators and supervisors to ensure that they possess the technical qualifications and competence to properly operate a plant. The aim of such regulation is to give effect to the legislative intent to ensure that treatment plants are properly operated. The ultimate goal of such regulation, as expressed in Chapter 1 of Division 7 of the Water Code, is to protect water quality from degradation for the use and enjoyment of the people of the state.

To construe Water Code Section 13627 as suggested by the operator would nullify this legislative intent and reach an absurd consequence. First, that certificates are not irrevocable is evidenced by the fact that the Legislature has provided for biennial renewal of certificates "subject to compliance...with renewal requirements prescribed by regulations." Id. Section 13628. Secondly, to conclude that the State Board may certify an operator or supervisor to ensure that the individual is properly qualified but may not revoke such certificate where the individual fails to utilize or possess the appropriate training, education or experience would defeat the legislative purpose of ensuring that the plant be operated at the highest level of technical competence commensurate with the nature of the facilities. The construction urged by the operator would reach the absurd result of making a certificate irrevocable even though the operator demonstrated an inability or unwillingness to properly perform his or her duties. This construction is contrary to the legislative scheme and must, therefore, be rejected.

b. Standards for Revocation

Additionally, the operator contends that Section 3691 is invalid because the Legislature has failed to provide standards to guide the

State Board in revoking operator certificates. We find, however, that Chapter 9, when read in its entirety, provides sufficient standards to guide the State Board in the adoption of regulations governing revocation. Under the chapter, the State Board is required to classify types of sewage treatment plants "for the purpose of determining the levels of competence necessary to operate them." Id. Section 13626. State Board regulations are to specify the training, education and experience required to qualify a supervisor or operator from each type and class of plant. Id. Section 13627. The emphasis of Chapter 9 is on ensuring that supervisors and operators possess the technical qualifications and competence to properly operate a wastewater treatment facility. We find that the chapter provides adequate guidance to the State Board in formulating regulations for both certification and revocation for operators who fail to possess or use their skills and qualifications in the operation of a sewage treatment facility.

2. Due Process

Contention: The operator contends that the State Board has violated his due process rights by failing to initiate disciplinary proceedings with an accusation. He also argues that Section 3691 fails to provide adequate notice of the conduct which is proscribed.

Finding: The filing of an accusation to initiate license revocation proceedings is required for agencies subject to the Administrative Procedure Act, Government Code Sections 11370 et seq. Government Code Section 11503. The State Board is not one of the agencies subject to the Act, however; consequently, the filing of an accusation for proceedings to revoke an operator certificate is not legally mandated. See id. Section 11501.

Water Code Section 185 requires the State Board to adopt rules for the conduct of its affairs "in conformity, as nearly as practicable, with

the provisions of" the Administrative Procedure Act. In compliance with this section, the State Board has adopted regulations in Subchapter 15, Chapter 3, Title 23 of the California Administrative Code, governing adjudicatory proceedings. 23 C.A.C. Sections 648-648.8. The State Board is also subject to the notice requirements of the Bagley-Keene Open Meeting Act, Government Code Sections 11120 et seq. See Gov. Code Section 11125.

Due process does not require any particular form of notice or method of procedure in administrative adjudicatory proceedings. Drummey v. State Board of Funeral Directors and Embalmers, 12 Cal.2d 75, 80, 87 P.2d 848 (1939). All that is required is reasonable notice and a reasonable opportunity to be heard. Id. With respect to administrative pleadings, in particular, due process requires simply that the licensee be given fair notice of the acts or omissions with which he is charged so that he may prepare his defense. Garcia v. Martin, 192 Cal.App.2d 786, 789, 14 Cal.Rptr. 59 (1961).

A review of the record of these proceedings indicates that the notice provided to Kabine Mara met all applicable due process, statutory and regulatory requirements. He had ample notice of the charges against him and of the particular incidents on which the Office was relying to support those charges. Further, the operator has not alleged any inability to prepare his case, and a review of the transcripts fails to reveal any element of surprise regarding the charges or evidence produced against him.

