

To Whom It May Concern:

This correspondence is in response to your notification of action pursuant to Section 13301 of the California Water Code. I am not a recipient of a notification for a hearing concerning a Cease and Desist Order issued to the residents and property owners of the Los Osos / Baywood Park Prohibition Zone. I am forwarding this response as an interested party.

I am aware that your office's notification is not a determination and is only part of the process of notice of hearing

I am claiming my right against self incrimination and that providing any information to the R.W.Q.C.B. is not an admission of guilt or complicity in the violations proposed by your office.

I understand by this notification of a hearing that time will be limited as to my ability state my concerns. As this may limit my ability to present my concerns I contend that this time constraint is unreasonable and I request the customary 3 minutes that your board and most other agencies usually allow for public discourse.

The following pages are a response to the assertion that the issuing of the C.D.O's. is an 'administrative action' as well as other aspects of this action. That your actions are not bound by the Codes as stated under C.E.Q.A., Government Codes, and Public Resource Codes and that your office is 'exempt' from presenting the necessary documentation of an Environmental Impact Report, a Negative Impact Declaration or a Mitigated Negative Impact Declaration with all accompanying scientific and permitting documentation as well as the required hearings and public participation. This exemption would allow your office and the R.W.Q.C.B. to authorize and to enforce the enactment of this 'project' as describe in the terms of the Cease and Desist Orders.

My contention is that your agency issuance of these C.D.O's. is not exempt from CEQA. That the exemption is not valid due to actions propose by your agency and as stated in the C.D.O's. that action constitutes a 'certified project' that is an exception to the exemptions.

David Duggan

Exemptions

As stated on pages 2 and 3, item 10 of the Cease and Desist orders in which it is stated:

This enforcement **action** is being taken for the protection of the environment and as such is exempt from the provisions of the California Environmental Quality Act (Section 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).

Understanding this reference is made to (section 15321) under CEQA:

- (a) Actions by regulatory agencies to enforce or revoke a lease, permit, license, **certificate**, or **other entitlement for use** issued, adopted, or prescribed by the regulatory agency or **enforcement of a law**, general rule, **standard**, or **objective**, **administered or adopted** by the regulatory agency. Such actions include, but are not limited to, the following: (2) The adoption of an **administrative decision or order enforcing** or revoking the lease, permit, license, **certificate**, or **entitlement for use** or **enforcing** the general rule, **standard, or objective**.

If you read the C.D.O’s. and the last thing you will read is the declaration of the Executive Officer **certifying** the C.D.O’s. such as any Administrative officer would do when issuing a license or permit or **other entitlement for use** or a **administrative decision or order**

enforcing a **standard, or objective** as stated in the Exemptions and Exceptions to the Exemptions and as defined under CEQA. You will also find that the C.D.O's. will allow for operations past previously set deadlines ordered by the R.W.Q.C.B. as to the compliance dates of resolutions passed by the R.W.Q.C.B.

Also the supposition that the R.W.Q.C.B. in claiming that this is an Administrative decision. Lets consider sub section (2) as defined in CEQA Article 20 Definitions (section 15369.) Ministerial:

"Ministerial" describes a governmental decision involving **little or no personal judgment** by the public official as to the wisdom or manner of carrying out the **project**. The public official merely applies the law to the facts as presented but uses **no special discretion or judgment** in reaching a decision. A ministerial decision involves only the use of **fixed standards or objective measurements**, and **the public official cannot use personal, subjective judgment** in deciding **whether or how** the **project** should be carried out. Common examples of ministerial permits include automobile registrations, dog licenses, and marriage licenses. A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee. **(These are only examples as described by CEQA).**

What is not clear is whether this a **discretionary action** and if so it is subject to an E.I.R. or Negative Impact Declaration or a Mitigated Negative Impact Declaration of which require substantial study and

review of which has not been under taken in this case or that **the exemption** of this **action** has a **exception** to the exemption. This aspect will be discussed further after the next supposition.

