

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

STAFF REPORT FOR PUBLIC MEETING OF DECEMBER 1-2, 2005

Prepared on November 10, 2005

ITEM NO. 3

SUBJECT: Administrative Civil Liability Order No. R3-2005-0137 for Los Osos Community Services District, Los Osos Wastewater Project, San Luis Obispo County

SUMMARY

The Los Osos Community Services District (CSD) has failed to comply with the compliance dates specified in Time Schedule Order No. 00-131. Order No. 00-131 includes a compliance schedule for implementation of the community wastewater project. Failure to comply with the schedule specified in Order No. 00-131 subjects Los Osos CSD to monetary liability in the amount of \$10,000 per day of violation. In addition, Los Osos CSD has also discharged waste in violation of a prohibition contained in the Water Quality Control Plan, Central Coast Basin (Basin Plan). Los Osos CSD is liable for \$15,000 per day since October 1, 1999, for discharges from three on-site disposal systems (\$5,000 per day for discharge from each system).

On October 3, 2005, the Los Osos CSD stopped work on the community wastewater project. This will cause the violations of Order No. 00-131 and the prohibition to continue indefinitely, unless the CSD implements a wastewater disposal option other than a treatment plant (such as above-ground holding tanks).

The Central Coast Water Board Executive Officer issued Complaint No. R3-2005-0137 on October 6, 2005, in the amount of \$11,190,000. Time Schedule Order violations (subject to additional \$10,000 per day penalty) continue and due to Los Osos CSD's actions to halt the wastewater project, will continue for the foreseeable future. The

proposed Order is intended to compel the CSD to complete the community wastewater project and to hold the CSD accountable for ongoing water quality degradation resulting from project delay. Proposed Administrative Civil Liability Order No. R3-2005-0137 and Time Schedule Order No. 00-131 are included with this report as Attachments 1 and 2, respectively.

DISCUSSION

Background: Los Osos is a community of approximately 15,000 residents, adjoining Morro Bay State and National Estuary. Many of the community's 5,000 homes are on very small lots (some as small as 25 or 37 feet wide by 125 feet deep) and some lots have shallow groundwater which surfaces in some areas during wet weather cycles. In addition to homes, there are business and government buildings. The vast majority of homes and other buildings use septic systems for waste disposal.

Many of the lots that are too small for leachfields use seepage pits which discharge directly to groundwater or with very little separation to groundwater. To function properly, there needs to be sufficient separation between the leaching devices and groundwater so that adequate assimilation and treatment of waste can occur. This problem cannot be corrected with system maintenance or repair because development is too dense, groundwater too high, and the underlying

geology is unable to handle the current volume of waste (approximately one million gallons per day).

The waste discharges pollute shallow groundwater with pathogens and nitrate. Shallow aquifer pollution also threatens the deep sole-source drinking water aquifer. Levels of nitrate in groundwater have increased from approximately 6 ppm in 1954 to currently over 45 ppm (drinking water standard for nitrate) in most of the discharge prohibition area (explained below), with significant areas exceeding 60 ppm (more than 33% over the standard). Shallow aquifer wells have been shut down due to nitrate exceeding health levels.

During wet weather cycles, septic tank effluent (primary treated, undisinfected sewage) surfaces in numerous areas and floods yards, streets and gutters. People, pets and wildlife are exposed to pooling human waste.

For clarity, use of the phrase "failing septic systems" in the case of Los Osos refers to the fact that septic systems cannot function in the manner intended. Standard septic systems function as follows. Sewage solids are retained in the septic tank for periodic removal by pumping and hauling to a disposal site. The liquid portion of the sewage flows into the soil (via horizontal leachfield or vertical pit) and depends upon microorganisms, filtering and dilution within the soil column for treatment prior to entering ground water. In Los Osos, the small lot size, density of septic systems, shallow groundwater, and sandy soils prevent the septic systems from effectively treating the sewage. Accordingly, the septic systems are failing to adequately or effectively treat the waste. In Los Osos, the septic system failure cannot be "repaired" simply by pumping (maintaining) the tanks, since the tanks are operating as designed (they are retaining solids). It is the liquid portion of the sewage discharged through leachfields that is degrading water quality in Los Osos.

In 1983, the Central Coast Water Board adopted Resolution No. 83-13, which amended the Basin Plan and prohibited, effective November 1, 1988, discharges of waste from individual and community sewage systems within portions of the Baywood Park/Los Osos area of San Luis Obispo County (Basin Plan Prohibition Zone).

After many years of delay, the San Luis Obispo County Board of Supervisors voted unanimously to proceed with a community wastewater project for Los Osos in October 1995. The Regional Board reviewed the proposed project and found it acceptable as a means of resolving water quality problems in the community. The County then proceeded with design plans and completion of the environmental review and permitting process. The community-wide sewer system was (in 1997) on schedule to begin construction in 1997, and included a treatment plant to be built on a site outside of town, east of South Bay Boulevard. During the permitting process, the California Coastal Commission members responded to those community members who protested the County project, and wanted a treatment plant in town, by encouraging the community to form a community services district.

In November 1998, Los Osos voted to form a Community Services District (CSD) to replace San Luis Obispo County as the governing body for community services. The Los Osos CSD chose not to proceed with the County's wastewater project, began anew the process for project development, and developed a revised project for wastewater collection, treatment and disposal.

Through a lengthy multi-year process of redundant (with the County's process) alternative evaluation and public meetings, the Los Osos CSD developed a technically, environmentally and financially sound community wastewater project.