The operator challenges these proceedings, however, on the basis that the grounds for revocation previously cited fail to proscribe an ascertainable standard of conduct. In particular, he contends that the terms "willfully," "negligently," and "reasonable care and judgment" do not provide notice of the conduct which is prohibited.

That the terms "willfullness" and "negligence" have a well accepted meaning in American jurisprudence can hardly be argued. In statutory offenses the term "willfully" implies simply a willingness to commit the act. Pen. Code Section 7. It does not require any intent to violate the law. Id. This interpretation has been held to be proper in cases construing statutes enacted under the state's police power. E.g., Pittenger v. Collection Agency Licensing Bureau, 208 Cal.App.2d 585, 588, 25 Cal.Rptr. 324 (1962). "Negligence" means "a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns." Pen. Code, Section 7; see People v. Young, 20 Cal.2d 832, 836, 129 P.2d 353 (1942).

The terms "reasonable care and judgment" also are well-understood. The courts have felt that normally conscientious persons of average prudence and intelligence have a concept of what is "reasonable," and there are numerous cases which indicate that courts will readily deal with the attributes of reasonableness or unreasonableness, in light of the matter and circumstances involved. Seligman v. Tucker, 6 Cal.App.3d 691, 697, 86 Cal.Rptr. 187 (1970). The phrase "reasonable or ordinary care," in particular, means "that degree of care which people of ordinarily prudent behavior could be reasonably expected to exercise under the circumstances of a given case." Kopfinger v. Grand Central Pub. Market, 60 Cal.2d 852, 857, 37 Cal.Rptr. 65, 389 P.2d 529 (1964). The operator's contention that the grounds for revocation of his certificate fail to proscribe an ascertainable standard of conduct must, therefore, be rejected.

3. Burden and Standard of Proof

Contention: The operator contends that the State Board has the burden of proving the charges against him and that the standard of proof is clear and convincing proof to a reasonable certainty.

Finding: These contentions are correct. In disciplinary administrative proceedings the burden of proof is on the party asserting the affirmative, in this case the State Board. Cornell v. Reilly, 127 Cal.App.2d 178, 184, 273 P.2d 572 (1954). With respect to the standard of proof, the court in Ettinger v. Board of Medical Quality Assurances, Department of Consumer Affairs, 135 Cal.App.3d 853, 185 Cal.Rptr. 601 (1982) held that the standard of proof in an administrative hearing to revoke the license of or discipline a professional licensee should be clear and convincing proof to a reasonable certainty and not a mere preponderance of the evidence.

4. Discriminatory Enforcement

Contention: Mara asserts as a defense to this proceeding that the State Board is engaged in discriminatory enforcement of Section 3691. To support this assertion, he alleges that the State Board has failed to institute revocation proceedings against the operators who were under his supervision at the time of the illegal discharges.

Finding: Uneven enforcement of the laws can constitute a denial of equal protection which is guaranteed by the federal Constitution Yik Wo v. Hopkins, 118 U.S. 356 (1886). Generally, such unequal enforcement must be accompanied by a malicious intent on the part of the prosecution before it is considered a denial of equal protection. Snowden v. Hughes, 321 U.S. 1, 8 (1944). An equal protection violation does not arise merely because officials prosecute one and not another for the same act. Murguia v. Municipal Court, 15 Cal.3d 286, 297, 124 Cal.Rptr. 204, 540 P.2d 44 (1975).

An individual alleging discriminatory prosecution bears the burden of establishing this defense. Id. at 305. In order to establish a claim of selective prosecution, two elements must be proven: (1) that the person was deliberately singled out on the basis of some invidious criterion, e.g. race, religion, or national origin; and (2) that the prosecution would not have been pursued but for the discriminatory design of the prosecuting authorities. Id. at 298.

