



CALIFORNIA ASSOCIATION OF REALTORS®

December 8, 2008

State Water Resources Control Board
Division of Water Quality
Attn: Todd Thompson, P.E.
1001 I Street, 15th Floor, P.O. Box 2231
Sacramento, CA 95812

RE: Comments on Proposed AB 885 Onsite Wastewater Treatment Systems Regulations and Draft Environmental Impact Report

Dear Mr. Thompson:

Thank you for the opportunity to provide comments on the proposed AB 885 Onsite Wastewater Treatment Systems (OWTS) regulations and the accompanying Draft Environmental Impact Report (DEIR). As you know, the CALIFORNIA ASSOCIATION OF REALTORS® has participated as a “stakeholder” in the AB 885 regulatory process since it began in 2002. During this process, we have found ourselves representing not only the interests of our 184,000 REALTOR® members, but also the interests of property owners who currently own, or might someday own, an OWTS. This letter provides a synopsis of our overarching concerns, followed by detailed comments on both the proposed regulations and DEIR.

OVERARCHING CONCERNS

Cost to Existing Property Owners and New Homebuyers not Justified. No matter what, the proposed regulations are going to be hugely expensive for California property owners who currently own or some day will own an OWTS. Even if a major repair will not automatically trigger the new regulations for existing property owners, most property owners will be required to pay for testing of their private groundwater wells, required service contracts for supplemental treatment systems and inspections of their septic tanks every five years, whether there is evidence of OWTS-related problems or not. Making everyone perform these expensive tasks, without first determining that surface and/or ground water is actually being impacted, dilutes the impact of the AB 885 regulations while adding an unnecessary cost burden to property owners, many of which are low income. Furthermore, because of the prescriptive depth to groundwater standards and loss of sidewall infiltration, among other things, new and existing homebuyers will be forced to install tremendously expensive “alternative systems”- if they are even allowed - making homeownership unachievable for many people throughout the state.

Lack of Sound Science to Justify Broad Approach. It has become evident throughout the stakeholder process that there is not enough scientific data to prove whether OWTS are causing water quality problems throughout the state. In fact, it seems to be clear that OWTS are NOT the major culprits when it comes to pathogens and nitrates in surface and groundwater, but that agriculture is likely the major contributor to such problems. Having realized the lack of data and science surrounding OWTS problems, the proposed regulations have become a data collection tool for regulators, instead of focusing on areas where local regulators know they



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have problems directly related to OWTS. If state regulators also feel there is not enough scientific data to write a comprehensive set of regulations pursuant to AB 885, then perhaps the stakeholders should go back to the Legislature together, requesting funding to perform the necessary data gathering, and amending AB 885 to effect a more focused, efficient set of regulations for OWTS.

No Pragmatic Variance Process. If the proposed regulations are passed "as is," there likely will be thousands—if not hundreds of thousands--of properties that will ultimately be uninhabitable or unbuildable, even in areas where there is no OWTS problem. We believe the ONLY way to deal with this under the current proposal is to provide an effective, pragmatic variance process, where local government regulators can make site-specific exceptions to the regulations. The current proposal will result in many property owners losing their rights to the use of their land, and having their property condemned. Allowing local health departments to make determinations of "functional equivalency" and allowing an effective variance process could alleviate many of the economic and political problems the proposed regulations are sure to face upon implementation.

DETAILED COMMENTS ON PROPOSED REGULATIONS

Article 1. GENERAL PROVISIONS

§30000. SWRCB - Definitions.

1. Under "Record Plan," expand the definition to allow Permits for Installation as satisfying the definition of a Record Plan.

§30001. SWRCB - Applicability.

1. We request a statement of reasons why there is a requirement to notify the RWQCB, as opposed to the local permitting agency, to discharge wastewater at greater volumes than the design flow into an OWTS.

§30002. SWRCB - General Requirements.

1. Section (i) - C.A.R. supports the voluntary creation of an operations and maintenance (O&M) manual for new and replaced systems. We believe there is no better way than education of OWTS owners to protect against system failures and the need for major repairs. However, we believe that the mandate is unnecessary. To begin, contact information on service providers is ephemeral and the relevant system design details are already available in the Permit for Installation. Thus, these critical details are already available to the OWTS owner. In addition, we suggest that generalized OWTS operational procedures should be made available to the public online on the SWB AB 885 website.

2. Section (j) - The requirement in this section for owners of existing OWTS with supplemental treatment systems to maintain an O&M manual and a Record Plan is likely to result in legal challenges. It is certain that for thousands of systems these items were either not originally provided to the system owner, or are no longer available. Any new requirements to maintain documents should be for new or replaced systems only.

