Linda S. Adams
Secretary for Environmental Protection

State Water Resources Control Board

Office of Enforcement
1001 I Street • Sacramento, California 95814 • (916) 341-5277
Mailing Address: P.O. Box 100 • Sacramento, California • 95812-0100
Fax (916) 341-5284 • http://www.waterboards.ca.gov

Arnold Schwarzenegger
Governor

TO: Michael Thomas, Assistant Executive Director
Central Coast Water Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401

FROM: Reed Sato, Director Reed Sato
Yvonne West, Staff Counsel
Office of Enforcement

DATE: December 1, 2006

SUBJECT: PROSECUTION TEAM'S REBUTTAL TO LEGAL COMMENTS SUBMITTED BY LOS OSOS COMMUNITY SERVICES DISTRICT AND OTHER RESPONDENTS TO THE PROPOSED LOS OSOS CEASE AND DESIST ORDERS

The Prosecution Team submits this memorandum in conformance with the Revised Notice of Public Hearing issued by the Chairman of the Central Coast Regional Water Quality Control Board ("Water Board") on October 16, 2006. Part I of the memorandum responds to the Los Osos Community Services District's ("LOCSD") October 12, 2006 letter. In Part II, the Prosecution Team responds to issues raised by respondents other than the LOCSD that are not otherwise addressed in Part I. Part III identifies the findings in new AB 2701 recently signed by the Governor. Part IV describes language modifications to the proposed model cease and desist order which the Prosecution Team recommends in response to comments and submissions made by the designated parties.

I. RESPONSE TO LOCSD'S OCTOBER 12, 2006 COMMENT LETTER.

The LOSCD's October 12, 2006 comment letter is mainly a restatement of arguments previously submitted to the Water Board in the June 22, 2006 letter from Mr. Onstot. Accordingly, the Prosecution Team has already responded to the majority of the LOCSD's arguments in its July 20, 2006 memorandum from Reed Sato to Michael Thomas entitled "Response to Questions Regarding Presentation of Prosecution Team's Case." For ease of reference, this part of the memorandum contains a summary the Prosecution Team's response to the LOCSD's prior arguments and responds to any new arguments raised by the LOCSD.

A. The Water Board Proceedings in this Matter Do Not Violate Due Process Rights.

The LOCSD argues that the Water Board cannot proceed with this adjudication because the Water Board is biased against the CDO recipients and, therefore, any further Water Board proceeding would violate the CDO recipients' due process rights. The LOCSD incorrectly claims bias based on: (1) comments of Water Board members at the January 5, 2006 Administrative Civil Liability hearing for the LOCSD ("ACL Hearing") and (2) the prior participation of Ms. Lori Okun in the prosecution of the proposed Cease and Desist Orders ("CDOs").

1. LOCSD Misconstrues Prior Statement of Central Coast Water Board members in an Attempt to Demonstrate Bias.

The LOCSD continues to misconstrue statements made by Water Board members in an attempt to create an appearance of bias. The LOCSD's bias argument simply is not supported by the facts. The LOCSD erroneously alleges that the Water Board made "the decision to initiate prosecution of the individual septic system owners" at the ACL Hearing "when it directed Mr. Briggs to begin such process." (October 12, 2006 letter from the LOCSD to Michael Thomas, p.3.)

The LOCSD's allegation is disingenuous because the record clearly states that the Prosecution Team had initiated enforcement actions against individual septic system owners prior to the ACL Hearing. (ACL Hearing Transcript, 412;12-25.) It is also a matter of record that the LOCSD was informed that the prosecution staff's intent to begin enforcement proceedings against individual property owners as early as October 2005. (See, letter transmitting ACL complaint to the LOCSD, dated October 6, 2005 attached as Exhibit "A".)

The LOCSD's analogy that the Water Board's actions at the ACL Hearing are "tantamount to a superior court judge telling a District Attorney which citizens to make defendants and which defendant to take to trial before that very same judge" is outrageous. The record demonstrates that the Water Board did not direct staff as to the type of enforcement action that should be pursued against individual dischargers or the specific persons against whom the enforcement actions would be directed. (ACL Hearing Transcript, 412:12-430:25.)

The statements made by Water Board members at the ACL Hearing amount to a general discussion on how to achieve compliance with the prohibition of discharge from septic systems within certain areas of Los Osos ("Prohibition Zone"), which is contained within the Water Quality Control Plan for the Central Coast Basin ("Basin Plan"). The Water Board directed staff to present individual enforcement actions for the Water Board's consideration in the future. Water Board members are entitled to inquire from

staff as to the proceedings that may be initiated to enforce the Prohibition Zone and direct staff to pursue certain types of enforcement action.

The Water Board's comments simply reflect the exercise of Water Board's investigatory authority. The United States Supreme Court and the California Supreme Court have determined that an adjudicative body's mere exercise of multiple functions, such as investigatory and adjudicatory functions, is not grounds for finding an unconstitutional risk of bias. (*Withrow v. Larkin* (1975) 42 U.S. 35, 47.) As a rule, there is a "presumption of honesty and integrity in those serving as adjudicators." (*Withrow*, *supra*, 42 U.S. 47.)

The statements cited by the LOCSD as demonstrating bias simply do not provide a basis for the claim that the Central Coast Water Board improperly initiated these enforcement efforts against the individual dischargers. As a matter of law, the Water Board members are afforded a presumption of honesty and integrity and the LOCSD has not presented any evidence to negate that presumption.

2. *The Appointment of a New Prosecuting Attorney Eliminates any Potential Due Process Violations Under Quintero.*

The LOCSD cites *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810 as legal authority in support of their request to dismiss the current proceedings and recuse both Water Board staff and the Water Board itself.[1] Neither *Quintero* nor any other case requires members of the Water Board staff to be precluded from participating on the Prosecution Team. Furthermore, the fact that the Water Board heard proceedings in which Ms. Okun participated does not render the Water Board incapable of giving the CDO recipients a fair hearing.

The Water Board has already determined that *Quintero* does not require Ms. Okun's removal. (Transcript of April 28, 2006 Water Board meeting, Part 1, pp. 122-126.) Nevertheless, out of an abundance of caution Ms. Okun voluntarily withdrew from the Prosecution Team, her prior participation has been stricken from the record, and Mr. Reed Sato has been appointed counsel to the Prosecution Team. The appropriate remedy under *Quintero* when the totality of the circumstances demonstrates the probability of actual bias is a new hearing presented by different counsel. (*Quintero*, *supra*, 114 Cal.App.4th at p. 818.) Accordingly, any potential due process concerns resulting from Ms. Okun's prior participation before the Water Board have been eliminated.

Even if *Quintero* did require Ms. Okun's recusal, the LOCSD acknowledges that *Quintero* does not require that Water Board staff be precluded from participating in the

[1] The LOCSD refers to another case entitled *Morongo Band v. SWRCB*. The LOCSD fails to advise the Water Board that Morongo is on appeal, and, therefore cannot be cited as legal authority.

prosecution by asking the Water Board to take the *Quintero* holding "one step further." (October 12, 2006 Letter from Gregory Murphy to Michael Thomas, p. 5.) There is no case law to support the LOCSD's proposition that members of Water Board staff cannot participate in the Prosecution Team.

Unlike the facts at issue in *Quintero*, the Water Board proceedings are governed by the Administrative Procedures Act (Government Code, sections 11340 through 11529 ("APA")). The court in *Quintero* recognized that the APA's procedures for conducting administrative hearings "exemplify the elements of a fair procedure." (*Quintero*, *supra*, 114 Cal.App.4th 814.)

The Water Board's compliance with the APA's adjudicative procedures and restrictions on *ex parte* communications ensure an adequate separation of functions within the Water Board staff during CDO proceedings and protect the CDO recipients' due process rights. Recusal of the Water Board staff participating in prosecution efforts based on staff advising the Water Board on matters outside of the CDO proceedings is not compelled, required or even contemplated under existing law. In fact, taking such an action would be in direct conflict with the APA which specifically contemplates Water Board staff providing advice on matters which that staff member has not served as an investigator, prosecutor or advocate. (Government Code section 11430.30(a).)

3. *The Current Water Board Members Can Address Septic System Enforcement Actions Related to the Prohibition Zone.*

In addition to arguing for the unprecedented step of recusing Water Board staff, the LOCSD takes a giant leap in logic to argue that this Water Board is precluded from adjudicating current or future enforcement actions concerning the Prohibition Zone because certain Water Board members participated in the proceedings in which Ms. Okun was involved. The LOCSD cites *Quintero* as supporting its argument. The remedy in *Quintero*, however, was to order a new hearing, presumably in front of the same Personnel Board. (*Supra,* 114 Cal.App.4th 818.) It is unclear, therefore, exactly how *Quintero* supports the LOCSD's argument. For the reasons discussed previously in Section A.2. of this memorandum, any potential due process concerns resulting from Ms. Okun's participation have been eliminated.

The LOCSD cites the fact that the Water Board refused to allow Los Osos residents to make public comments at a hearing in Monterey in September as demonstrating that the Water Board has been influenced by Ms. Okun's prior participation in these proceedings. Again, it is not clear exactly why the LOCSD believes that the Water Board's actions demonstrate bias.

The LOCSD does not state on what matter Los Osos residents wished to speak at the September Water Board meeting. Generally, the Water Board is not legally required to provide a public forum at its meetings. (See, Government Code sections 11120

through 11132.) Furthermore, the APA specifically prohibits communications between Water Board members and persons with an interest in a pending enforcement proceeding "regarding any issue in the proceeding . . . without notice and opportunity for all parties to participate in the communication." (Government Code section 11430.10(a).)

The Water Board determined that the issues the Los Osos residents were interested in speaking on were related to wastewater and the proposed CDOs. (October 12, 2006 Letter from Gregory Murphy to Michael Thomas, p. 6.) All the parties involved in this proceeding were not present at the September Water Board meeting in Monterey. Accordingly, public comments to the Water Board by Los Osos residents at the September meeting on wastewater issues were prohibited by the APA.

The LOCSD is correct in asserting that *ex parte* communications between Water Board members and members of the Prosecution Team are also prohibited. (Government Code section 11430.10(a).) The LOCSD, however, incorrectly argues without citing any legal authority that the Water Board must prove that it has complied with the APA's *ex parte* prohibitions. The LOCSD does not cite any incidence of *ex parte* communications between Water Board members and the Prosecution Team[2].

If the LOCSD is alleging that the Water Board has had *ex part* contacts with the Prosecution Team, then the LOCSD bears the burden of proving such contacts took place. If the converse burden of proof applied, then the Water Board would be in the impossible position of trying to prove a negative. As stated above in Section A.1. of this memorandum, there is a presumption that the Water Board as an adjudicatory body is unbiased. To require the Water Board to prove that no improper *ex parte* communication has occurred would require a presumption of bias in direct conflict with this well established rule.