The operator has failed to allege and the record in this case is devoid of any evidence that the Office instituted proceedings against him because of any invidious criterion. The mere fact that the Office did not proceed against the operators under Mara's supervision does not establish a claim of discriminatory prosecution.

The State Board finds that the Office had a rational basis for proceeding against the operator rather than those under his supervision, many of whom were OIT's. As a supervisor, it is appropriate to hold Mara to a higher standard of conduct than would be expected of the individuals he supervised.

5. Attorney's Fees

Contention: The operator contends that he is entitled to attorney's fees because the State Board lacks statutory authority to revoke, has deprived him of due process and lacks evidence to support disciplinary action against him.

Finding: For the reasons previously stated, this Board has determined that it has the implied statutory authority to revoke and that the operator has not been deprived of due process. Further, as discussed below, the Board has sufficient evidence to support disciplinary action.

In any event, however, there is no provision in the Water Code specifically authorizing the State Board to pay attorney's fees. In the absence of such express statutory authorization, no attorneys fees can be allowed. C.C.P. Section 1021; see Griggs v. Board of Trustees, 61 Cal.2d 93, 99, 37 Cal.Rptr. 194 (1964).

6. Admissibility of Administrative Investigatory Report

Contention: The operator has objected to the admissibility of an administrative investigatory report prepared by Mr. Jay Baksa, current city administrator for the City of Gilroy, and to admissibility of Baksa's testimony concerning the report. During the hearings on this matter, the admissibility of the report and testimony were taken under submission.

Finding: The report, entitled "Summary of the Administrative Investigation" was prepared by Mr. Baksa following interviews conducted from September 15 through 23, 1983, of 13 city employees, three ex-employees, one city council member and one contractor, concerning the illegal discharges of domestic wastewater from the Gilroy plant to Llagas Creek. The report is a summary of the conclusions reached by Mr. Baksa as a result of the investigation. Of the 13 employees interviewed by Baksa, eight testified at the State Board hearings on revocation of Mara's certificate.[11]

The technical rules of evidence are inapplicable to adjudicatory proceedings conducted by the State Board. 23 C.A.C. Section 648.4. Any relevant non-repetitive evidence may be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious

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[11] These include Kabine Mara, Robert Elia, Jesse Dimas, Raymond Gonzales, Ambrosio Rodriguez, Helen Lotito, Martha Beck, and David Hansen.

wastewater disposal ponds to Llagas Creek.[20] The discharge was authorized to enable the City to prepare for construction of a flood control project for Llagas Creek.[21] The letter predicated authorization, however, on "the existing conditions, which include: . . . 4. No domestic waste in the [agricultural] ponds...." and specifically stated that "no domestic wastewater shall be discharged."[22] On February 15, 1983, however, the center percolation beds, a part of the agricultural pond system, already contained mixed domestic and agricultural wastewater.[23] After the February 15 authorization, the contents of the center beds were drained to Llagas Creek in violation of the terms of the authorization.[24]

The record also reflects that Kabine Mara "willfully"[25] caused or allowed discharges in violation of Order No. 82-14 to occur. The operator

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[20] Pl. Exh. A, Tab 3.

[21] Id.

[22] Id.

[23] E.g., R.T. 5/23, p. 103.

[24] Fn. 15, supra; R.T. 6/18, pp. 69-70.

[25] As explained previously, "willfully" implies simply a purpose or willingness to commit the act charged. See p. 19, supra, of this Order. It does not require any intent to violate the law, to injure another, or to acquire any advantage. Pen. Code Section 7. It does not require an evil intent but implies simply that the person knows what he is doing, intends to do what he is doing and is a free agent. In re Trombley, 31 Cal.2d 201, 807, 193 P.2d 734 (1948).