3. Section (k) - Property owners often times lose or misplace documents; thus, it is not practical to mandate that an O&M manual be required in a property transaction. Real estate professionals will be required to purchase additional lost instrument bonds and will be exposed to increased liability should the manual be absent. To mitigate the needless litigation that is sure to result from this mandate, we suggest that the second sentence in this section be amended to read: "Upon the sale of a site, it is ~~the obligation of~~ recommended that the owner of the site to provide the buyer, through escrow or otherwise as available, a complete copy of the O&M manual and record plan for the OWTS at the site."

4. Section (s) (1) - The groundwater monitoring well requirements in this section are prescriptive, hugely expensive and alone could render a lot unbuildable. As this section is written, all new OWTS shall require the installation of an additional monitoring well down-gradient of the dispersal system. The regulations do not

offer any exemptions for lot sizes that allow domestic wells to be located in excess of 100 feet of dispersal systems, and/or the separation of the drinking water aquifer and septic dispersal system by an impermeable layer or other protective geologic or hydrologic conditions.

5. Sections (s) (1) and (2) - Requiring OWTS owners to self-test groundwater every 5 years may be redundant in certain parts of the state. For instance, the County of San Bernardino Department of Environmental Health performs routine domestic well testing every 3 years. An exemption to the 5-year testing requirement should be made for jurisdictions in which groundwater testing is already required and/or performed by a local agency.

6. Section (t) - The list of constituents required for testing are overkill. This section should be changed to fecal coliforms, Escherichia coli, and enterococci testing only (Section 2.7.3), if these tests are to remain mandatory. To test for items that do not show a direct nexus to a failing OWTS is costly and unnecessary. In addition, we request clarification in this section that the test results, while not available to the public by internet, will be available to the property owner and/or their agent.

Article 3 PERFORMANCE REQUIREMENTS AND SPECIFICATIONS

§30014. SWRCB - Dispersal Systems.

1. Section (b) - As prescribed in this section, dispersal systems will be designed only counting the bottom area of the system as the infiltrative surface. Currently, most jurisdictions throughout California allow sidewall surface area to be included as infiltrative surface. By changing this calculation to bottom area only, many existing unimproved lots will be rendered unbuildable and many existing systems not replaceable, even with supplemental systems. We request a statement of reasons for introducing this drastic change in minimum systems design requirements. Furthermore, waivers should be allowed based on parcel size and/or the lack of a domestic well.

2. Section (h) - In certain circumstances, dispersal systems can be engineered to allow for light vehicle traffic across a specified portion of the system to allow for site access. The regulations should allow exemptions for systems engineered for placement beneath driveways and/or other paths of access.

Article 4 PROTECTING IMPAIRED WATER BODIES

§30040. SWRCB - Applicability and Requirements.

1. Section (a) - We appreciate that this section is limited to those water bodies where OWTS have been specifically identified as contributing to their impairment. However, we are concerned that nitrogen and/or pathogen impairment may actually be a result of agriculture or wildlife. Thus, while the arbitrary prohibition of standard OWTS within 600 feet of an affected water body will not ensure protection for that water body, it will ensure that many lots will be deemed unbuildable, or will have to be condemned.

2. Section (b) (4) - This section should be removed from the regulations. We strongly believe that the requirement to augment an existing OWTS with a supplemental system should be limited to systems known to be contributing to the pollution/impairment of a water body. The findings in section (b) (1) (B) (C) and (D) do not take into consideration hydrogeologic conditions and therefore clearly cannot illustrate a nexus between an OWTS and an affected water body. If an existing system is not a problem, it should be exempt.

DETAILED COMMENTS ON DRAFT ENVIRONMENTAL IMPACT REPORT

Section 2.0 BACKGROUND AND PROJECT DESCRIPTION

Human Exposure to OWTS-Degraded Groundwater

Section 2.7.3 states that approximately 600,000 or so domestic wells in California “may be vulnerable to pollution from the discharges of existing or yet-to-be installed OWTS”, based upon a conclusion drawn from testing 900 domestic wells in Northern California. The DEIR acknowledges that the analyses were not

designed to identify pollutant sources, yet the report concludes, “it is reasonable to conclude that effluent from on-site systems is a potential source of contamination for nearby domestic wells” because of the proximity of the wells to OWTS, the limited potential effluent dispersion or dilution, and the “inherent vulnerability” of the wells. While we recognize that OWTS contamination of surface and ground water has occurred in California, the DEIR is drawing a statewide conclusion based upon uncertain findings from a local sampling program, and without considering information from health departments or other sources of groundwater sampling results from around the state. We believe the emphasis should be on the notion that OWTS are ***potential*** sources of contamination and therefore actual substantiation of an OWTS's impact on groundwater is warranted before requiring such strict and expensive monitoring and sampling requirements.