Finally, the LOCSD argues that certain Water Board members must recuse themselves from this and future enforcement actions concerning the Prohibition Zone based on the misinterpretation of statements made by Water Board members at the ACL Hearing. The LOCSD's argument is based on the continued mischaracterization of the record and the false proposition that the Water Board members "initiated prosecution" in this action.

As discussed above in Section A.1. of this memorandum, Water Board members did not act improperly at the ACL Hearing. The Water Board did not direct staff to initiate prosecution, give direction on any particular individual to be prosecuted or tell staff what type of enforcement mechanism to use in pursuing individual enforcement.

[2] Mr. William Moylan has submitted comments in which he alleges improper *ex parte* contacts between the Prosecution Team staff and the Water Board. These allegations are addressed below in Part II, Section A. of this memorandum.

There is no basis for recusal of Water Board members. The LOCSD fails to present, and the Prosecution Team is unaware of, any legal authority for requiring the Water Board to recuse itself from these enforcement proceedings based on Ms. Okun's prior participation. The Water Board's adherence to the APA prohibitions against *ex parte* communication does not demonstrate bias. To the contrary, the Board's compliance with the APA insures that these proceedings protect the CDO recipients due process rights. Finally, the statements made by Water Board concerning individual enforcement actions at the ACL Hearing were well within the Water Board's authority and do not demonstrate any bias on the part of the Water Board. The Water Board remains the appropriate forum addressing septic system enforcement actions related to the Basin Plan Prohibition.

B. The Issuance of CDO's to Individual Dischargers Within the Basin Plan Prohibition Zone Is Appropriate and Legal.

1. The Water Board has Legal Authority to Enforce Basin Plan Prohibition Against Individual Dischargers.

When faced with a proposed administrative civil liability action, the LOCSD argued that the Water Board should pursue CDOs or clean up and abatement orders against individual homeowners. (ACL Hearing Transcript, p. 79, lines 8-20.) Now that the Water Board is pursuing such actions, the LOCSD has taken the opposite stance and argues that Los Osos residents and property owners cannot be held responsible for their septic tank discharges.

The LOCSD now asserts that individual dischargers cannot be subject to the proposed CDOs without citing any legal authority or precedence for that proposition. The LOCSD simply states the County of San Luis Obispo ("County") retains control over individual septic systems through its planning, permitting and regulatory functions then "moves to implead the County." (October 12, 2006 Letter from Gregory Murphy to Michael Thomas, p. 9.)

The Water Board clearly has statutory authority to issue a CDO to an individual. (Water Code section 13301.) In fact, the Water Board has issued CDOs to individuals residing within the Prohibition Zone in the past. Mr. Rob Shipe has also entered evidence into the record demonstrating that the Lahontan Water Board has successfully used CDOs against individual septic system owners in the past. (April 9, 2003 letter from California Regional Water Quality Control Board, Lahontan Region to Property Owners in Eagle Lake; Lahontan Region Board Order No. 6-91-(Proposed).)

The LOCSD's request to "implead" the County must be denied. There is no procedure to "implead" the County into these proceedings. The County is not the subject of any of the proposed CDOs nor has the County requested designated party status. Even if a

procedure was available for impleading the County, it would be inappropriate because the LOCSD has not provided notice of its request to the County.

2. *The Proposed CDOs Comply with Water Code Section 13360 and CEQA.*

The proposed CDO requires septic system pumping, inspection and the performance of necessary repairs every three years as interim compliance measures until the CDO recipients comply with the Prohibition Zone. These interim compliance measures do not violate Water Code section 13360 because they do not mandate how waste discharge requirements are to be met. The interim compliance measures simply require maintenance and repair of existing systems to minimize damage until waste discharge requirements are met through whatever means the CDO recipients select.

The Legislature's intent in enacting Water Code section 13360 is to prevent "unwarranted interference with the ingenuity of the party subject to a waste discharge requirement; it is not a sword precluding regulation of discharges of pollutants." (*Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1438.) The only purpose of section 13360 is to preserve the freedom of persons who are subject to a discharge standard to elect between available strategies to comply with that standard. (*Tahoe-Sierra*, *supra*, 210 Cal.App.3d 1438.) The proposed CDOs comply with section 13360 by allowing the CDO recipients to propose alternative means to comply with the Prohibition Zone. (See, Sections A.2.b and A.3. of the proposed CDO; see also Sections A.1.b.ii. and A.2 of the modified CDO attached as Exhibit "D" and discussed below in Section IV of this Memorandum.) CDO recipients can avoid being subject to the interim compliance measures by complying with the Prohibition Zone. Accordingly, the proposed CDOs do not violate Water Code section 13360.

The LOCSD argues that the Water Board must prepare environmental documents under CEQA before adopting the CDOs. Assuming that the CDOs are "projects" as defined by CEQA, the CDOs are exempt from CEQA because the septic systems are existing facilities and because these are exempt regulatory actions. The CDOs are exempt from CEQA under four separate categorical exemptions: (1) the existing facility exemption (Cal. Code of Regs., tit. 14, § 15301); (2) the enforcement action exemption (Cal. Code of Regs., tit. 14 § 15321 subd (a).); (3) the protection of natural resources exemption (Cal. Code of Regs., tit. 14 § 15307); and (4) the protection of environment exemption (Cal. Code of Regs., tit. 14 § 15308). Once a categorical exemption applies to a project, CEQA does not require the preparation of environmental documents. (Pub.lic Resources Code section 21084; Cal. Code of Regs., tit. 14 § 15300.)

CEQA does provide for an exception to categorical exemptions where there is substantial evidence that the otherwise exempt project involves some unusual circumstances which will result in a significant adverse impact on the environment. (Cal. Code of Regs., tit. 14, § 15300.2, subds. (b), (c).) The person challenging the

exemption has the burden of showing that significant adverse impact will result. (*Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1259.)

The LOCSD argues that because the CDOs require the individual discharger to take the specific action of pumping there septic tanks the "otherwise applicable exemption" from CEQA does not apply. The LOCSD cites SWRCB Order No. WQ 93-17 as support for the proposition that when the method of compliance is identifiable at the time that the enforcement order is adopted, then a study of the environmental impacts of that compliance is required under CEQA and a categorical exemption is improper. The LOCSDs argument is a misstatement of SWRCB Order No. WQ 93-17 and applicable legal authority.

SWRCB Order No. WQ 93-17 is a denial of a petition to review the Water Board's decision to issue a clean up and abatement order ("CAO") against Lindsay Olive Growers. Lindsay Olive Growers raised the argument that prior to issuing a CAO the Water Board is required to comply with CEQA because the CAO may have a significant effect on the environment. The SWRCB found that the categorical exemption for enforcement actions (Cal. Code of Regs., tit. 14 § 15321 subd (a)) applies to the issuance of CAOs and that because the order did not prescribe the method of compliance it could not have a significant effect on the environment. (SWRCB Order No. WQ 93-17, 16.)

Contrary to what the LOCSD assert, SWRCB Order No. WQ 93-17 does not support the proposition that when the method of compliance is identified the categorical exemption for enforcement actions is inapplicable. It is only when the party challenging the applicability of the categorical exemption can demonstrate through substantial evidence that a significant adverse impact will result from the otherwise exempt activity that the enforcement action is subject to CEQA. (*Fairbank, supra,* 75 Cal.App.4th 1259.)

Furthermore, adoption of the CDO's is exempt from CEQA under the three additional categorical exemptions discussed above in this Section. The LOCSD does not challenge the applicability of these categorical exemptions. The LOCSD has failed to allege, let alone provide substantial evidence that the CDO's will have any significant adverse impact on the environment.

3. *Statements of Water Board Members at the ACL Hearing Do Not Violate The Bagley-Keene Act.*

The LOCSD's contention that the Water Board violated the Bagley-Keene Act is based on the erroneous argument that the Water Board took some action at the ACL Hearing to initiate these CDO proceedings. As discussed in greater detail above in Section A.1. of this memorandum, the record clearly demonstrates that the Prosecution Team initiated CDO proceedings prior to the ACL Hearing. The Water Board took no action,

heard no evidence, did not deliberate and did not decide any matter relating to the CDOs at the ACL Hearing. It was the attorneys for the LOCSD that raised the issue of individual enforcement actions at the ACL Hearing. The ensuing discussion between Board members, staff and the LOCSD concerning individual enforcement actions within the Prohibition Zone was appropriate within the context of a properly noticed and agendized public hearing concerning a proposed ACL to enforce the Prohibition Zone. Accordingly, the Water Board's discussion with Prosecution Team staff did not implicate any additional Bagley-Keen Open Meeting Act notice and agenda requirements.

4. *Issuing CDOs is an Appropriate Enforcement Tool for the Water Board To Use To Attain Compliance with the Basin Plan Prohibition.*

The LOCSD objects to the use of CDOs as inappropriate based on the misinterpretation of Government Code section 4477. The LOCSD incorrectly interprets section 4477 as prohibiting state agencies from entering into contract for the purchase of supplies, equipment, or services from any entity that is subject to a CDO.

Government Code section 4477 will not prevent individual dischargers that are subject to a CDO from contracting with the state. Only those discharges that are in violation of a CDO are subject to section 4477's prohibition. Government Code section 4477 provides,

> No state agency shall enter into any contract for the purchase of supplies, equipment, or services from any person who is **in violation** of . . . a cease and desist order not subject to review issued pursuant to Section 13301 of the Water Code for violation of waste discharge requirements or discharge prohibitions . . .
>
> (emphasis added)

Additionally, the Attorney General has concluded that the prohibition against letting state contracts only applies to a discharger that is in violation of the cease and desist order. (55 Ops.Cal.Atty.Gen. 3123 (Aug. 11, 1972).) Even if the discharger is in violation of the CDO, the prohibition only applies to state contracts in excess of $25,000. (Government Code, section 4478.) Keeping in mind the limited nature of section 4477's prohibition, it is unlikely that any of the individual discharger subject to the propose CDOs will suffer the level of "financial havoc" alleged by the LOCSD. Furthermore, Individual dischargers can avoid any contracting prohibitions by remaining in compliance with the proposed CDO's.

5. *The Mere Availability of Alternative Enforcement Mechanisms Does Not Prejudice the Current Proposed CDO Recipients.*

The LOCSD cites a September 8, 2006 submission from the Prosecution team as indicating that the Water Board may change enforcement mechanisms and adopt

CAOs or ACLs against the CDO recipients. The LOCSD alleges that such a change in tactics would prejudice the CDO recipients. The Prosecution Team has not and is not advocating for using any mechanism beside the proposed CDOs in the current enforcement actions. The issue currently before the Water Board is the issuance of CDOs.