The operator contends that his conduct cannot be considered "willful" because he was coerced into participating in the illegal discharges of domestic wastewater from the Gilroy treatment plant. An act cannot be considered willful if it is coerced. In order for coercion to constitute a defense to a criminal act, however, the person charged must demonstrate that the act was committed "under threats or menace sufficient to show that [he] had reasonable cause to and did believe [his life] would be endangered if [he] refused." Pen. Code Section 26. The operator has not alleged and there is no evidence to

(CONTINUED)

received orders from Fred Wood, ex-city administrator, to discharge domestic wastewater to Llagas Creek in both 1982 and 1983, and Mara, as the plant superintendent, implemented those orders.[26] The record is clear that he was aware that these actions placed his certificate in jeopardy.[27] Mara did not report the illegal discharges to the Regional Board,[28] and he was aware that Fred Wood had not reported the discharges to the Regional Board.[29]

The facts recited above support a finding that the operator willfully caused or allowed the technical provisions of Order No. 82-14, including Discharge Prohibition A.1, Discharge Specifications B.1 and 2, and General Reporting Requirements C3, to be violated. In particular, we conclude

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[25] (FOOTNOTE CONTINUED)

indicate that his life was in danger at the time of commission of the acts in question here; consequently, this defense must fail. Nevertheless, evidence of circumstances which fall short of coercion may be considered by this Board in mitigation of any penalty to be imposed against the operator. This evidence will be discussed below.

[26] E.g., R.T. 5/2, pp. 16, 69, 185-186, 193-194; R.T. 6/18, pp. 9, 33, 40. Pl. Exh. C, pp. 19, 21-22; Pl. Exh. F.

[27] E.g., R.T. 5/23, pp. 96-97, 138; Pl. Exh. F.

[28] E.g., R.T. 5/23, p. 139, 150. In this regard, we note that Mara signed the discharger self-monitoring reports which were required to be sent to the Regional Board by Order No. 82-14. Pl. Exh. A, Tab 2, Prov. D.3; R.T. 6/18, p. 18. He was under the erroneous impression that only illegal discharges which were "not ordered" had to be reported to the Regional Board. R.T. 6/18, p. 18. Regardless of who, the operator or Fred Wood, should have reported the illegal discharges to the Regional Board, we conclude that the operator willfully allowed the provision of Order No. 82-14, requiring the reporting of noncompliance, to be violated by failing to either report these events himself in the self-monitoring reports and by continuing the discharges knowing that Wood had failed to report them.

[29] E.g., R.T. 5/23 pp. 98, 107.

affairs. Id. Hearsay evidence,[12] in particular, is admissible for the purpose of supplementing or explaining other evidence but is not sufficient in itself to support a finding unless it would be admissible over objection in civil actions. Id.

The administrative investigatory report is clearly hearsay. While it is not inadmissible on that basis alone, this Board has concluded that it is appropriate to exclude the report and Baksa's testimony concerning the report. The Board has the benefit in this case of a higher form of evidence; that is, the direct testimony of the majority of employees interviewed by Baksa. Further, the Board finds that the probative value of the report is outweighed by the possibility of undue prejudice to the operator due to his inability to cross-examine those operators who were interviewed by Baksa but were not present at the State Board hearings.

B. Sufficiency of the Evidence

1. Charges against the Operator.

While the duration of the discharges is disputed, it is uncontroverted that domestic wastewater was discharged from the Gilroy treatment plant to Llagas Creek in 1982 and 1983. At a minimum domestic wastewater was discharged to Llagas Creek for ten days, nine hours per day, in March 1982,[13] and from approximately March 27 through April 8,

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[12] Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

[13] E.g., Reporter's Transcript for May 23, 1984 [R.T. 5/23], p. 95; Reporter's Transcript for June 18, 1984 [R.T. 6/18], p. 3; Pl. Exh. F, letter to Ken Jones, dated October 6, 1983.