Your agency has also stated using only the latter half of the following code that this action is also exempt from CEQA (section 15301) Existing Facilities: Class 1 consists of the **operation, repair, maintenance,** permitting, leasing, licensing, or **minor alteration of existing public** or private structures, **facilities, mechanical equipment,** or topographical features, involving negligible or **(no expansion of use beyond that existing at the time of the lead agency's determination.)**

What is clear is that the conditions of the C.D.O's. and specially the pumping regiment, that this is a **"project"** as stated in the Codes of exemptions that your office has claimed and therefore should be considered as such under the Codes of the State of California as is applicable. Referring back to exemptions under (Section 15321 of CEQA) the reference is made to (Public Resource Code section 21084. (a) The guidelines prepared and adopted pursuant to Section 21083 shall include **(a list of classes of projects)** which have been determined **(not to have a significant effect)** on the environment and which shall be exempt from this division. In adopting the guidelines, the Secretary of the Resources Agency shall make a finding that the listed classes of projects referred to in this section **(do not have a significant effect on the environment).**

Again we see a reference that this exemption is dependant on that this is a **"project."** But what seems to be as significant is the criteria that there will be **"(no significant effect)** on the environment."

Let's look at the term **"project"** first.

Under CEQA Definitions (section 15378.) Project

(a) **"Project"** means the **whole** of an **action**, which has a **potential** for resulting in either a **direct physical change in the environment**, or a **reasonably foreseeable indirect physical change in the environment**, and that is any of the following:

- (1) **An activity directly undertaken by any public agency** including **but not limited to** public works construction and related activities clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100-65700.
- (2) An activity undertaken by a person which is supported in whole or in part through public agency contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
- (3) An **activity** involving the **issuance** to a **person** of a lease, permit, license, **certificate**, or **other entitlement for use by one or more public agencies.**

What is applicable is that under (a) There **will** be a **significant effect to the environment** and that the R.W.Q.C.B. will be considered the **public agency** under sub section (1) and because of the Administrative claim of exemption from CEQA and to **allow discharges** from septic systems through the authority of the **C.D.O's. (Discharges from septic tanks are authorized up to January 1, 2010)** sub section (3) also applies. Sub section (2) would also apply if or when the C.D.O's. are issued, but we will breach that subject later.

Let's look at **"significant effect on the environment."**

Under CEQA Definitions (section 15382.) Significant Effect on the Environment:

"Significant effect on the environment" means a **substantial**, or **potentially substantial**, **adverse change** in any of the **physical conditions within the area affected by the project, including** land, **air**, **water**, minerals, flora, fauna, **ambient noise**, and **objects** of historic or **aesthetic significance**. An economic or social change **by itself** shall not be considered a significant effect on the environment. A **social or economic change** related to a **physical change** may be **considered** in determining whether the **physical change is significant**.

What is clear here is that **significant effects** to **air, water, ambient noise**, and **aesthetics** will apply to this **project** and to a **significant degree the social and economic impacts will also apply** though by themselves the social and economic factors would not be considered as far as an E.I.R. is concerned but since these actions do effect all of the areas concerned the **social and economic impacts** will also apply.

Let's consider the Environmental Impact Report and look at the definition of environment as described by CEQA.

Under CEQA (section 15360.) Environment:

"Environment" means the **physical conditions** which exist within the area which will be **affected by a proposed project** including land, **air**, **water**, minerals, flora, fauna, **ambient noise**, and **objects** of historical or **aesthetic significance**. The area involved shall be the area in which **significant effects** would occur either **directly or indirectly as a result**

of the project. The "environment" includes both natural and man-made conditions.

The actions as applied through the C.D.O's. do have a significant effect on the environment as described under this section.

Returning to the subject of the exemption, under CEQA (section 15301) as to the stated supposition of the C.D.O's. only the second part of the section 15301 was quoted and the first most significant part was omitted. Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features...

This omission does not allow for consideration that the continuing operation, repair and maintenance is subject to pumping through the use of an added piece of equipment (specifically a Diesel Truck) so an inspection and operation, repair, and maintenance of the septic tank can take place. By itself septic tank pumping on a normal pumping regiment would not be a significant addition of equipment nor have a significant effect on the environment and would not allow for the extended or expanded use of the "facility." However at 6 times per year it would add the significant use of heavy equipment which will in turn add to the degradation of air quality from exhaust and deleterious fumes from septic systems and an increase of ambient noise. The calculation would be 6 x the number of septic tanks divided by the working days of the year divided by 2 years. Approximately 100 septic tanks would have to be pumped every day. Diesel engines are a major source of particulate and smog-forming pollution. Diesel exhaust is considered a probable carcinogen. These machines or mechanical

devices will also add to the **ambient noise** level as well as the release of **deleterious fumes** from septic tanks being pumped.