The staff report from the Prosecution Team prepared on August 29, 2006 and posted on the Water Board web page on September 7, 2006 ("Staff Report") outlines alternative enforcement mechanisms for the Water Boards to consider when taking future actions. The Prosecution Team is not currently pursuing any of these alternative mechanisms. Nevertheless, the potential use of a CAO rather than CDOs for future enforcement actions does not violate due process. If an alternative such as a CAO or ACL were pursued it would be done so in a manner that protected due process rights by following all legally required notice and hearings procedures.

The Staff Report states that it is the Prosecution Staff's intent to pursue similar orders against randomly selected groups until all property owners and tenants in the Prohibition Zone have received enforcement orders. (Staff Report, 5.) Alternative enforcement mechanisms, such as CAOs and ACLs, remain available to the Water Board and could be used in the future.

The LOCSD cites no legal authority for the proposition that the same type of enforcement must be used against all dischargers in the Prohibition Zone. Furthermore, selective enforcement of a valid law is not a violation of the due process rights of the party that the law is enforced against unless it can be demonstrated that the enforcement is arbitrary and unreasonable. (*Patel v. Pennaman*, 103 F.3d 868, 874 (9th Cir. 1996), *cert. den.* 520 U.S. 1240 (1997).)

6. The Water Board Actions to Enforce the Prohibition Zone are Not Arbitrary or Unreasonable

The LOCSD attempts to compare the current situation within Los Osos to Water Board enforcement action in Morro Bay to demonstrate that the Water Board is acting arbitrarily by enforcing the Prohibition Zone. The situation in Morro Bay is not analogous to the facts at issue in this action. Morro Bay has an existing treatment plant that meets full secondary treatment requirements most of the time. Accordingly, past actions by the Water Board concerning Morro Bay cannot be used to justify delaying enforcement of the Prohibition Zone nor do they demonstrate any inconsistency in the board's implementation of enforcement policy.

C. The Proposed CDOs are Supported by Valid Scientific, Technical and Environmental Analyses

In addition to the legal arguments below, the Prosecution Team has responded to the LOCSD's technical comments separately in its technical response document. The LOCSD's argument that the CDO recipients were prejudiced by the delay in posting the Prosecution Team's master documents is no longer relevant. Any disadvantage from the posting delay has been cured by the Water Board's subsequent rescheduling of these CDO hearings to December 14th and 15th to provide CDO recipients a full 30 days to review the Prosecution Team's submissions.

1. Challenges to Resolution 83-13 are Not Proper at This Time

The LOCSD claims that it cannot be precluded from challenging Resolution 83-13 and the adoption of the Prohibition Zone because at the time that Resolution 83-13 was adopted in 1983 the Prohibition Zone could not be challenged until actual enforcement took place. (October 12, 2006 Letter from Gregory Murphy to Michael Thomas, p.12.) The LOCSD also contends that since 1983 the Porter-Cologne Act has been amended to "require near-immediate challenge" to Water Board acts such as the adoption of Resolution 83-13. (October 12, 2006 Letter from Gregory Murphy to Michael Thomas, p.12.) Again, the LOCSD fails to site any legal authority for the proposition that Resolution 83-13 could not be challenged prior to enforcement, nor does the LOCSD cite what provisions of the Porter-Cologne Act have been amended to preclude challenging Resolution 83-13. Finally the LOCSD concludes, without citing any legal authority, that it would be a due process violation to preclude challenges to Resolution 83-13 based on "change in law."

It is difficult for the Prosecution Team to respond to vague assertions for which no legal authority has been provided. Nevertheless, the assumptions upon which Los Osos basis its argument for why the Water Board should consider challenges to Resolution 83-13 are false. First, resolution 83-13 was open to challenge at the time it was adopted in 1983. (*Marina County Water District v. State Water Resources Control Board* (1984) 163 Cal.App.3d 132.) California Supreme Court Case law demonstrates that in 1984 a basin plan prohibition could be challenged prior to any enforcement of that prohibition by petitioning the State Water Resources Control Board and subsequent writ of mandate. (*Marina, supra* 163 Cal.App.3d 134-135.) In *Marina*, the Supreme Court affirmed denial of a writ of mandamus challenging the Water Board's adoption of a zone of prohibition in an area south of Monterey Bay. (*Marina, supra* 163 Cal.App.3d 132, 141.) The petition to the State Water Resources Control Board in *Marin* was filed by the petitioners prior to the prohibition on all waste water discharge in the zone becoming effective. (*Marina, supra* 163 Cal.App.3d 135-136.) Second, the Prosecution Team has never asserted that the Porter-Cologne Act is the basis upon which challenge of Resolution 83-13 is precluded and the LOCSD does not provide a

cite to support this proposition. Accordingly, the relevance of the subsequent amendments of that Act is illusive.

The Water Board September 7, 2006 Notice of Public Hearing clearly states that the validity of the Prohibition Zone is not an issue in this hearing. Regardless, because the LOCSD and the CDO recipients continue to raise the issue, the Prosecution Team has provided a summary of the substantial evidence supporting the adoption of the Prohibition Zone separately in its technical response document.

2. *Enforcement of the Prohibition Zone Does Not Require Site Specific Investigation or Evidence That a Septic Tank is Malfunctioning.*

Assuming that all the CDO recipients have properly permitted septic systems that are working as they are designed to work, the CDO recipients are still in violation of the Prohibition Zone and are the proper subject of the proposed enforcement actions. The Basin Plan prohibits the use of septic systems within the Prohibition Zone regardless of whether or not the septic systems are properly permitted by the County and working as designed. Accordingly, the Prosecution Team does not have to prove, and the Water Board does not have to find, that individual septic systems are unpermited or defective in order to enforce the proposed CDO's.

The fact that a septic system is permitted by the County does not preclude the Water Board from taking enforcement action against discharges from that system. The County does not have jurisdiction to allow continued use of septic tanks after the Water Board prohibits their use. (Water Code sections 13280 through 13283.) Furthermore, the Water Code specifically allows discharge prohibitions for existing systems. (Water Code section 13280.) Similarly, the fact that the County approved the construction of a certain home after the Prohibition Zone took effect does not preclude the Water Board from enforcing the prohibition against that particular homeowner.

II. PROSECUTION TEAM'S RESPONSE TO ADDITIONAL ISSUES RAISED BY OTHER RESPONDENTS

This part of the memorandum responds to substantive legal issues raised by respondents other than the LOCSD. Some of the respondents raised the same issues as the LOCSD's comment letter. Those comments and responses are addressed above in Part I of this memorandum and are not repeated below.

A. The Alleged *Ex Parte* Contacts Did Not Take Place.

In his October 11, 2006 letter to the Water Board, Mr. William Moylan alleges Harvey Packard has had "unethical contact" with the Chair of the Board. Mr. Moylan has misconstrued statements made by Mr. Packard as an indication that Mr. Harvey has had *ex parte* contact with the Chair of the Board. Mr. Packard has not had *ex parte* contact with the Chair of the Water Board or any other Water Board members on issues concerning the proposed CDOs. Mr. Packard has submitted signed declarations attached as Exhibit "B" in which Mr. Packard swears under penalty of perjury that he has had no communication outside of public hearings with the Water Board on issues relating to the proposed CDOs.

B. Requiring Homeowners to Provide Information Regarding Violations Does Not Violate the Fifth Amendment.

In prior submissions, the LOCSD argues that the Fifth Amendment protects homeowners from responding to the requirement of Water Code section 13267 to provide information regarding violations. A few CDO recipients continue to argue that Water Board proceedings violate the Fifth Amendment.

A witness raising the Fifth Amendment in a civil matter must explain how the response to a particular question will incriminate the witness, and bears the burden of proving that the privilege applies. (*Marriage of Sachs* (2002) 95 Cal.App.4th 1144, 1151.) Because no legal authority is cited to support this argument, it is unclear exactly how the Water Board's exercise of the authority granted by Water Code section 13267 could violate the Fifth Amendment rights of a designated party. Self-monitoring and reporting is a common tool used by a variety of environmental laws and regulations. Furthermore, the Water Board has not imposed or sought to impose fines based on any information provided by home owners in response to Water Code section 13267 inquiries.

C. Random Selection of CDO Recipients Does Not Violate Due Process or Equal Protection Rights.

In order for the selection of CDO recipients to violate due process rights, the CDO recipients would have had to be selected in a manner that is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (Patel v. Penman (9th Cir. 1996) 103 F.3d 868, 873.) The Staff Report articulates a ration basis for randomly selecting this group of CDO recipients and explained how the random selection process was conducted. Accordingly, the random selection of CDO recipients does not violate the CDO recipients' due process rights.

Furthermore, selective enforcement of a valid law does not violate equal protection rights unless it is "the deliberate product of invidious discrimination based upon some

improper criterion." (*People v. Superior Court of Los Angeles County* (1977) 70 Cal.App.3d 341, 343.) The CDO recipients must show that they were selected for enforcement on an impermissible ground such as race, religion or exercise of their constitutional rights. (*United States v. Kidder* (9th Cir. 1989) 869 F.2d 1328, 1335.) The Prosecution Teams random selection of homeowners to receive the first round of CDOs does not demonstrate any improper motive or discriminatory purpose, therefore, the Water Boards selective enforcement of the Prohibition Zone does not violate equal protection rights of the CDO recipients.

D. Lack of Knowledge of Prohibition Zone at Time of Home Purchase is Not a Legal Defense.

Various homeowners claim that they did not know that their homes were within the Prohibition Zone and/or that septic tank discharges from their homes are illegal. Mr. Robert Shipe provided disclosure forms that refer to an assessment for the construction of a sewer system. Unfortunately, these forms do not inform the home purchasers of the potential consequences if such a system is not constructed. Regardless, even where realtors provided no notice or the discharger purchased the home before 1983, the lack of notice in not a defense. (*People ex rel. State Air Resources Bd. V. Wilmshurst* (1999) 68 Cal.App.4th 1332, 1346 [Ignorance of the law does not excuse violations].)

III. FINDINGS OF AB 2701

On September 20, 2006, Governor Schwarzenegger signed AB 2701 which amended Government Code section 61105 and added Government Code section 25825.5 relating to the construction and operation of a community wastewater collection and treatment system to address the Prohibition Zone. A copy of the AB 2701 text is attached as Exhibit "C" hereto.

