State Water Resources Control Board

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FROM: Reed Sato, Director
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DATE: December 1, 2006

SUBJECT: PROSECUTION STAFF OBJECTIONS REGARDING DESIGNATED PARTIES EVIDENCE, PROPOSED CEASE AND DESIST ORDERS R3-2006-1000 THROUGH -1049

The Prosecution Team submits the attached evidence objections in the above-referenced matter. The Prosecution Team and Mr. Gregory Murphy are negotiating a stipulated agreement regarding the objections to the Los Osos Community Services District's evidence submission. Several designated parties have incorporated LOCSD's documents either by reference or by submitting their own copies of the same documents. It is the Prosecution Teams intent that the attached objections be lodged against the documents objected to regardless of the party submitting or referencing that document.

Attachment

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

Harvey Packard
Matt Thompson
Central Coast Water Board

Prosecution Staff Evidence Objections

The Los Osos Community Services District's (LOCSD) submitted its first set of evidence in these proceedings on April 4, 2006. This first submittal included a list of 847 documents to be submitted as evidence and several computer disks ("CD Set A"). The LOCSD October 12, 2006 letter also contains a list of 847 documents entitled "Exhibit A" that appear to be identical to the April 4, 2006 submittal except for which documents the LOCSD claims to be providing on computer disk (CD). The LOCSD submitted three additional computer discs on October 12, 2006 ("CD Set B"). CD Set B does not contain the additional documents identified as being provided in Exhibit A. To the contrary, CD Set B include documents from Exhibit A that are identified as being incorporated by reference and a substantial number of files in various formats that do not appear anywhere on Exhibit A. Those files are referenced below by their file name as it appears on the disk provided by LOCSD.

Various dischargers also provided documents. Prosecution Staff objects to certain of these documents as follows. Prosecution Staff reserves all other objections, and may seek to exclude additional documents from the record at the hearing.

It is unclear why some of the documents were introduced. In some cases we have not objected to documents that may have been introduced to prove matters outside the scope of the hearing, such as whether the prohibition zone is appropriate. We reserve all objections to introduction of evidence outside the stated scope of the hearing.

Many of the LOCSD documents are listed more than once and provided on multiple disks. If one objection is noted to a document that is listed twice or is included multiple times, the intent is to object to including the document in the record at all.

Some of the documents labeled ACL-LOCSD-xxx are mislabeled on the CDs that the LOCSD provided. The ACL-LOCSD-xxx numbers in the right-hand column of the LOCSD's CDO document list match the LOCSD's written document list for the hearing on ACL R3-2005-0137 (the "ACL action"). However, the file names of many of the pdf documents provided by the LOCSD are off by one number. For example, Document 156, February 10, 1995 San Lorenzo Management Plan, is labeled ACL-LOCSD-216 but it appears on the LOCSD's CD as document 0217.pdf on CDs provided in both CD Set A and CD Set B. I have attempted to correct all errors in the following references that this caused. If using the CD, please ensure that the document you are viewing matches the description on the document list.

Some of the 847 listed "documents" are actually copies of entire files, and not single documents. The LCSD has also submitted a substantial number of files

that are not listed on the documentary evidence list and that are in a format not generally used by the Water Board. Accordingly, the LCSD's submissions are still under review and the Prosecution Staff reserves its right to raise objections at the time that documents are relied upon by the LOCSD or discharger.

The evidentiary standard for this hearing is set forth in Government Code Section 11513, except as otherwise ordered by the Chair[1]:

> (c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. Any *relevant* evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. [Emphasis added.]
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> (d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

I. LOCSD: Objections for Failure to Comply with Requirement to Provide Copies

The Water Board's hearing procedures and the hearing notices allow for incorporation of evidence by reference, only if that evidence is already in the Water Board's files, and the person seeking to incorporate the evidence specifies its location in the Water Board files and designates the particular portions of the evidence on which the party relies. (Cal. Code of Regs., tit. 23, § 648.3.)