This brings us back to the exemption under CEQA (section 15321). As stated in the previous paragraph the **environmental degradation** would be **significant** and **would create a health hazard** for **infants, children,** and **seniors** as well as the **middle adult population**. This action would also **lower the social and economic conditions** of the community which is an **added detriment to the community** and is **considered significant** by the previously stated codes.

The conclusion per the exemptions claimed by your office in retrospection are not valid nor is the condition that is stated in the C.D.O's. of the pumping of the septic tanks every other month. But this supposition needs to be supported by code so we will explore the exceptions to the exemptions as stated under CEQA.

Exceptions vs. Exemptions

Under CEQA (section 15301 and section 15321) **exemptions** from requiring an **E.I.R. or a Negative Impact Report** are laid out for **uses** that **do not significantly effect the environment** and for **ministerial action** concerning administrative purview. **These exemptions are not allowed if the effects of the action significantly cause environmental, health, social, and economic hardships.**

Again we see that under the exemption codes there are exceptions. But lets look at the codes for the Exceptions of the Exemptions.

Under CEQA there are codes that are exceptions to the exemptions.

CEQA (section 15300.2.) Exceptions:

(c) Significant Effect. A categorical exemption **(shall not)** be used for an **(activity)** where there is a **reasonable possibility** that the activity **(will)** have a **significant effect on the environment** due to **unusual circumstances**.

The operative words are "**shall not**" and "**will**" and under these exceptions "**shall not**" means exactly that and there is no other interpretation. Under (c) there is a **reasonable possibility** that adverse effects "**will**" cause a "**significant effect on the environment** due to **unusual circumstances**" **(pumping every other month)** such as **air pollution, deleterious fumes from septic systems** and an **increase of ambient noise**. But I would also point out that there is a reasonable inference that this action could **potentially** caused harm to septic systems **(facilities)** such as septic system failure as well as there "**will**" be an **increase in seawater intrusion, overdraft of the water basin** and the **loss of tens of millions of gallons of water** from the Los Osos Water Basin. As previously stated in the exemption section of this paper the **definitions** of the **wording in the exemption** as well as the **exceptions to the exemption** are paramount in determining the **validity of the exemptions** and the actual conditions within the C.D.O's. such as the **pumping requirement**. The **negative aspects** of this enforcement according to code have significantly shown the **positive gains are few** and are dubious at best. One word that came apparent but may have been overlooked was the word "**maintenance**" as stated in section 15301 and that word if applied to **Septic Maintenance Program** brings the intent of this action to the forefront. But because the full extent of this action may have not been carefully and thoroughly thought through a possibility of an **environmental and economic disaster**

may be the finale out come or at the least the **air, water, ambient noise** and **aesthetics** of the community will **significantly effected**.

This sub section would only be applicable if the C.D.O's. were issued and that the property owners applied for state funding as written in Water Code § 13301.1. Assistance with order:

The regional board shall render to persons against whom a cease and desist order is issued pursuant to Section 13301 all possible assistance in making available current information on successful and economical water quality control programs, as such information is developed by the state board pursuant to Section 13167, and information and **assistance in applying for federal and state funds necessary to comply with the cease and desist order.**

This code provides the recipient of a C.D.O. **assistance in finding funding so they can achieve compliance** to include **low interest loans and grants**. Again the requirement stated in the Codes under CEQA in this instance calls for either a **Negatives Impact Declaration** or a **Mitigated Negatives Impact Declaration** or an **E.I.R.** But this is the least of the evidence showing that the conditions required by R.W.Q.C.B. through the C.D.O's. **are not exempt** and are covered under the **exceptions to the exemptions** under CEQA.

Research into these issues has lead to this code under the Public Resource Codes and it is significant and applicable in this situation.

Public Resource Code (section 21083.)