1983.[14] In addition, domestic wastewater was mixed with agricultural wastewater and the combined effluent discharged to the creek in February and March 1983.[15] The Regional Board was not informed of these discharges at the time of their occurrence.[16]

The discharges were clearly illegal. Order No. 82-14 prohibited the discharge of treated or untreated domestic wastewater to Llagas Creek, required that domestic wastewater be confined to the percolation ponds without overflow or bypass to adjacent properties or drainageways, and required that a minimum freeboard of one foot be maintained in all disposal ponds.[17] Order No. 82-14 also required that any noncompliance with the terms of the Order which might endanger health or the environment, such as violation of a discharge prohibition, be reported within 24 hours from the time the discharger became aware of the circumstances.[18] The oral report was to be followed up with a written report within five days.[19]

With respect to the discharge of mixed domestic and agricultural wastewater, the record reflects that, by a letter dated February 15, 1983, the Regional Board authorized the discharge of wastewater from the agricultural

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[14] E.g., Pl.Exh. C, pp. 3 & 5, R.T. 5/23, pp. 107-108; R.T. 6/18, p. 40.

[15] E.g., Pl. Exh. C, pp. 6-7; R.T. 5/23, pp. 103-105 and 123-125; R.T. 6/18, pp. 19-26.

[16] E.g., Reporter's Transcript for May 2, 1984 [R.T. 5/2], pp. 137, 138, 148; R.T. 5/23 pp. 103, 139, 150, 151; R.T. 6/18, pp. 17, 21, 81.

[17] P. 2 of this Order, supra.

[18] Pl. Exh. A, Tab 2, Standard Provisions and Reporting Requirements, C. 3, p. 5.

[19] Id.

that the fact alone that the operator willfully caused or allowed Discharge Prohibition A.1 and Discharge Specification B.1 of Order No. 82-14 to be violated is sufficient to support revocation of his certificate.

The facts also support a finding that he failed to use reasonable care or judgment in the performance of his duties as a Grade V certified operator. His participation in the illegal discharges of domestic wastewater in 1982 and 1983 must be deemed a failure to use reasonable care or judgment in the performance of his duties as a Grade V certified operator. In this regard, we note that Mara, as the plant superintendent, asked or ordered either OIT's or lower grade operators to participate in the illegal discharges.[30]

2. Mitigating Circumstances

We have concluded that the record supports findings that the operator willfully caused or allowed the technical provisions of Order No. 82-14 to be violated and that, in so doing, he failed to use reasonable care and judgment in the performance of his duties as a Grade V certified operator. These facts justify revocation of his Grade V certificate.

The record, however, also contains evidence of mitigating circumstances which the Board has considered in determining the appropriate penalty for the operator. The record indicates that, during the time of the events in question, Mara was operating under pressures caused by a number of factors, including a poorly designed treatment plant, orders from his superior and tensions among his staff, which may have a contributed to his failure to exercise good judgment. In 1982 and 1983 the Gilroy domestic plant clearly had

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[30] E.g., R.T. 5/2, pp. 61, 70; R.T. 6/18, pp. 8, 33-34.

inadequate land disposal capability,[31] which was exacerbated by unusually heavy winter rains.[32] The illegal discharges of domestic wastewater which occurred at that time were not at Mara's instigation, but rather were ordered by Fred Wood, the ex-city administrator.[33] The operator understood that his choices were to comply with Wood's orders or lose his job.[34] Mara also experienced pressures at the workplace due to general dissatification among his employees, which culminated in the filing of a number of grievances in 1983. The operator's training and cultural background, additionally, appear to have influenced his decision-making. Further, we note that the operator attempted to mitigate potential adverse environmental effects of the discharges by ensuring that the domestic wastewater was properly treated and that adequate flows were maintained in Llagas Creek to afford sufficient dilution to the domestic wastewater flows.[35]

While we conclude that the operator's conduct in this case fell far short of what we would expect of a Grade V certified operator, we have determined that the mitigating circumstances dictate a more lenient penalty than absolute revocation.[36] The Board will, therefore, downgrade Mara's Grade V certificate to a Grade II certificate for a period of one year,

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[31] E.g., R.T. 5/2, pp. 134-136, 144-146; R.T. 6/18, pp. 73.