In that legislation, the Legislature found that "[T]here are ongoing discharges to the Los Osos Discharge Prohibition Zone established in the Water Quality Control Plan for the Central Coast Basin" and that "[T]here is an urgent need to protect the public health and safety by eliminating these discharges...". (See, added Government Code section 25825.5(a)(1) – (7)) The legislation temporarily aligned certain wastewater collection and treatment powers between the Los Osos Community Services District and the County of San Luis Obispo so that the County could design, construct, and operate a project that would eliminate discharges in the prohibition zone. These findings illustrate the serious problem which the Water Board is addressing in the Prohibition Zone. The Water Board should rely on these legislative findings in considering the compliance alternatives in the proffered CDOs.

IV. MODIFICATION OF PROPOSED CEASE AND DESIST ORDER

Several of the Respondents to the proposed Cease and Desist Order, submitted by the Prosecution Team on September 8, 2006 (proposed CDO), have submitted a "settlement agreement" which they claim to support. The Prosecution Team carefully reviewed and considered that document and does not agree with the language in that document. However, the Prosecution Team has treated that proposed agreement as a request by those Respondents to have the Water Board consider alternative language for the model cease and desist order which is different from that initially proposed by the Prosecution Team.

In that light, the Prosecution Team is prepared to modify the proposed CDO. The modification is attached as Exhibit "D" hereto and a redline version showing changes between the initial model CDO and the modified CDO is attached as Exhibit "E" hereto.

The modified CDO addresses several concerns that have been expressed to the Prosecution Team:

1. The proposed CDO was designed to force the Los Osos/Baywood Park community to adopt the Tri-W site for the location of a community wastewater treatment plant[3] ;

2. The proposed CDO is based on an unrealistic assumption that a community wastewater collection and treatment system (community wastewater system) will be available for hook-ups by January 1, 2010;

3. The proposed CDO doesn't take into consideration the impact of AB 2701.

At the time the proposed CDO was drafted, the status of AB 2701 was uncertain. Now that the Governor has signed this important legislation, the Prosecution Team believes that the potential impacts of that legislation should be recognized in any CDO issued to enforce the Basin Plan Prohibition Zone.

The modified CDO makes clear that so long as the community wastewater system contemplated by AB 2701 is moving forward, the respondent is not required to cease use of the septic system for the Respondent's site (See, Paragraph A.1). There is no requirement in the modified CDO that the community wastewater system be completed by any particular date. That was the intent of the proposed CDO but the Prosecution Team believes the modified CDO is clearer in that regard.

If the AB 2701 process is proceeding but does not produce a community wastewater system within three years, the Prosecution Team recommends additional pumping and

[3] Nothing in the proposed CDO or any modification thereto was or is intended by the Prosecution Team to support or prevent the use of the Tri-W site as a community treatment plant location

maintenance work at regular intervals consistent with that initially required within 3 months of the order by Paragraph B.

While the project laid out in AB 2701 is very promising, the Water Board should recognize that the design, construction, and operation of a wastewater collection and treatment system is not guaranteed by this legislation. For example, if the benefits assessment contemplated by the bill does not take place, the project will not proceed.

In the event that the AB 2701 process does not move forward, the modified CDO provides an alternative mechanism for complying with the Basin Plan Discharge Prohibition. This mechanism takes the form of a firm discharge cessation date (See, modified CDO, Paragraphs A.2 and A.3). This discharge cessation date becomes operative either because the County of San Luis Obispo (County) has failed to approve a benefits assessment by January 1, 2008 (modified CDO, Paragraph A.2) or that during the process of implementing the community wastewater project, there is a material cessation (i.e. work stoppage) of the project, as determined by the Water Board (modified CDO, Paragraph A.3).

If the benefits assessment fails by January 1, 2008, the discharger would be required to cease discharges by January 1, 2011, as opposed to 2010 in the original proposed CDO. The Prosecution Team extended this date so as to make clear that there is no connection between any discharge cessation date and any date that may have been associated with the Tri-W project. If there is no community wastewater system in the works as of 2008, the Prosecution Team believes that an additional three years to fully end the illegal septic system discharge is more than sufficient given the length of time that the Basin Plan Discharge Prohibition has been in place.

As to the material cessation standard, it is the fact that a material cessation of the project has occurred --- regardless of who or what caused the cessation --- that triggers the discharge cessation requirement[4]. In order to eliminate any claim that the determination of the "material cessation" would be arbitrarily made by staff, the Prosecution Team proposes that the Water Board would make that determination.

As with the original proposed model CDO, the Prosecution Team believes that a firm, discharge cessation date remains the key and essential element of the modified CDO or any enforcement action taken with regard to the Basin Plan Discharge Prohibition. In this administrative proceeding, the Water Board is addressing the ongoing violation of a Basin Plan Discharge Prohibition. It makes little sense for the Water Board to go through these formal proceedings and not establish a discharge cessation date at this

[4] Some dischargers have suggested that the material cessation trigger should only apply to actions within the control of the County. That is too limiting as the issue is not who has stopped the project or why, but that there would be no concrete alternative to the continued discharge in violation of the Basin Plan Discharge Prohibition.

time. Such an oversight would mean that the Water Board would not be addressing the discharge prohibition that has been part of the applicable basin plan since 1988.

The absence of a firm, discharge cessation date is an overriding factor as to why the "settlement agreement" proffered by several of the proposed CDO recipients is unacceptable to the Prosecution Team. Those dischargers want the Water Board to go through another enforcement hearing procedure at some later time in the event that a community wastewater project is not implemented. What their "settlement agreement" does is make these hearings "interim" administrative proceedings in addressing the Basin Plan Discharge Prohibition rather than the final administrative proceedings to enforce that discharge prohibition which the Prosecution Team believes is appropriate after so many years of community-wide noncompliance. Moreover, the sheer scope of bringing formal enforcement actions against the 4000+ dischargers in the Los Osos/Baywood Park community militates in favor of final actions being spelled out in an order at this time against the dischargers, and against piecemeal or interim proceedings.

One clause that the Prosecution Team has stricken from the prior CDO is the discretion of the Executive Officer to grant extensions on the interim compliance and reporting requirements based on certain factors. (See, Section A.4 and B of the proposed CDO). While the Prosecution Team would like the Executive Officer to have such authority, we believe that in the context of a cease and desist order, the Executive Officer is not clearly delegated the authority to modify cease and desist order compliance dates at his or her discretion (See, Water Code section 13223). However, we have retained language that allows the Executive Officer to extend interim or reporting dates based on circumstances beyond the dischargers control for the Water Board's evaluation as to whether that limited authorization also is prohibited by Water Code section 13223.

CONCLUSION

For these reasons, along with those already presented, the Prosecution Team recommends adoption of the modified CDO against each of the dischargers who do not reach a settlement with the Prosecution Team and choose, instead, to contest the proposed enforcement actions.

EXHIBIT A

October 6, 2005 letter from Roger Briggs transmitting ACL Complaint to LOCSD

California Regional Water Quality Control Board
Central Coast Region

Alan C. Lloyd,Ph.D.
Agency Secretary

Internet Address: http://www.waterboards.ca.gov/centralcoast
895 Aerovista Place, Suite 101, San Luis Obispo, California 93401-7906
Phone (805) 549-3147 • FAX (805) 543-0397

Arnold Schwarzenegger
Governor

October 6, 2005

Los Osos Community Services District
P. O. Box 6064
Los Osos, CA 93412

Dear Directors:

COMPLAINT FOR ADMINISTRATIVE CIVIL LIABILITY FOR VIOLATION OF TIME SCHEDULE ORDER NO. 00-131

Enclosed is Administrative Civil Liability Complaint No. R3-2005-0137 issued by the Executive Officer of the Central Coast Regional Water Quality Control Board (Central Coast Water Board) for violations of Regional Board Order No. 00-131, a Time Schedule Order Concerning Los Osos Community Services District in San Luis Obispo County.

On December 1 or 2, 2005, the Central Coast Water Board at the Central Coast Water Board Hearing Room, 895 Aerovista Place, Suite 101, San Luis Obispo, will hear public testimony and decide whether to affirm the Executive Officer's recommended liability of $11,190,000 to Los Osos Community Services District (CSD), increase or decrease the amount, or refer the matter for judicial civil action.

The Central Coast Water Board remains committed to resolving water quality problems in Los Osos. Our position is unchanged from that stated in earlier correspondence, hence there has been ample prior warning of this action. Time Schedule Order No. 00-131 contains a date-specific compliance schedule for completion of the wastewater project and specifies monetary penalties of $10,000 per day for failure to comply with the schedule, unless such failure is beyond the CSD's reasonable ability to control. The Regional Board's requirements and Time Schedule Order No. 00-131 were issued to the community's governing entity (the Los Osos CSD) and recent election of new Los Osos CSD Directors does not change those requirements specified in Order No. 00-131. Controllable project delays, such as halting construction on the wastewater project, would clearly be within the CSD's ability to control.

If completion of the wastewater project proceeds immediately, I am prepared to recommend that the Water Board apply the assessed amount to project costs. However, such recommendation would be contingent upon the CSD taking all necessary actions to support completion of this wastewater project, including (but not limited to) continuing to defend against appeal of the recent Superior Court ruling invalidating the facility location initiative; that is, continue to support the Superior Court's ruling in favor of the project under construction.

I remain hopeful that each of the Los Osos CSD directors will solemnly consider the long-range economic, social and environmental impacts to your community that would result from halting the wastewater project. Monetary penalties in the enclosed Complaint represent just a portion of the costs that would result from such action. Additional costs include payment of the debt already incurred, repayment of the State loan with interest (see attached letter previously sent to the District by the State Water Resources Control Board), payment of construction contracts, repayment of grants, ultimately paying for a wastewater project without funding assistance currently available, and paying for a project

that is likely to incur additional costs due to inflation. **We also intend to begin enforcement proceedings against individual dischargers; that is, individual property owners** with septic system discharges in violation of the Basin Plan prohibition. This action will also be additional cost to the community that you could avoid by choosing to comply rather than intentionally violating the prohibition and the Water Code, and intentionally continuing extended pollution.

Please review these documents and provide written comments **by Monday, Ocober 31, 2005, 5:00 pm.** Late comments will be accepted only upon a ruling of the Chair. If you have questions or would like to discuss this matter further detail, please call me at 805/549-3140.

