

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

STAFF REPORT FOR MEETING OF MAY 10-11, 2007
Prepared on April 20, 2007

ITEM NUMBER: 6

**SUBJECT: Consideration of Future Enforcement Proceedings for Individuals
Who Own or Use Septic Systems in the Los Osos Prohibition Zone**

KEY INFORMATION

Locations: All developed properties throughout the Los Osos/Baywood Park
Prohibition Zone, San Luis Obispo County
Type of Waste: Domestic wastewater
Action Proposed: Board Discussion

SUMMARY

In January 2006, the Water Board Prosecution Team proposed cease and desist orders against 45 randomly selected property owners in the Prohibition Zone. Twenty-three parties elected to sign the Board-approved settlement agreement, the Water Board issued 13 orders, two more orders are on today's agenda, and seven remain unresolved. The Prosecution Team brings this item to the Board's attention today so the Board, the Prosecution Team and Los Osos community members can discuss options for continuing individual enforcement actions.

BACKGROUND

In 1983, the Central Coast Water Board adopted a prohibition of waste discharges from onsite systems (septic systems) in the most densely developed area of Los Osos and Baywood Park, which is now commonly known as the Prohibition Zone. That prohibition took effect in 1988, and remains in effect today. All owners and tenants of occupied improved properties in the Prohibition Zone are discharging waste from their septic systems in violation of this prohibition. These prohibited discharges have degraded groundwater quality and threaten public health. Shallow groundwater discharges into Morro Bay Estuary along the approximately 2.5-mile shoreline within the Prohibition Zone. In some areas, where shallow groundwater seeps into Morro Bay are accessible for sampling, analyses of these seeps indicate fecal coliform bacteria greatly exceed standards, and DNA testing indicates the largest source of the bacteria is humans. Septic systems discharge to shallow groundwater near these seeps. During wet weather cycles, high groundwater causes septic tank effluent to surface in some areas, presenting a health hazard. The Los Osos Community Services District (LOCSD) periodically operates pumping systems to dewater the most critical areas to prevent flooding of homes and streets.

Connection to a community sewer system is the most practical manner to comply with the prohibition. However, no community sewer system is available. LOCSD began constructing a community sewer system in August 2005, but stopped construction in October 2005.

As provided by AB 2701, San Luis Obispo County is considering whether to take over the community wastewater project. The County is reviewing alternatives and plans to present a short list of alternatives with estimated costs to the community in summer 2007. A vote of the property owners on an assessment to fund the project will follow.

On January 27, 2006, the Prosecution Team sent proposed cease and desist orders to owners of 45 randomly selected properties in the Prohibition Zone. On December 14, 2006, the Board adopted orders against 13 of the parties. Prior to the December 2006 hearing, 23 parties agreed to sign the Board-approved settlement agreement. The Prosecution Team is recommending that the Board adopt orders against two other parties (see Item 4 of this agenda). The Board has not scheduled hearings for the remaining seven parties.

ENFORCEMENT ALTERNATIVES

The process of holding hearings for individual cease and desist orders has been prolonged. The Prosecution Team is considering several other potential individual enforcement alternatives to speed up this process. Some of these potential alternatives are discussed here.

1. Cease and Desist Orders

The Prosecution Team and Board could continue with more cease and desist orders similar to those previously issued. The Board is familiar with this process. Based on our experience to date, the oral hearing time per order could be reduced while still providing due process to the potential order recipients. The individual orders could be processed in groups. The evidentiary issues are straightforward. The Board may impose reasonable limits on public comment, such as limiting the total amount of time allocated for public comment on particular issues and for each individual speaker.

2. Cleanup and Abatement Orders

California Water Code Section 13304 provides that any person who has discharged or discharges waste into waters of the state, which include groundwater, in violation of an order or prohibition issued by a Water Board, or creates or threatens to create a condition of pollution or nuisance, shall upon order of the Water Board, clean up the waste or abate the effects of the waste.

All of the septic system discharges in the Prohibition Zone violate this Water Board's Basin Plan prohibition; therefore, all persons responsible for those discharges are subject to cleanup orders. The primary advantage of cleanup orders in this case is that they may be issued by the Executive Officer or his delegate. This means that cleanup orders could be issued to all responsible parties in the Prohibition Zone simultaneously, as the cleanup orders need not be individually heard and approved by the Water Board. The cleanup order recipients could request an administrative hearing. Such hearings could be handled by an administrative officer, such as the Board's advisor, Michael Thomas. Such hearings could be managed on a consolidated basis with express limits on the factual evidence that could be addressed in such a hearing, guided by the relevant factual issues: whether the septic system at issue is owned or operated by the persons named in the proposed order and whether it is within the Prohibition Zone. The cleanup orders could be issued by the hearing officer on a written record. Such orders could be petitioned to the State Water Resources Control Board in accordance with applicable procedures.

Like cease and desist orders, cleanup and abatement orders do not have automatic enforcement provisions, but do provide a strong basis for further enforcement action, including administrative civil liability, if necessary.

3. Referral to the Attorney General

The Water Board could refer the matter to the Office of the Attorney General to enforce the Basin Plan prohibition in one or more civil actions. If the Water Board pursues this alternative, the Attorney General's Office might sue the entities who are discharging in violation of the Basin Plan prohibition for relief similar to that requested in the cease and desist orders or cleanup and abatement orders, as well as pursue other available legal and equitable remedies. If such a referral were made, the Prosecution Team anticipates that it would work with the Attorney General's Office to construct a reasonable offer of compromise to those entities interested in settling the matter rather than litigating their respective liability for the illegal discharges. If no enforcement actions were pending or impending before the Water Board, *ex parte* and other restrictions would not apply and the Water Board could direct the settlement and litigation process. If such restrictions did apply, the Prosecution Team and the settling parties could jointly propose a negotiated settlement to the Water Board for approval in a public meeting, if the Water Board does not want to delegate approval authority over the settlement.