(a) The Office of Planning and Research shall prepare and develop proposed guidelines for the implementation of this division by public

agencies. **The guidelines shall include objectives and criteria for the orderly evaluation of projects and the preparation of environmental impact reports and negative declarations in a manner consistent with this division.**

(b) The guidelines shall specifically include criteria for **public agencies** to follow in determining whether or not a **proposed project** may have a **"significant effect on the environment."** The criteria shall require a finding that a **project** may have a **"significant effect on the environment"** if one or more of the following conditions exist:

(1) A proposed project has the potential to **degrade the quality of the environment**, curtail the **range of the environment**, or **to achieve short-term, to the disadvantage of long-term, environmental goals.**

(2) The **possible effects of a project** are **individually limited** but **cumulatively considerable**. As used in this paragraph, "cumulatively considerable" means that the **incremental effects** of an **individual project are considerable when viewed in connection with** the effects of past projects, the effects of other current projects, and **the effects of probable future projects.**

(3) **The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.**

(c) The guidelines shall include procedures for determining the lead agency pursuant to Section 21165.

(d) The guidelines shall include criteria for public agencies to use in determining when a proposed project is of sufficient statewide, regional, **or area wide environmental significance that a draft environmental impact report, a proposed negative declaration, or a proposed mitigated negative declaration shall be submitted to appropriate state agencies**, through the State Clearinghouse, **for review and comment** prior

to completion of the environmental impact report, negative declaration, or mitigated negative declaration.

The following is gleaned from CEQA and the intent of the Act.

CEQA Chapter 1: Policy§ section 21000. Legislative intent:

The Legislature finds and declares as follows:

(a) The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern.

(b) **It is necessary to provide a high-quality environment that at all times is healthful and pleasing to the senses and intellect of man.**

(c) There is a need to understand the relationship between the maintenance of **high-quality ecological systems** and the **general welfare of the people of the state**, including their enjoyment of the natural resources of the state.

(d) The capacity of the environment is limited, and **it is the intent of the Legislature** that the government of the state takes immediate steps to identify any critical thresholds **for the health and safety of the people of the state** and take all **coordinated actions** necessary to prevent such thresholds being reached.

(e) Every citizen has a responsibility to contribute to the preservation and enhancement of the environment.

(f) **The interrelationship of policies and practices in the management of natural resources and waste disposal requires systematic and concerted efforts by public and private interests to enhance environmental quality and to control environmental pollution.**

(g) It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and **public agencies which are found to affect the quality of the**

environment, shall regulate such activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.

§ 21001. Additional legislative intent

The Legislature further finds and declares that it is the policy of the state to:

(a) Develop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.

(b) Take all action necessary to **provide the people of this state with clean air and water, enjoyment of aesthetic**, natural, scenic, and historic environmental qualities, and **freedom from excessive noise**.

(c) Prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history.

(d) **Ensure that the (long-term protection) of the environment, consistent with the provision of a decent home and suitable living environment** for every Californian, **shall be the guiding criterion** in public decisions.

(e) **Create and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations.**

(f) Require governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality.

(g) **Require governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment.**

§ 21001.1. Review of public agency projects:

The Legislature further finds and declares that it is the policy of the state that projects to be carried out by public agencies be subject to the same level of review and consideration under this division as that of private projects required to be approved by public agencies.

§ 21002. Approval of projects; feasible alternative or mitigation measures

The Legislature finds and declares that it is the policy of the state that

public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects. The Legislature further finds and declares that in

the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof.

§ 21002.1. Use of environmental impact reports; policy

In order to achieve the objectives set forth in Section 21002, the Legislature hereby finds and declares that the following policy shall

apply to the use of environmental impact reports prepared pursuant to this division:

(a) The purpose of an environmental impact report is to identify the (significant effects on the environment) of a project, to (identify alternatives to the project,) and to indicate the manner in which those (significant effects can be mitigated or avoided.)

There is no dispute that the R.W.Q.C.B. has the authority to issue C.D.O's. The dispute centers around the **conditions and exemptions** as stated in the C.D.O's. and whether or not the actions required of the residence of the Los Osos / Baywood Park Prohibition Zone are **environmentally, scientifically and economically sound**. As required of any **project** there is a process of review which constitutes checks and balances so agencies **can not circumvent the intent of the environmental codes** protecting not only the **waters of the state but the people that derive the beneficial use** of those waters. If both the **environment and the residents** of the Los Osos / Baywood Park community have the **potential of being harmed** by the **actions of any agency** that agency is required to adhere to the codes and guidelines of this State **with out exemption** and to **mitigate those actions** so compliance can be achieved.