The LOCSD purported to incorporate the following documents but did not provide copies, and there is no evidence that the Water Board has copies. The LOCSD did not comply with the requirement to specify the location of the documents or the portions on which the LOCSD relies. These are largely the same documents the LOCSD tried to introduce for the hearing on Administrative Civil Liability Order R3-2005-0137. Therefore, the following documents listed on the LOCSD's document list should be stricken (the document numbers refer to the number in the left-hand column of the LOCSD's list): 59 (*this document has an ID number, but no description and is not provided by the LOCSD*), 83, 186-189, 306, 356, 598, 606-630, transcript described in 631, 635, 637-640, and 642-701. The Prosecution Team reserves the right to object to other documents that the LOCSD has claimed to have provided in CD Set B but failed to actually provide, if those documents cannot be located in the Water Board's files.

[1] See Cal. Code of Regs., tit. 23, § 648, subd. (b), (d).

Document 28 (documents the Prosecution Team incorporated by reference in the ACL action) should be stricken; it is unclear which documents this refers to, since the Chair did not admit all of the Prosecution's documents.

Document 129, "1997-2005 Cleath and Assoc. LOLOCSD files GWR Monitoring Reports and all Back-up information and data" is listed as ACL-LOCSD-179. Document 0179.pdf is a seawater intrusion report. Prosecution Staff objects to Document 129 because it was not properly incorporated by reference and we cannot determine what LOLOCSD files or back-up this refers to. However, we have also introduced groundwater monitoring data, and this item may in part duplicate some of the LOCSD's other listed documents.

Document 133, "1998-2005 LOLOCSD to SWRCB quarterly and annual reports" is listed but no copy was provided. It is unclear whether this refers to quarterly reports regarding progress of the treatment plant construction, in which case the Prosecution Staff objects to it as irrelevant, or water quality monitoring reports, in which case we do not object assuming this refers to the quarterly and annual reports with supporting data as submitted to the Water Board. If it is intended to mean anything else, we object for failure to comply with section 648.3.

The LOCSD also purported to incorporate by reference various documents submitted by the public. These are the documents labeled ACL-PUB-xxx. It is impossible to determine what these documents are or to determine whether they are in the Water Board's files. For example, there are 16 separate documents described only as "10/25/05 Email to Roger Briggs." The LOCSD made no attempt to comply with section 648.3 of the regulations. Therefore, the following documents listed on the LOCSD's document list should be stricken: 229-354. We reserve all other objections, if these documents are identified.

The LOCSD again included the following documents that the Chair struck from the ACL action due to overly vague descriptions. Therefore, the following documents listed on the LOCSD's document list should be stricken: 598, 632, 636, 641.

II. LOCSD: Relevance Objections

A. Videos

The LOCSD provided copies of various videos. The unnumbered videos included on the DVD the LOCSD prepared for this hearing (LOTTF Right to Choose, parts 1 and 2; LOTTF Low Cost Alternatives) address whether or not the Tri-W project is a good project or alternatives for a community system. This is irrelevant to this hearing. Therefore, these videos should be stricken.

The LOCSD has again tried to introduce various lengthy videotapes of LOCSD meetings. (LOCSD documents 599-606). The Chair rejected these at the ACL action because the LOCSD made no attempt to specify what portions of the tapes it sought to rely on, or for what purpose they were introduced. Prosecution Staff objects on that basis. We also object on the basis that these videos are irrelevant since they appear to address the consideration of specific treatment plant projects, which is not relevant to this hearing.

B. Evidence Regarding SRF Loan

The following documents relate to the State Revolving Fund (SRF) loan or other funding issues (e.g., Proposition 218 or bond funding). It is undisputed that the SRF Loan program funded the Tri-W project and that the LOCSD does not plan to build the Tri-W project. The loan contract is sufficient evidence of the loan. All other evidence regarding the SRF Loan is irrelevant. Therefore, all documents listed on the LOCSD's document list regarding the SRF Loan should be stricken including, without limitation: 17, 20, 26-27, 48, 55, 81, 87, 88, 99, 114-115, 117, 118, 130 (the attachments to this document include news articles which are objectionable as stated below), 136-144, 160, 169, 197, 199-201, 210-213, 215-218, 219, 358-360, 365, 374-375, 396, 403, 406-407, 517, 524, 531, 532-533, 535-536, 544, 555, and 588.