Sincerely,

Roger W. Briggs
Executive Officer

Attachments:
Administrative Civil Liability Complaint No. R3-2005-0137
State Water Resources Control Board letter to Bruce Buel dated September 23, 2005

cs: Steve Monowitz
CA Coastal Commission
725 Front Street, Suite 300
Santa Cruz, CA 95060-4508

John Euphrat
Department of Planning and Building
County Government Center
San Luis Obispo, CA 93408

Darrin Polhemus
SWRCB-DFA
P. O. Box 944212
Sacramento, CA 94244-2120

S:\seniors\shared\wdr\wdr facilities\san luis obispo co\los osos\enforcement\2005ACLletter
File: Los Osos CSD Wastewater Project
Task: 126-01

EXHIBIT B

Declaration of Harvey Packard

REED SATO (SBN 87685)
Director
YVONNE WEST (SBN 221414)
Staff Counsel
Office of Enforcement
State Water Resources Control Board
1001 I Street, 16th Floor
Sacramento, California 95814
Telephone: 916-341-5889
Fax: 916-341-5284
E-mail: rsato@waterboards.ca.gov
ywest@waterboards.ca.gov

Attorneys for Roger Briggs and
The Prosecution Team

BEFORE THE CALIFORNIA WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION

In the Matter of: Discharges of Waste From Individual or Community Sewage Disposal Systems in the Los Osos/Baywood Park Prohibition Zone, (CCRWQCB Resolution No. 83-13 Basin Plan, p. IV-67	NOS. R3-2006-1001 to R3-2006-1050 (Section 13301 of the Water Code) DECLARATION OF HARVEY PACKARD IN SUPPORT OF PROSECUTION TEAM'S REBUTTAL TO LEGAL COMMENTS SUBMITTED BY LOS OSOS COMMUNITY SERVICES DISTRICT AND OTHER RESPONDENTS TO THE PROPOSED LOS OSOS CEASE AND DESIST ORDERS

I, Harvey Packard, declare as follows:

1. I am Division Chief with the Central Coast Regional Water Resources Control Board. I have been an employee of the Central Coast Regional Water Resources Control Board for 14 years. I am the Prosecution Team Lead in this matter.

2. I have personal knowledge of the facts set forth in this declaration and if called to testify about these facts I would do so.

3. On August 29, 2006, I meet with Mr. William Moylan and Mr. and Mrs. Mortara concerning the proposed cease and desist orders in this matter.

4. In my conversations with Mr. Moylan I referenced the Water Board's desire to see individual enforcement actions brought to enforce the prohibition against discharges of waste

from individual sewage disposal systems in the Los Osos/Baywood Park Prohibition Zone ("Prohibition Zone"). My comments to Mr. Moylan were based on statements made by the Chairman of the Board during a public hearing concerning a proposed Administrative Civil Liability Complaint against the Los Osos Community Services District on January 5, 2006.

5. I have never had conversations with the Chairman of the Board or any other Board member outside of a public meeting or hearing of the Water Board on issues relating to this matter. Furthermore, I have never received direction from the Chairman or any other Board member to initiate or pursue an enforcement action against a specific individual within the Prohibition Zone.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed this 29th day of November, 2006, in San Luis Obispo, California

Harvey Packard

EXHIBIT C

AB 2701

BILL NUMBER: AB 2701 CHAPTERED
BILL TEXT

CHAPTER 360
FILED WITH SECRETARY OF STATE SEPTEMBER 20, 2006
APPROVED BY GOVERNOR SEPTEMBER 20, 2006
PASSED THE ASSEMBLY AUGUST 24, 2006
PASSED THE SENATE AUGUST 22, 2006
AMENDED IN SENATE AUGUST 17, 2006
AMENDED IN SENATE AUGUST 16, 2006
AMENDED IN SENATE AUGUST 7, 2006
AMENDED IN SENATE JUNE 21, 2006
AMENDED IN SENATE MAY 26, 2006
AMENDED IN ASSEMBLY APRIL 24, 2006

INTRODUCED BY Assembly Member Blakeslee
(Principal coauthor: Senator Maldonado)

FEBRUARY 24, 2006

An act to amend Section 61105 of, and to add Section 25825.5 to, the Government Code, relating to San Luis Obispo County.

LEGISLATIVE COUNSEL'S DIGEST

AB 2701, Blakeslee San Luis Obispo County.

(1) Existing law authorizes the establishment of community services districts for the provision of various services to the geographic area within a district, including the collection, treatment, or disposal of sewage, wastewater, recycled water, and stormwater.

This bill would authorize the County of San Luis Obispo to undertake any efforts necessary to construct and operate a wastewater collection and treatment system to meet the needs of the Los Osos Community Services District, as specified, and to impose and collect user fees and other charges to cover the reasonable costs of any wastewater collection or treatment services provided pursuant to these provisions.

The bill would also require the Board of Supervisors of San Luis Obispo County to prepare and submit a proposed assessment to pay for the facilities, and, if certain requirements are met, to decide whether to proceed with construction of the project. The district would retain the powers to provide all other services to a designated zone. After a minimum of 3 years and when the district and the county mutually apply for, and are granted, a modification to the waste discharge permit issued by the Regional Water Quality Control Board, responsibilities would be transferred back to the district.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 25825.5 is added to the Government Code, to read:

25825.5. (a) The Legislature finds and declares all of the following:

(1) There are ongoing discharges to the Los Osos Discharge Prohibition Zone established in the Water Quality Control Plan for

the Central Coast Basin.

(2) The agency responsible for eliminating these discharges is the Los Osos Community Services District, which is a relatively new agency, formed in 1998.

(3) The Central Coast Regional Water Quality Control Board has imposed substantial fines on the Los Osos Community Services District for failing to make adequate progress toward eliminating these discharges.

(4) The Los Osos Community Services District has a relatively small staff that has no experience of successfully designing and constructing facilities of the size and type needed to eliminate these discharges.

(5) The County of San Luis Obispo has a larger staff that has experience in successfully designing large public works projects.

(6) There is an urgent need to protect the public health and safety by eliminating these discharges and the most feasible alternative is best accomplished by a temporary realignment of certain wastewater collection and treatment powers between the Los Osos Community Services District and the County of San Luis Obispo.

(7) It is the intent of the Legislature in enacting this section and amending Section 61105 to authorize the County of San Luis Obispo to design, construct, and operate a wastewater collection and treatment project that will eliminate these discharges, particularly in the prohibition zone, to avoid a wasteful duplication of effort and funds, and to temporarily prohibit the Los Osos Community Services District from exercising those powers.

(b) As used in this section, the following definitions apply:

(1) "Board" means the Board of Supervisors of the County of San Luis Obispo.

(2) "County" means the County of San Luis Obispo.

(3) "District" means the Los Osos Community Services District, formed pursuant to the Community Services District Law, Division 3 (commencing with Section 61000) of Title 3, located in San Luis Obispo County.

(4) "Prohibition zone" means that territory within the Baywood Park-Los Osos area of the county that is subject to the wastewater discharge prohibition imposed by the Central Coast Regional Water Quality Control Board pursuant to Resolution 83-13.

(c) The county may undertake any efforts necessary to construct and operate a community wastewater collection and treatment system to meet the wastewater collection and treatment needs within the district. These efforts may include programs and projects for recharging aquifers, preventing saltwater intrusion, and managing groundwater resources to the extent that they are related to the construction and operation of the community wastewater collection and treatment system. These efforts shall include any services that the county deems necessary, including, but not be limited to, any planning, design, engineering, financial analysis, pursuit of grants to mitigate affordability issues, administrative support, project management, and environmental review and compliance services. The county shall not exercise any powers authorized by this section outside the district.

(d) Nothing in this section shall affect the district's power to do any of the following:

(1) Operate wastewater collection and treatment facilities within the district that the district was operating on January 1, 2006.

(2) Provide facilities and services, other than wastewater collection and treatment.

(e) To finance the construction and operation of a wastewater collection and treatment system, the county may levy benefit

assessments consistent with the requirements of Article XIII D of the California Constitution, pursuant to any of the following:

(1) The Improvement Act of 1911 (Division 7 (commencing with Section 5000) of the Streets and Highways Code).

(2) The Improvement Bond Act of 1915 (Division 10 (commencing with Section 8500) of the Streets and Highways Code).

(3) The Municipal Improvement Act of 1913 (Division 12 (commencing with Section 10000) of the Streets and Highways Code).

(f) The county may charge standby charges for sewer services, consistent with the requirements of Article XIII D of the California Constitution, pursuant to the Uniform Standby Charge Procedures Act (Chapter 12.4 (commencing with Section 54984) of Part 1 of Division 2 of Title 5).

(g) The county may impose and collect user fees and charges and any other sources of revenue permitted by law sufficient to cover the reasonable costs of any wastewater collection or treatment services provided pursuant to this section.

(h) Promptly upon the adoption of a resolution by the board requesting this action, the board of directors of the district shall convey to the county any requested retained rights-of-way, licenses, funds, and permits previously acquired by the district in connection with construction projects for which the district awarded contracts in 2005. The county shall use those fee interests, rights-of-way, licenses, and funds for the purpose of furthering the construction and operation of a wastewater collection and treatment system pursuant to this section.

(i) After the approval of a benefit assessment, the board shall complete a due diligence review before deciding to proceed with the construction and operation of a wastewater collection and treatment system. The board shall consider any relevant factors, including, but not limited to, the prompt availability of reasonable and sufficient financing, the status of enforcement actions, the successful development of reasonable project technology and location options, the availability of any necessary permits and other approvals, and the absence of other significant impediments. At the completion of this due diligence review, the board shall adopt a resolution declaring its intention to proceed or not proceed with the construction and operation of the wastewater collection and treatment system.

(j) Collection of assessments may not commence until the adoption of the resolution to proceed pursuant to subdivision (i).

(k) The county shall have no power or responsibility to construct and operate a wastewater collection and treatment system pursuant to this section and the district shall resume that power and responsibility when any of the following occurs:

(1) If the board adopts a resolution not to hold a benefit assessment election pursuant to subdivision (e).

(2) If there is a majority protest to a benefit assessment proposed by the county, on the date of the resolution adopted by the board determining that the majority protest exists.

(3) If there is not a majority protest, but the board adopts a resolution, pursuant to subdivision (i), which declares that the county will no longer exercise its powers pursuant to this section, on the date specified in the board's resolution.

(4) If the county constructs and operates a wastewater collection and treatment system pursuant to this section, not less than three years after the operation of the system commences, the board and the board of directors of the district shall mutually apply to the Central Coast Regional Water Quality Control Board for a modification of the waste discharge permit, requesting permission to transfer of

the responsibility to operate the wastewater collection and treatment system from the county to the district. Consistent with that modification, the board shall adopt a resolution that specifies the date on which the county will no longer exercise its powers pursuant to this section.

(l) When the power and responsibility to construct and operate a wastewater collection and treatment system transfers from the county to the district pursuant to subdivision (k), the county shall do all of the following:

(1) Promptly convey to the district any remaining retained fee interests in any real property, rights-of-way, licenses, other interests in real property, funds, and other personal property that the county previously acquired pursuant to subdivision (h).

(2) Promptly convey to the district the wastewater collection and treatment system that the county constructed pursuant to this section.