The following is a suggested alternative to the issuance of the C.D.O's. and not a suggested alternative to the discharge requirement as presented in the C.D.O's. This alternative may assure compliance within the frame work of CEQA and the intent of the C.D.O's. would be less of a burden on the community and less destructive of the environment.

The advantages of the R.W.Q.C.B. compliance with CEQA out weigh the detractors caused by the actions as proposed in the conditions of the C.D.O's. and may negate the issuing of the C.D.O's. to individual property owners and / or residents and allow a C.D.O. to be issued to County of San Luis Obispo as the Responsible and the L.O.C.S.D. as the Lead Agency. The review of options and public input as well as the forwarding of a solution through the use of scientific data will only help solidify the actions of the R.W.Q.C.B. and qualify it as the Trustee Agency in conjunction with the cooperation of the local governmental agencies. The proven system of procedures as codified under CEQA sets the criteria and agency responsibility in what can be called a three tier system, Trustee Agency, Responsible Agency, and Lead Agency.

Trustee Agency: The R.W.Q.C.B. sets the conditions of the project and project parameters such as the project objectives, time line for project initiation, conclusion, and proof of compliance.

Responsible Agency: The County of San Luis Obispo would responsible for permitting, collection of fees, funding, and disbursements of those funds.

Lead Agency: The L.O.C.S.D. would be responsible for completing an E.I.R. or submitting a Negative Impact Declaration or Mitigated Negative Impact Declaration, administration of the project for proof of compliance, data gathering, and the oversight of actions by private companies involved in the physical actions required in carrying out the project.

There can be an individual initiative component in this process as well in that property owners can volunteer to have their septic tanks pumped and

inspected prior to the project initiation so data compilation and compliance can begin at an accelerated pace. This will also alleviate some of the environmental degradation which may occur with a project of this type.

To add teeth to the R.W.Q.C.B. actions property owners who do not comply with the project parameters will be subject to an individual C.D.O. using the L.O.C.S.D. as a witness for the prosecution in the proceedings.

Once the CEQA requirements are met the R.W.Q.C.B. will have a free hand in most aspects of enforcement and should have an enhanced ability to enforce compliance.

The previous statements are only a suggested alternative but understanding the underlying and complicated issues of the community the best way to achieve compliance and to mitigate the discharges from septic systems in a comprehensive manner may be to divide the responsibilities for these actions and create a joint powers agreement between the County and the District. As this problem was created before the District was itself created then the likely solution could be defined as stated in the previous page. This solution would recognize the responsibility of all the parties concerned and no entity involved in creating this situation that now confronts us can claim immunity. Every resident, property owner, the District, County and to some extent the R.W.Q.C.B. has had a hand in creating the quagmire that is now known as the Los Osos Sewer Issue.

Many in this community have tried to comply with the resolutions of the R.W.Q.C.B. and the opposition to the creation of a Waste Water Treatment

Project began long before most of the current residents moved to Los Osos. But the people in opposition to a W.W.T.F. are few compared to those who want a project. The differences between the majority of the people who want to comply and build a W.W.T.F. are the location, the cost, and technology. To say that the District doesn't want a W.W.T.F. would be false and misleading. But what is clear is that internal and outside influences have kept this community from complying with water quality standards through division and confrontation. The burden of individual C.D.O's. has only served to divided and polarized this community even more. As stated in the codes from previous pages any action by your board should enhance the quality of life in the community. With the previous stated codes in mind your agency may want to reconsider the issuance of these Cease and Desist Orders to the individuals and place the responsibility on those agencies that can assure that the correct procedures are followed and that compliance can be met. A scientific analysis in accordance with CEQA will guarantee that all areas of concern are addressed and that no individual will be treated unequal or unfairly. It will also guarantee that the community will not suffer unnecessary social and economic hardship and that the environment will not suffer or be degraded in the process of complying with the intent of the R.W.Q.C.B. enforcement of Clean Water Standards.

Respectfully

David Duggan
Los Osos, Ca.