4. Administrative Civil Liability

The Board may impose administrative civil liability of up to \$5,000 per day for violations of cease and desist orders, cleanup and abatement orders, or Basin Plan prohibitions. Persons responsible for septic system discharges in the Prohibition Zone are currently violating the Basin Plan prohibition, so the Water Board could assess liability for past violations. Staff is recommending progressive enforcement (i.e., settlements and cleanup and abatement orders) rather than proceeding directly to civil liability actions. However, neither the proposed settlement agreements nor the cease and desist orders eliminate past or ongoing daily liability for Basin Plan violations.

4. No Action

The Water Board could elect to not proceed with additional individual enforcement actions at this time. Some in the community argue that further individual enforcement is counterproductive to the County's process and is not necessary.

PROSECUTION TEAM'S PROPOSED ACTION

The Prosecution Team recommends that the Water Board complete the hearings for the remaining parties who were issued proposed cease and desist orders, including the seven parties who withdrew their acceptances of the settlement agreement.

In addition, the Prosecution Team is prepared and now proposes to proceed with Alternative 2, cleanup and abatement orders. A proposed order is attached to this staff report. The proposed order is very similar to the adopted cease and desist orders, but there are a few significant changes:

- The language (section A.2) describing conditions that trigger the requirement to cease discharge is simplified and provides additional flexibility, allowing the County to obtain alternative funding sources, such as federal grant money or other complete funding that does not require a benefits assessment to repay.
- The deadline for parties to pump and inspect their septic systems is extended to two years (three years for those who settle), provided there are no visible signs of failure (section B.). The Prosecution Team is proposing this change to ensure that the approximately 4,000 affected dischargers do not all seek to comply at the same time. Currently available pumping capacity and local septage disposal capacity are adequate under this approach.

A proposed settlement agreement is also attached to this staff report. The proposed settlement agreement is very similar to the one previously approved by the Board. However, to encourage more parties to settle, we have made a significant change to the settlement in addition to the above-described changes: we are capping potential penalties for violating the order at \$100 per day instead of the \$5,000 per day allowed by law. The settlement also allows up to three years to pump and inspect the septic tank, whereas the cleanup and abatement order requires this action within two years. Under the "most favored nation" provision in existing settlements, parties who have already settled would receive the same terms.

Like the cease and desist orders, the other terms of the cleanup and abatement order require the party to hook up to a sewer system with 60 days of its availability, and if the County process to build a community sewer system is not successful, require the party to cease discharge from the septic system as early as January 1, 2011. The order also requires septic system maintenance in the meantime. The order does not mandate that a discharger connect to a community wastewater treatment and collection system but permits any lawful method which results in the cessation of the discharge in violation of the Basin Plan prohibition. The order requires no action of the recipient, other than septic system maintenance, as long as the County is making progress towards building a community wastewater collection and treatment facility.

We anticipate the process of issuing cleanup and abatement orders will consist of the following steps:

1. Using information from the County Assessor, the Prosecution Team will send a packet to all property owners within the Prohibition Zone containing a settlement agreement and a draft cleanup and abatement order. If the property owner signs and returns the settlement agreement, the Prosecution Team will not issue the cleanup and abatement order.
2. If the party does not sign the settlement agreement and wishes to contest the proposed cleanup and abatement order, the party will have a specified time in which to prepare and submit to a designated official of the Central Coast Water Board written legal, factual, and policy arguments against the proposed cleanup and abatement order. The factual issue should be limited to whether the septic tank at issue is owned or operated within the Prohibition Zone, and whether the proposed remedy is appropriate.
3. The Assistant Executive Officer or his designee will review the written arguments and will issue an order or other ruling. The orders will be executed by the Assistant Executive Officer or his designee.
4. Affected parties who are issued orders may petition the order to the State Water Board within 30 days of issuance. The order is effective and enforceable pending legal challenges, unless the State Water Board or a court issues a stay. There is not an automatic stay.

Since these enforcement actions are being taken at the staff level, the Prosecution Team does not plan to schedule a Board hearing or seek Board approval of any changes in either the cleanup and abatement order language or the settlement agreement, unless the Board directs otherwise or the Prosecution Team concludes that Board input is advisable.

CONCLUSION

After proceeding with the first set of cease and desist orders and reviewing available options for taking further enforcement, the Prosecution Team proposes to issue cleanup and abatement orders to all owners of property within the prohibition zone consistent with the material terms of the existing cease and desist orders. While the Prosecution Team wishes to proceed with the hearings on remaining cease and desist order recipients, if the Water Board chooses not to schedule hearings for the remaining seven proposed cease and desist orders, the Prosecution Team will withdraw those proposed orders and include the seven parties in the list of those who will receive cleanup and abatement orders.

ATTACHMENTS

1. Proposed Cleanup and Abatement Order
2. Proposed Settlement Agreement

S:\WDR\WDR Facilities\San Luis Obispo Co\Los Osos\enforcement\Individual CAOs\Staff Report, Individual CAOs Proposal, May 2007.doc