(3) Continue to collect any necessary assessments and use them to repay any indebtedness incurred by the county to finance the construction of the wastewater collection and treatment system pursuant to this section.

(4) The county shall cease collecting any benefit assessments after repayment of any indebtedness incurred by the county to finance the construction of the wastewater collection and treatment system.

(m) Nothing in this section shall be construed as imposing upon the county any liability for any district decisions or actions, or failures to act, or imposing upon the county any liability for any decisions or actions, or failures to act, by any district officers, employees, or agents. In addition, nothing in this section shall be construed as imposing upon the county any liability for any prior or subsequent district liabilities, whether liquidated or contingent, or any prior or subsequent liabilities of district officers, employees, or agents, whether liquidated or contingent.

SEC. 2. Section 61105 of the Government Code is amended to read:

61105. (a) The Legislature finds and declares that the unique circumstances that exist in certain communities justify the enactment of special statutes for specific districts. In enacting this section, the Legislature intends to provide specific districts with special statutory powers to provide special services and facilities that are not available to other districts.

(b) (1) The Los Osos Community Services District may borrow money from public or private lenders and loan those funds to property owners within the district to pay for the costs of decommissioning septic systems and constructing lateral connections on private property to facilitate the connection of those properties to the district's wastewater treatment system. The district shall lend money for this purpose at rates not to exceed its cost of borrowing and the district's cost of making the loans. The district may require that the borrower pay the district's reasonable attorney's fees and administrative costs in the event that the district is required to take legal action to enforce the provisions of the contract or note securing the loan. The district may elect to have the debt payments or any delinquency collected on the tax roll pursuant to Section 61116. To secure the loan as a lien on real property, the district shall follow the procedures for the creation of special tax liens in Section 53328.3 of this code and Section 3114.5 of the Streets and Highways Code.

(2) (A) Except as otherwise provided in this paragraph, on and after January 1, 2007, the Los Osos Community Services District shall not undertake any efforts to design, construct, and operate a

community wastewater collection and treatment system within, or for the benefit of, the district. The district shall resume those powers on the date specified in any resolution adopted pursuant to subdivision (j) of Section 25825.5.

(B) Nothing in this paragraph shall affect the district's power to do any of the following:

(i) Operate wastewater collection and treatment facilities within the district that the district was operating on January 1, 2006.

(ii) Provide facilities and services in the territory that is within the district, but outside the prohibition zone.

(iii) Provide facilities and services, other than wastewater collection and treatment, within the prohibition zone.

(C) Promptly upon the adoption of a resolution by the Board of Supervisors of the County of San Luis Obispo requesting this action pursuant to subdivision (h) of Section 25825.5, the district shall convey to the County of San Luis Obispo all retained rights-of-way, licenses, other interests in real property, funds, and other personal property previously acquired by the district in connection with construction projects for which the district awarded contracts in 2005.

(c) The Heritage Ranch Community Services District may acquire, construct, improve, maintain, and operate petroleum storage tanks and related facilities for its own use, and sell those petroleum products to the district's property owners, residents, and visitors. The authority granted by this subdivision shall expire when a private person or entity is ready, willing, and able to acquire, construct, improve, maintain, and operate petroleum storage tanks and related facilities, and sell those petroleum products to the district and its property owners, residents, and visitors. At that time, the district shall either (1) diligently transfer its title, ownership, maintenance, control, and operation of those petroleum tanks and related facilities at a fair market value to that private person or entity, or (2) lease the operation of those petroleum tanks and related facilities at a fair market value to that private person or entity.

(d) The Wallace Community Services District may acquire, own, maintain, control, or operate the underground gas distribution pipeline system located and to be located within Wallace Lake Estates for the purpose of allowing a privately owned provider of liquefied petroleum gas to use the underground gas distribution system pursuant to a mutual agreement between the private provider and the district or the district's predecessor in interest. The district shall require and receive payment from the private provider for the use of that system. The authority granted by this subdivision shall expire when the Pacific Gas and Electric Company is ready, willing, and able to provide natural gas service to the residents of Wallace Lake Estates. At that time, the district shall diligently transfer its title, ownership, maintenance, control, and operation of the system to the Pacific Gas and Electric Company.

(e) The Cameron Park Community Services District, the El Dorado Hills Community Services District, the Golden Hills Community Services District, the Mountain House Community Services District, the Rancho Murieta Community Services District, the Salton Community Services District, the Stallion Springs Community Services District, and the Tenaja Meadows Community Services District, which enforced covenants, conditions, and restrictions prior to January 1, 2006, pursuant to the former Section 61601.7 and former Section 61601.10, may continue to exercise the powers set forth in the former Section 61601.7 and the former Section 61601.10.

(f) The Bear Valley Community Services District, the Bell Canyon

Community Services District, the Cameron Estates Community Services District, the Lake Sherwood Community Services District, the Saddle Creek Community Services District, and the Wallace Community Services District may, for roads owned by the district and that are not formally dedicated to or kept open for use by the public for the purpose of vehicular travel, by ordinance, limit access to and the use of those roads to the landowners and residents of that district.

(g) Notwithstanding any other provision of law, the transfer of the assets of the Stonehouse Mutual Water Company, including its lands, easements, rights, and obligations to act as sole agent of the stockholders in exercising the riparian rights of the stockholders, and rights relating to the ownership, operation, and maintenance of those facilities serving the customers of the company, to the Hidden Valley Community Services District is not a transfer subject to taxes imposed by Part 11 (commencing with Section 23001) of Division 2 of the Revenue and Taxation Code.

(h) The El Dorado Hills Community Services District and the Rancho Murieta Community Services District may each acquire, construct, improve, maintain, and operate television receiving, translating, or distribution facilities, provide television and television-related services to the district and its residents, or authorize the construction and operation of a cable television system to serve the district and its residents by franchise or license. In authorizing the construction and operation of a cable television system by franchise or license, the district shall have the same powers as a city or a county under Section 53066.

(i) The Mountain House Community Services District may provide facilities for television and telecommunications systems, including the installation of wires, cables, conduits, fiber optic lines, terminal panels, service space, and appurtenances required to provide television, telecommunication, and data transfer services to the district and its residents, and provide facilities for a cable television system, including the installation of wires, cables, conduits, and appurtenances to service the district and its residents by franchise or license, except that the district may not provide or install any facilities pursuant to this subdivision unless one or more cable franchises or licenses have been awarded under Section 53066 and the franchised or licensed cable television and telecommunications services providers are permitted equal access to the utility trenches, conduits, service spaces, easements, utility poles, and rights-of-way in the district necessary to construct their facilities concurrently with the construction of the district's facilities. The district shall not have the authority to operate television, cable, or telecommunications systems. The district shall have the same powers as a city or county under Section 53066 in granting a franchise or license for the operation of a cable television system.

SEC. 3. Due to the unique circumstances concerning the wastewater treatment needs in the Los Osos Community Services District, as set forth in Section 1 of this act, it is necessary that, and the Legislature finds and declares that, a general statute cannot be made applicable within the meaning of Section 16 of Article IV of the California Constitution.

EXHIBIT D

Modified CDO

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401

PROPOSED CEASE AND DESIST ORDER NO. R3-2006-____

Requiring

[OWNER NAMES]
OWNER AND OCCUPANT
[SITE ADDRESS], LOS OSOS
APN [#]
SAN LUIS OBISPO COUNTY
TO CEASE AND DESIST FROM DISCHARGING WASTES IN VIOLATION OF A BASIN PLAN PROHIBITION PRESCRIBED BY THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL COAST REGION

The California Regional Water Quality Control Board, Central Coast Region (hereafter Water Board), finds:

1. _____ own(s) and operate(s) an on-site wastewater treatment and disposal system (Septic System) at _____ (Site) in Los Osos, California. The Site is a residence located within the prohibition zone established by Resolution no. 83-13. The Septic System consists of a septic tank that discharges wastewater to an on-site subsurface disposal facility. _____ is/are referred to in this Order as "Discharger."

2. The Site has no wastewater disposal facility other than the Septic System. Waste generated at the Site includes human waste and wastewater from toilets and from domestic activities such as bathing, laundry, dishwashing and disposal of garbage. This waste is discharged to the Septic System. Liquid waste then discharges from the Septic System and eventually to groundwater.

3. The discharge of waste or the threatened discharge of waste from the Septic System violates a prohibition of waste discharge from individual sewage disposal systems set forth in the Water Quality Control Plan, Central Coast Basin (Basin Plan). The Water Board adopted the prohibition on September 16, 1983. The Basin Plan prohibition specifies, in part (page IV-67):

   "3. Discharges from individual and community sewage disposal systems are prohibited effective November 1, 1988, in Los Osos/Baywood Park area depicted in the prohibition boundary map included as Attachment "A" of Resolution 83-13".

The prohibition boundary map is contained in Appendix A-30 of the Basin Plan. The Site is within the prohibition area.

4. On January 27, 2006 and February 28, 2006, notice was provided to the Discharger and other affected persons regarding the Water Board's consideration of this Order.

5. Pursuant to AB 2701, as of January 1, 2007, the County of San Luis Obispo (County) will be authorized to undertake any efforts necessary to construct and operate a community wastewater collection and treatment system to serve the territory which is subject to the wastewater discharge prohibition imposed by the Central Coast Regional Water Quality Control Board (Water Board) pursuant to Resolution No. 83-13. That territory includes the Site. If the Site is connected to a community wastewater collection and treatment system as contemplated by AB 2701 the Site will comply with the applicable waste discharge prohibition in the Basin Plan

6. The Water Board, on ____, 2006, in San Luis Obispo, California, held a public hearing and heard evidence regarding this Order.

7. This Order includes monitoring and reporting requirements pursuant to Water Code Section 13267. The Water Board needs the required information in order to assess compliance with the Basin Plan and this Order, and to ensure that pollutant loading within the prohibition area is minimized to the extent possible. The Discharger is required to provide this information because the Discharger is the owner and/or operator of the Septic System. The staff report that accompanied the draft order includes additional evidence in support of this requirement. The Water Board adopted the prohibition in 1983, it became effective in 1988, and the Discharger has incurred little or no costs since then to comply with the prohibition. The burden of any monitoring or reporting required by this Order is reasonable in light of the severe pollution that has resulted from operation of septic systems in the prohibition area, and the long history of violations of the prohibition at the Site.

8. The technical report required by Section A.2.b or 3 (as applicable) is necessary to determine that any alternative to connecting to a community wastewater collection and treatment system meets applicable legal requirements, including the septic system discharge prohibition, and to assess compliance with Paragraph A.1 of this Order.