C. Evidence Regarding Tri-W Project, Construction Contracts for Tri-W Project, Alternative Sites or Designs for a Community System, 2005 Recall Election, and Measure B

The following documents relate to the wastewater treatment plant project the LOCSD commenced in August 2005 (the "Tri-W Project"), construction contracts for Tri-W Project, alternative sites or designs for a community system, the 2005 LOCSD election recalling and replacing three LOCSD directors, or Measure B. It is undisputed that there is no community sewer service available to the dischargers. The prohibition has been in effect for almost twenty years. The prohibition applies to all individual dischargers. The reasons for not having a community sewer system, and whether the Tri-W Project was a good or bad project, are irrelevant for purposes of this hearing. Therefore, all documents regarding these issues should be stricken including, without limitation: 18, 21-24, 30, 51-54, 57-66, 89, 97, 98, 103-105 (103-104 are also subject to III.A, below), 109, 110, 113-114, 119-123, 131-135, 139, 158, 183, 185, 188, 191-192,195, 198-199, 202-206, 209, 219, 223, 357, 362, 364, 366-373, 376-378, 380-384, 389-393, 398-399, 404-405, 410-411, 415, 419, 421, 426, 433, 436, 438, 441, 442, 446-448, 450-451, 454-455, 464, 465, 468-471, 473, 478, 480-483, 485, 496-499, 510, 512-516, 518-523, 525-530, 534, 556-557, 565-566, 575-583, 703.

D. Regarding Other Sites

The following documents relate to other sites (i.e., other projects such as Monarch Grove, Bear Valley Chevron, etc., as opposed to alternative sites for a community wastewater project) and it is not clear how they are relevant here: 77, 80, 82, 90, 156, 189, 196, 397, 409, 553, and 554.

E. Documents Related to Litigation

Prosecution Staff is unable to discern the relevance of these documents and objections on that basis: 135, 178, 180, 186, 425, 428-430, 434, 440, 443, 504-509, 511, 532-533, 525-530, and 558.

F. Other Evidence

CD Set B contains a file entitled "Briggs Complaint" that contains 194 documents in support of an unsigned "complaint" from a Mr. Bud Sanford against Roger Briggs. The Briggs Complaint is hearsay evidence of a third party that is not even signed. Furthermore, evidence concerning Roger Briggs conduct is not relevant for purposes of this hearing. The entire Briggs Complaint file should be stricken.

Prosecution Staff is unable to discern the relevance of these documents and objections on that basis: 1, 3, 5-6, 8, 10, 11, 13, 15-16, 70 & 552 (applies to MMPs only), 71 (the LOCSD's MS4 permit application), 79, 83, 159 (agenda without attachments), 166, and 170-172.

It is impossible to determine what this description refers to: document 561.

Disk number 3 from CD Set B contains over 100 files with a .DWG extension that appear to contain topographical maps. Prosecution Staff is unable to determine the relevance of these file and objections on that basis.

III. LOCSD: Hearsay Objections

A. News articles, etc.

Prosecution Staff objects to all documents that are newspaper articles, press releases, blogs, or letters to the editor submitted by any party. This is not the type of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Therefore, all such documents listed on the LOCSD's document list should be stricken.

B. Other Documents

Document 177: unauthenticated/unsigned notes are not the type of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Therefore, Document 177 should be stricken.

IV. Other Designated Parties' Evidence

A. Incorporation by reference

To the extent any Designated Party submitted or incorporated by reference any document listed above, the Prosecution Staff objects to the incorporation on the same basis.

B. News articles, etc.

Prosecution Staff objects to all documents that are newspaper articles, press releases, blogs, or letters to the editor submitted by any party. This is not the type of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Therefore, all such documents should be stricken.

V. Evidence Submitted After November 15, 2006

Comments from Rhain Galassa and Bruce and Antoinett Payne were received after the November 15, 2006 deadline for submitting comments in response to the Prosecution Teams case as established in the October 16, 2006 Revised Notice of Public Hearing in this matter. All comment and associated evidence received after the established November 15, 2006 deadline should be stricken.