***Section 5.0 SUMMARY OF FISCAL AND ECONOMIC ANALYSIS OF THE PROPOSED PROJECT
Households Using OWTS Within 600 Feet of a 303 (d) Listed Body of Water.***

This section profiles existing and future conditions to determine the amount of homes that will be affected by the proposed regulations and what the anticipated total fiscal impact of the regulations will be. This section identifies 2,798 existing OWTS (Section 5.2.2) within 600 feet of the five 303 (d) listed bodies of water where OWTS have been identified as contributing to the water quality impact. The fiscal impact of these systems, assuming an annual growth rate of approximately 8.6% (Section 5.2.1) is the only consideration given in the fiscal analysis. Unfortunately, no consideration was given to the 296 additional water bodies listed for nutrient and/or bacteriological impairment (Sections 2.5.2 and 7.2.1) and the potential need for OWTS located within 600 feet of these water bodies needing to add supplemental systems should OWTS be identified as contributing to the impact of these additional bodies of water. In our estimate, tens of thousands of additional homes and businesses could be required to install supplemental systems. We feel that since these additional systems were not addressed in the fiscal analysis, the cumulative and annualized impact on property owners is woefully underrepresented.

Economic Benefits from Improved Water Quality

The vast majority of OWTS impacted by the proposed regulations do not lie along the coastline. This portion of the analysis focuses too heavily on the impact of beach closures and does not adequately address economic valuation/impact in other geographic settings.

Effects of the Proposed Project on Property Value and Real Estate Transactions

Section 5.4.5 concludes that changes in transaction costs and timing, disclosure requirements and property value effects would not be significant under the proposed regulations. We disagree. The proposed regulations include new mandates that will require O&M manuals and Record Plans to be transferred upon time of sale. Furthermore, disclosure of compliance, or lack thereof, with the new sampling requirements and historic results along with the new maintenance requirements will also prove to be significant. Restrictions on lot development will also pose an increased liability exposure, especially for lots that were subdivided based on historic OWTS criteria yet are still undeveloped. In many cases, the new regulations will result in takings of private property if OWTS are prohibited or if existing systems cannot be replaced. Another significant effect to transactions is the uncertainty on how to disclose pending or future decisions on 303(d) water bodies and the potential need to provide associated reports and inspections, and/or the need to install a supplemental system. The DEIR does not give fair treatment to the increased disclosure responsibility, increased liability and increased uncertainty added to real estate transactions by the proposed regulations.

Section 5.5 identifies financial assistance for property owners to offset OWTS-related costs via loans funded through the State Revolving Fund (SRF). Simply stating that the “SRF has always had funds available” does not guarantee property owners with financial assistance when the reality is that local governments will have to compete for these funds before they can be made available. The DEIR failed to evaluate the entire fund and award process and to determine the realistic availability and likelihood of these dollars being available not only for local OWTS programs, but also the ability of those dollars to adequately fund ***all*** the property owners in need of assistance.

Section 7.0 OTHER CEQA-REQUIRED SECTIONS

Potential for the Proposed Statewide Regulations to Restrict Growth

Section 7.5.1 states that "It is not known where implementation of the proposed statewide regulations could inhibit growth." At a minimum, the lack of sidewall infiltration in dispersal system design and the minimum three-foot vertical separation requirement coupled with local jurisdictions having already banned the use of supplemental systems alone exemplifies that the proposed regulations are certain to deem large portions of the state "unbuildable" - which will inhibit growth. This is also in conflict with Section 1.6, which states, "implementing the proposed project either would have no impact or would have a less-than-significant impact on issue areas associated with overall land development." Because of this oversight, the DEIR failed to evaluate the impact of the proposed regulations on the ability for local governments to achieve the goals of their Regional Housing Needs Allocation (RHNA) goals.

Cumulative Traffic Impacts

Section 1.6.9 states that "Because the proposed project would not be expected to increase the number of OWTS installed over time, OWTS-related traffic patterns or emergency access to either the site of a treatment system or surrounding areas would likely not be affected." Section 7.2.6 continues this notion by finding that any increase in traffic due to installation and maintenance requirements would "be minimal and on an infrequent basis." However, full installation, maintenance, inspection and sampling compliance by all OWTS owners will easily increase vehicle miles travelled (VMTs) in rural areas by at least several millions of additional miles per year beyond present conditions. The DEIR fails to quantify and analyze the increased VMTs and their contribution to increased green house gas (GHG) emissions throughout the state. Had the DEIR appropriately acknowledged the impact of the proposed regulations on GHG emissions, the DEIR could have considered a relaxed version of the proposed regulations with reduced well testing and tank inspection requirements as a way to mitigate the increased GHG emissions.

Thank you for the opportunity to provide these comments. As you can see from the above, we are very concerned about the practical implications of the proposed AB 885 regulations and the lack of comprehensive analysis in the DEIR. Property owners with OWTS or those who might need to install or replace OWTS in the future must feel confident that the state is seriously attempting to tackle a water quality problem, and not create unreasonable burdens or increase the cost of home ownership in California.

Sincerely,



Elizabeth Gavric
Legislative Advocate