9. Alternatives proposed to comply with this Order may be subject to permitting requirements, including the requirement to obtain waste discharge requirements. Nothing in this Order relieves the Discharger of the obligation to obtain any necessary permit or waste discharge requirements.

10. This enforcement action is being taken for the protection of natural resources and the environment and as such is exempt from the provisions of the California Environmental Quality Act (Sections 15307, 15308, and 15321, Chapter 3, Division 6, Title 14, California Code of Regulations, "CEQA"). In addition, the Septic System is

an existing facility and this Order allows no expansion of use beyond that previously existing so this enforcement action is exempt from the provisions of CEQA (Section 15301, Chapter 3, Division 6, Title 14, California Code of Regulations).

IT IS HEREBY ORDERED, pursuant to Sections 13260, 13267 and 13301 of the California Water Code, that the Discharger shall comply with the following requirements:

A. CESSATION OF DISCHARGE

1. In the event that the County is successful in approving a benefits assessment by January 1, 2008 to finance the construction of a community wastewater collection and treatment system after providing the owners of the subject property with notice and an opportunity to protest the assessment in accordance with Article XIII D of the California Constitution, and, thereafter, the County completes a timely due diligence review for the construction of a community wastewater collection and treatment system, and constructs a community wastewater collection and treatment system in accordance with a schedule approved by the Regional Board;

    a. The Discharger shall cease all unpermitted discharges (discharges not approved or permitted by the Water Board) from the Septic System no later than 60 days after a community wastewater collection and treatment system is available for connection to the Site;

    b. After the Water Board provides notice of the expected availability date to the Discharger and no later than 90 days before the expected availability date, the Discharger shall submit the following information, either:

        i. A statement that the Discharger agrees to connect to the community wastewater treatment plant and sewer system within 60 days after the system becomes available for connection to the Site; or

        ii. A technical report proposing an alternative method of ceasing all unpermitted discharges from the Septic System. The proposed alternative must be adequate to cease unpermitted discharges from the Septic System within 60 days after the date on which the approved schedule anticipates that the community wastewater collection and treatment system will be available, and must include a proposed monitoring and reporting plan. If the alternative involves a discharge of waste that could affect waters of the State, the report shall be in the form of a report of waste discharge. "Waters of the State" is defined in Water Code Section 13050(e). "Report of waste discharge" means a report that complies with Water Code Section 13260 and, if applicable, Water Code Section 13376. In the event that the proposed alternative is not approved by the Water Board, Discharger will be required to cease all unpermitted discharges from

the Septic System no later than 60 days after the availability of a community wastewater collection and treatment system is available for connection to the Site in accordance with Paragraph A.1.a.

2. In the event that the benefits assessment is not approved by the County before January 1, 2008, the Discharger shall cease all discharges from the Septic System no later than January 1, 2011 unless the Water Board has approved an onsite system for discharge from the Site by June 30, 2010, the Discharger shall submit a technical report proposing a method of complying with the January 1, 2011 discharge prohibition date. The proposed alternative must be adequate to cease unpermitted discharges from the Septic System by January 1, 2011, and must include a proposed monitoring and reporting plan. If the alternative involves a discharge of waste that could affect waters of the State, the report shall be in the form of a report of waste discharge. "Waters of the State" is defined in Water Code Section 13050(e). "Report of waste discharge" means a report that complies with Water Code Section 13260 and, if applicable, Water Code Section 13376.

3. In the event that after the benefits assessment is approved by the County, there is a material cessation of the work, as determined by the Water Board, which prevents the implementation, completion, or availability of a community wastewater collection and treatment system to the Site, the Discharger shall cease all discharges from the Septic System by the later of January 1, 2011 or two years following written notice by the Executive Officer of the material cessation. Six months prior to that discharge cessation date, the Discharger shall submit a technical report proposing a method of complying with the discharge cessation date. The proposed alternative must be adequate to cease unpermitted discharges from the Septic System by the discharge cessation date and must include a proposed monitoring and reporting plan. If the alternative involves a discharge of waste that could affect waters of the State, the report shall be in the form of a report of waste discharge. "Waters of the State" is defined in Water Code Section 13050(e). "Report of waste discharge" means a report that complies with Water Code Section 13260 and, if applicable, Water Code Section 13376.

4. The Executive Officer may also extend the due date for any interim or reporting requirement of Section A for up to ninety days for circumstances beyond the Discharger's reasonable control.

5. Nothing in this Order authorizes discharges from the Septic System at any time, whether before or after January 1, 2011.

B. INTERIM COMPLIANCE REQUIREMENTS

By three months after the date of this Order, the Discharger shall (1) have the contents of the Septic System pumped or certify that the Septic System has been pumped within the previous three years, and (2) obtain a report by the County of San Luis Obispo or a septic tank pumper that either describes recommended repairs to the Septic System or states that no repairs are necessary. If the Discharger disagrees with any repair recommendation, the Discharger shall provide justification to the Executive Officer no later than four months after the date of this Order explaining why the repairs are not necessary. Unless Water Board staff agrees, in writing, that any recommended repair is not necessary, the Discharger shall provide documentation no later than February 1, 2007, that the Discharger has complied with these pumping, inspection and repair requirements. Until the community wastewater collection and treatment system is available to the Site and/or all unpermited discharges from the Septic System cease, the Discharger shall have three months from every third anniversary of the entry of this Order to satisfy the same pumping, inspection and repair requirements. The Executive Officer may extend the due date for any requirement of Section B for up to ninety days for circumstances beyond the Discharger's reasonable control.

C. PROVISIONS

1. All reports, receipts, notifications and other documents the Discharger submits pursuant to the Order (including Paragraph A.2 of this Order) shall be accompanied by a statement from the Discharger stating: "I certify under penalty of perjury that the attached documents were prepared at my request or under my supervision, and to the best of my knowledge are true, accurate and complete. I understand that there are significant penalties for providing false or incomplete information, including the possibility of criminal fines or imprisonment."

2. If more than one person or entity is a "Discharger" subject to this Order, compliance by any of those persons or entities with the submission requirements of this Order constitutes compliance by all Dischargers. Multiple submissions are not required. However, all named Dischargers are responsible for compliance with all requirements of this Order, and will be subject to enforcement for any non-compliance. Agreements among and/or between Dischargers as to how they will comply with this Order's requirements are not binding on the Water Board and do not protect any Discharger from enforcement actions.

3. Discharger shall inform any subsequent owner or occupant at the Site of this Order and provide a copy of the Order. The Discharger is liable for the use of the Septic System, while the Discharger owns the Site, including but not limited to the use of the Septic System by any tenant or any other person occupying the Site.

4. The property owner shall notify the Executive Officer and the Staff Prosecution Team in writing of any transfer of ownership of the Site within 30 calendar days following close of escrow or transfer of record title after transfer of ownership.

5. The property owner shall notify the Executive Officer and Staff Prosecution Team in writing of the name of any new occupant of the Site within 30 days after the new occupant takes occupancy.

6. If, in the opinion of the Executive Officer, the Discharger fails to comply with any provision of this Order, then the Executive Officer may apply to the Attorney General for judicial enforcement or issue a complaint for Administrative Civil Liability.

FAILURE TO COMPLY WITH PROVISIONS OF THIS ORDER MAY SUBJECT THE DISCHARGER TO FURTHER ENFORCEMENT ACTION INCLUDING ASSESSMENT OF CIVIL LIABILITY UNDER SECTIONS 13268 OR 13350 OF THE WATER CODE AND REFERRAL TO THE ATTORNEY GENERAL FOR INJUNCTIVE RELIEF AND CIVIL OR CRIMINAL LIABILITY.

I, Harvey C. Packard, Division Chief, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Coast Region, on _____, 2006.

_____
Division Chief

EXHIBIT E

Redline version of model CDO showing changes between the CDO proposed by the Prosecution Team on September 8, 2006 and the modified CDO

STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401

PROPOSED CEASE AND DESIST ORDER NO. R3-2006-____

Requiring

[OWNER NAMES]
OWNER AND OCCUPANT
[SITE ADDRESS], LOS OSOS
APN [#]
SAN LUIS OBISPO COUNTY
TO CEASE AND DESIST FROM DISCHARGING WASTES
IN VIOLATION OF A BASIN PLAN PROHIBITION
PRESCRIBED BY THE CALIFORNIA REGIONAL WATER
QUALITY CONTROL BOARD, CENTRAL COAST REGION

The California Regional Water Quality Control Board, Central Coast Region (hereafter Water Board), finds:

1. _____ own(s) and operate(s) an on-site wastewater treatment and disposal system (Septic System) at _____ (Site) in Los Osos, California. The Site is a residence located within the prohibition zone established by Resolution no. 83-13. The Septic System consists of a septic tank that discharges wastewater to an on-site subsurface disposal facility. _____ is/are referred to in this Order as "Discharger."

2. The Site has no wastewater disposal facility other than the Septic System. Waste generated at the Site includes human waste and wastewater from toilets and from domestic activities such as bathing, laundry, dishwashing and disposal of garbage. This waste is discharged to the Septic System. Liquid waste then discharges from the Septic System and eventually to groundwater.

3. The discharge of waste or the threatened discharge of waste from the Septic System violates a prohibition of waste discharge from individual sewage disposal systems set forth in the Water Quality Control Plan, Central Coast Basin (Basin Plan). The Water Board adopted the prohibition on September 16, 1983. The Basin Plan prohibition specifies, in part (page IV-67):

   "3. Discharges from individual and community sewage disposal systems are prohibited effective November 1, 1988, in Los Osos/Baywood Park area depicted in the prohibition boundary map included as Attachment "A" of Resolution 83-13".

The prohibition boundary map is contained in Appendix A-30 of the Basin Plan. The Site is within the prohibition area.

4. On January 27, 2006 and February 28, 2006, notice was provided to the Discharger and other affected persons regarding the Water Board's consideration of this Order.

Deleted:

5. Pursuant to AB 2701, as of January 1, 2007, the County of San Luis Obispo (County) will be authorized to undertake any efforts necessary to construct and operate a community wastewater collection and treatment system to serve the territory which is subject to the wastewater discharge prohibition imposed by the Central Coast Regional Water Quality Control Board (Water Board) pursuant to Resolution No. 83-13. That territory includes the Site. If the Site is connected to a community wastewater collection and treatment system as contemplated by AB 2701 the Site will comply with the applicable waste discharge prohibition in the Basin Plan

6. The Water Board, on ____, 2006, in San Luis Obispo, California, held a public hearing and heard evidence regarding this Order.