[32] R.T. 5/23, p. 78.

[33] E.g., R.T. 5/2, pp. 132, 139; R.T. 5/23, pp. 96-97, 107.

[34] R.T. 5/23, pp. 99-100.

[35] R.T. 5/23, pp. 101, 108.

[36] We note that the power to revoke includes the power to impose a lesser penalty. See, e.g. Reynolds v. State Bd. of Equalization, 29 Cal.2d 137, 173 P.2d 551 (1946).

beginning with the date of this Order. During this period, Mara must report to the appropriate Regional Board any waste discharges which violate the technical provisions of any applicable waste discharge requirements or NPDES permit issued to his employer. At the conclusion of the one-year period, Mara will be eligible for reinstatement of his Grade V certificate, provided that: (1) he successfully completes the examination for a Grade V certificate, and (2) he successfully completes an appropriate course on management skills, to be approved by the Office. We wish to emphasize that any failure on Mara's part to report to the appropriate Regional Board any violations of applicable waste discharge requirements or NPDES permits issued to his employer, after reinstatement of his Grade V certificate, will weigh heavily with this Board in any future disciplinary proceedings.

III. CONCLUSIONS

After review of the record and consideration of the issues raised by the operator, and for the reasons previously discussed, we conclude as follows:

1. The State Board has the implied statutory authority to revoke Kabine Mara's operator certificate;

2. There are sufficient standards in Chapter 9, Division 7 of the Water Code, to guide the State Board in the adoption of regulations governing revocation of operator certificates;

3. Kabine Mara was not deprived of procedural due process in these revocation proceedings;

4. The grounds for revocation in Section 3691 provide adequate notice to Mara of the conduct which is proscribed;

5. The State Board has the burden of proof in this proceeding;

6. The standard of proof is clear and convincing evidence to a reasonable certainty;

7. The operator has failed to establish a claim of discriminatory enforcement;

8. The operator is not entitled to attorney's fees;

9. The administrative investigatory report of and testimony by Mr. Jay Baksa concerning the report should be excluded from evidence;

10. The evidence is sufficient to support a finding that the operator willfully caused or allowed the technical provisions of Order No. 82-14, including Discharge Prohibition A.1, Discharge Specifications B.1 and B.2 and General Reporting Requirement C.3, to be violated;

11. The operator has failed to establish a defense of coercion;

12. The finding that the operator willfully caused or allowed Discharge Prohibition A.1 and Discharge Specification B.1 of Order No. 82-14 to be violated is sufficient, standing alone, to support revocation.

13. The evidence is sufficient to support a finding that the operator failed to use reasonable care or judgment in the performance of his duties as a Grade V operator, based upon his participation in the illegal discharges of domestic wastewater to Llagas Creek.

14. Evidence in mitigation of Mara's actions supports a penalty of downgrading his Grade V certificate to a Grade II certificate for a one-year period, with reinstatement of his Grade V certificate thereafter, provided the operator successfully completes the Grade V examination and a management course to be approved by the Office.

IV. ORDER

IT IS HEREBY ORDERED that the operator's Grade V certificate is downgraded to a Grade II certificate for a one-year period, commencing with the date of this Order.

IT IS FURTHER ORDERED that, during this one-year period, Mara must report to the appropriate Regional Board any waste discharges which violate the technical provisions of any applicable waste discharge requirements or NPDES permit issued to his employer.

IT IS FURTHER ORDERED that Mara shall be eligible for reinstatement of his Grade V certificate at the conclusion of the one-year period, provided that he successfully completes:

1. the Grade V examination; and
2. an appropriate management course to be approved by the Office.

V. CERTIFICATION

The undersigned, Executive Director of the State Water Resources Control Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 19, 1984.

Aye:

Warren D. Noteware
Kenneth W. Willis
Carole A. Onorato

No:

Darlene E. Ruiz

Absent:

Abstain:

for Walter G. Pettit
Michael A. Campos
Executive Director