Formatted: Bullets and Numbering

7. This Order includes monitoring and reporting requirements pursuant to Water Code Section 13267. The Water Board needs the required information in order to assess compliance with the Basin Plan and this Order, and to ensure that pollutant loading within the prohibition area is minimized to the extent possible. The Discharger is required to provide this information because the Discharger is the owner and/or operator of the Septic System. The staff report that accompanied the draft order includes additional evidence in support of this requirement. The Water Board adopted the prohibition in 1983, it became effective in 1988, and the Discharger has incurred little or no costs since then to comply with the prohibition. The burden of any monitoring or reporting required by this Order is reasonable in light of the severe pollution that has resulted from operation of septic systems in the prohibition area, and the long history of violations of the prohibition at the Site.

Formatted: Bullets and Numbering

8. The technical report required by Section A.2.b or 3 (as applicable) is necessary to determine that any alternative to connecting to a community wastewater collection and treatment system meets applicable legal requirements, including the septic system discharge prohibition, and to assess compliance with Paragraph A.1 of this Order.

Formatted: Bullets and Numbering

Deleted: sewer

9. Alternatives proposed to comply with this Order may be subject to permitting requirements, including the requirement to obtain waste discharge requirements. Nothing in this Order relieves the Discharger of the obligation to obtain any necessary permit or waste discharge requirements.

Formatted: Bullets and Numbering

10. This enforcement action is being taken for the protection of natural resources and the environment and as such is exempt from the provisions of the California Environmental Quality Act (Sections 15307, 15308, and 15321, Chapter 3, Division 6, Title 14, California Code of Regulations, "CEQA"). In addition, the Septic System is

Formatted: Bullets and Numbering

an existing facility and this Order allows no expansion of use beyond that previously existing so this enforcement action is exempt from the provisions of CEQA (Section 15301, Chapter 3, Division 6, Title 14, California Code of Regulations).

IT IS HEREBY ORDERED, pursuant to Sections 13260, 13267 and 13301 of the California Water Code, that the Discharger shall comply with the following requirements:

Deleted: ————Page Break————

A. CESSATION OF DISCHARGE

Formatted: Font: Bold

1. In the event that the County is successful in approving a benefits assessment by January 1, 2008 to finance the construction of a community wastewater collection and treatment system after providing the owners of the subject property with notice and an opportunity to protest the assessment in accordance with Article XIII D of the California Constitution, and, thereafter, the County completes a timely due diligence review for the construction of a community wastewater collection and treatment system, and constructs a community wastewater collection and treatment system in accordance with a schedule approved by the Regional Board;

   a. The Discharger shall cease all unpermitted discharges (discharges not approved or permitted by the Water Board) from the Septic System no later than 60 days after a community wastewater collection and treatment system is available for connection to the Site;

   b. After the Water Board provides notice of the expected availability date to the Discharger and no later than 90 days before the expected availability date, the Discharger shall submit the following information, either:

      i. A statement that the Discharger agrees to connect to the community wastewater treatment plant and sewer system within 60 days after the system becomes available for connection to the Site; or,

      ii. A technical report proposing an alternative method of ceasing all unpermitted discharges from the Septic System. The proposed alternative must be adequate to cease unpermitted discharges from the Septic System within 60 days after the date on which the approved schedule anticipates that the community wastewater collection and treatment system will be available, and must include a proposed monitoring and reporting plan. If the alternative involves a discharge of waste that could affect waters of the State, the report shall be in the form of a report of waste discharge. "Waters of the State" is defined in Water Code Section 13050(e). "Report of waste discharge" means a report that complies with Water Code Section 13260 and, if applicable, Water Code Section 13376. In the event that the proposed alternative is not approved by the Water Board, Discharger will be required to cease all unpermitted discharges from

Deleted: <#>Discharger shall cease all discharges from the Septic System no later than the earlier of (i) January 1, 2010, or (ii) 60 days after the availability of a community sewage treatment plant. ¶
¶
<#>This Paragraph 2 applies if a community wastewater treatment plant and sewer system will be available to the Discharger no later than January 1, 2010. The Discharger shall submit the following information no later than the earlier of (i) June 30, 2009, or (ii) 180 days before the expected completion date; either:¶
¶

Formatted

Formatted: Bullets and Numbering

Deleted: sewage

Deleted: sewage treatment plant

Formatted: No underline

Deleted:

Formatted

Formatted: Bullets and Numbering

Deleted: complying with Paragraph A.1.

Deleted: by

Deleted: in Paragraph A.1

the Septic System no later than 60 days after the availability of a community wastewater collection and treatment system is available for connection to the Site in accordance with Paragraph A.1.a.

2. In the event that the benefits assessment is not approved by the County before January 1, 2008, the Discharger shall cease all discharges from the Septic System no later than January 1, 2011 unless the Water Board has approved an onsite system for discharge from the Site by June 30, 2010, the Discharger shall submit a technical report proposing a method of complying with the January 1, 2011 discharge prohibition date. The proposed alternative must be adequate to cease unpermitted discharges from the Septic System by January 1, 2011, and must include a proposed monitoring and reporting plan. If the alternative involves a discharge of waste that could affect waters of the State, the report shall be in the form of a report of waste discharge. "Waters of the State" is defined in Water Code Section 13050(e). "Report of waste discharge" means a report that complies with Water Code Section 13260 and, if applicable, Water Code Section 13376.

3. In the event that after the benefits assessment is approved by the County, there is a material cessation of the work, as determined by the Water Board, which prevents the implementation, completion, or availability of a community wastewater collection and treatment system to the Site, the Discharger shall cease all discharges from the Septic System by the later of January 1, 2011 or two years following written notice by the Executive Officer of the material cessation. Six months prior to that discharge cessation date, the Discharger shall submit a technical report proposing a method of complying with the discharge cessation date. The proposed alternative must be adequate to cease unpermitted discharges from the Septic System by the discharge cessation date and must include a proposed monitoring and reporting plan. If the alternative involves a discharge of waste that could affect waters of the State, the report shall be in the form of a report of waste discharge. "Waters of the State" is defined in Water Code Section 13050(e). "Report of waste discharge" means a report that complies with Water Code Section 13260 and, if applicable, Water Code Section 13376.

4. The Executive Officer may also extend the due date for any interim or reporting requirement of Section A for up to ninety days for circumstances beyond the Discharger's reasonable control.

5. Nothing in this Order authorizes discharges from the Septic System at any time, whether before or after January 1, 2011.

Formatted: Indent: Left: 0.25"

Formatted: Indent: Left: 0.25", Hanging: 0.25", No bullets or numbering

Deleted: This Paragraph 3 applies if no community treatment plant and sewer system will be available to the Discharger by January 1, 2010. By

Deleted: 2009

Deleted: Paragraph A.1.

Deleted: the date in Paragraph A.

Formatted: Indent: Left: -0.5", Hanging: 0.5"

Deleted: These January 10, 2010 compliance dates may be revised by the Executive Officer to be reasonably related to progress in constructing a wastewater system for the community.

Formatted: Font: Not Bold

Formatted: Indent: Left: 0.25", Hanging: 0.25", No bullets or numbering

Formatted: Font: Not Bold

Deleted:

Formatted: Indent: Left: 0.25", Hanging: 0.25", No bullets or numbering

Deleted: ¶
¶

Deleted: the date in Paragraph A.

B. INTERIM COMPLIANCE REQUIREMENTS

By three months after the date of this Order, the Discharger shall (1) have the contents of the Septic System pumped or certify that the Septic System has been pumped within the previous three years, and (2) obtain a report by the County of San Luis Obispo or a septic tank pumper that either describes recommended repairs to the Septic System or states that no repairs are necessary. If the Discharger disagrees with any repair recommendation, the Discharger shall provide justification to the Executive Officer no later than four months after the date of this Order explaining why the repairs are not necessary. Unless Water Board staff agrees, in writing, that any recommended repair is not necessary, the Discharger shall provide documentation no later than February 1, 2007, that the Discharger has complied with these pumping, inspection and repair requirements. Until the community wastewater collection and treatment system is available to the Site and/or all unpermited discharges from the Septic System cease, the Discharger shall have three months from every third anniversary of the entry of this Order to satisfy the same pumping, inspection and repair requirements. The Executive Officer may extend the due date for any requirement of Section B for up to ninety days for circumstances beyond the Discharger's reasonable control.

Formatted: Font: Not Bold

Deleted:

Formatted: Font: Not Bold

C. PROVISIONS

1. All reports, receipts, notifications and other documents the Discharger submits pursuant to the Order (including Paragraph A.2 of this Order) shall be accompanied by a statement from the Discharger stating: "I certify under penalty of perjury that the attached documents were prepared at my request or under my supervision, and to the best of my knowledge are true, accurate and complete. I understand that there are significant penalties for providing false or incomplete information, including the possibility of criminal fines or imprisonment."

Deleted: 3

Deleted: and

2. If more than one person or entity is a "Discharger" subject to this Order, compliance by any of those persons or entities with the submission requirements of this Order constitutes compliance by all Dischargers. Multiple submissions are not required. However, all named Dischargers are responsible for compliance with all requirements of this Order, and will be subject to enforcement for any non-compliance. Agreements among and/or between Dischargers as to how they will comply with this Order's requirements are not binding on the Water Board and do not protect any Discharger from enforcement actions.

Deleted:

Deleted: regarding which of them

Deleted: Water Board

Deleted: is

Deleted: does

Deleted: party

3. Discharger shall inform any subsequent owner or occupant at the Site of this Order and provide a copy of the Order. The Discharger is liable for the use of the Septic System, while the Discharger owns the Site, including but not limited to the use of the Septic System by any tenant or any other person occupying the Site.

4. The property owner shall notify the Executive Officer and the Staff Prosecution Team in writing of any transfer of ownership of the Site within 30 calendar days following close of escrow or transfer of record title after transfer of ownership.

Deleted: contemplated

Deleted: at least

Deleted: prior to

5. The property owner shall notify the Executive Officer and Staff Prosecution Team in writing of the name of any new occupant of the Site within 30 days after the new occupant takes occupancy.

6. If, in the opinion of the Executive Officer, the Discharger fails to comply with any provision of this Order, then the Executive Officer may apply to the Attorney General for judicial enforcement or issue a complaint for Administrative Civil Liability.

FAILURE TO COMPLY WITH PROVISIONS OF THIS ORDER MAY SUBJECT THE DISCHARGER TO FURTHER ENFORCEMENT ACTION INCLUDING ASSESSMENT OF CIVIL LIABILITY UNDER SECTIONS 13268 OR 13350 OF THE WATER CODE AND REFERRAL TO THE ATTORNEY GENERAL FOR INJUNCTIVE RELIEF AND CIVIL OR CRIMINAL LIABILITY.

I, Harvey C. Packard, Division Chief, do hereby certify the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, Central Coast Region, on _____, 2006.

_____
Division Chief