In 1999, the Water Board issued Cease and Desist Orders to the Los Osos CSD for those facilities under its jurisdiction that were discharging in violation of the Basin Plan Prohibition (described under "Discharges of Waste" below).

In 2000, the Water Board issued Time Schedule Order No. 00-131, which specifies the following compliance dates for completion of vital project components (the current status is in the right column):

Project Component	Compliance Date	Status
Draft EIR	12/15/00	Complete
Final EIR	04/01/01	Complete
Assessment District or comparable means of financing project	07/29/01	Complete
Complete design plans	07/15/02	Complete
County Use and Coastal Development permits	07/15/02	Complete
Commence construction	09/06/02	Started on 8/22/05 and halted 10/3/05
Complete construction	08/30/04	--
Report on compliance	Quarterly	--

Los Osos CSD completed and certified an Environmental Impact Report (EIR) for the community wastewater project in March 2001. In June 2001, voters formed an assessment district (with 85% voter approval) to finance those portions of the project not funded by the State Revolving Fund loan. The Coastal Commission approved the Coastal Development Permit in August of 2004. The CSD and the State Water Resources Control Board (State Water Board) entered a low-interest loan agreement pursuant to the State Revolving Fund (SRF) loan program in August 2005. The loan agreement was specific to the approved project location. Construction of the community wastewater facilities also began in August 2005.

In a recall election held September 27, 2005, Los Osos voters replaced the majority of its CSD directors with project opponents. On October 3, 2005, the Los Osos CSD issued stop work orders to the construction firms.

The CSD board has expressed its intention to move the treatment plant location to a new site, possibly with a new treatment technology. Even if the same treatment technology is used, a move would cause significant delays due to reengineering, re-permitting, and re-bidding the construction contracts.

On September 27, 2005, local voters adopted Measure B, which prohibits the CSD from constructing a treatment facility at any site unless the siting decision is first put to a vote of the residents, following full CEQA/NEPA review, and

with a no-project alternative and (if applicable) an environmentally preferable alternative included on the ballot. According to Measure B, construction cannot proceed unless the chosen site receives at least a majority vote of those voting. This requirement makes it unlikely that any alternative project can ever proceed, since the community has been unable to agree on a project in the 22 years since the Water Board enacted the prohibition. Measure B also provides that all contracts entered after March 1, 2005 that are "inconsistent" with Measure B terminate "according to [their] terms." The contracts allow the District to terminate them without cause, but as of November 3, 2005 the District has not done so. Terminating the contracts would breach the SRF Loan agreement. The CSD has asserted that it cannot proceed with the current project without violating Measure B.

Before the election, the CSD challenged Measure B in *LOCSD v. Rodewald*. The trial court found that Measure B was unconstitutional and entered an interlocutory judgment, which the initiative proponents immediately appealed. The Court of Appeal allowed the election to go forward. It is not clear whether the CSD intends to pursue its challenge to Measure B. However, the CSD requested and received a continuance of its October 26, 2005 hearing date in the Court of Appeal. The hearing is currently set for December 14, 2005. Also, the CSD has taken no action to seek voter approval of the current project location or to initiate a repeal of Measure B.

Immediately after the election, the CSD issued stop-work notices to its three construction contractors. The SRF Loan contract requires the CSD to proceed with the project in accordance with an approved schedule, so the stop-work notices violate the loan agreement. The CSD also threatened a breach of the SRF Loan contract by stating its intent to move the project location from the approved site. The State Water Board has therefore suspended disbursements under the SRF Loan. The CSD issued conditional notices to resume work on October 21, 2005, but the notices were contingent on the State Water Board releasing further disbursements from the SRF Loan. The State Water Board had already informed the CSD that it would not make further disbursements absent a commitment to proceed with the approved project at

the approved location. On November 1, 2005, the State Water Board advised the CSD: "If the District decides, in a timely way, that it can proceed with resumption of work on all three construction contracts, as previously approved, for a construction of a wastewater treatment plant at the Tri-W site, the Water Board will consider resuming funding under the terms of the [SRF Loan] Agreement."

Water Board staff have, over the past several years, issued numerous written and verbal warnings to the CSD that delaying the wastewater project may result in monetary penalties for violation of Time Schedule Order No. 00-131. At the CSD's January 6, 2005 meeting, the Executive Officer answered CSD Board Members' questions about possible delays and said he would recommend enforcement action if the CSD delayed the project. The Executive Officer stated the same thing in letters to the CSD dated September 19, 2003, December 7, 2004, March 11, 2005, and May 27, 2005. As early as December 5, 2001, the Executive Officer sent a letter to the District saying,

"Possible Enforcement Actions - The Time Schedule Order includes provision for the Regional Board to modify the schedule or waive penalties if the delay is due to causes beyond the CSD's ability to control. As discussed previously, delays due to re-evaluating alternative(s) or waiting for various funding opportunities are not beyond the CSD's ability to control."

Note the specific concern about re-evaluating alternatives, stated four years ago. More recently, our May 27, 2005 letter said, in part,

"Our position remains unchanged from that stated in earlier correspondence. 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 not to specific members of the Boards of Directors. The recent election of new Los Osos CSD Directors, and the pending recall election this

fall do not change those requirements specified in Order No. 00-131. Controllable project delays, such as delaying construction to re-evaluate alternatives, and re-evaluation of previous decisions would clearly be within the CSD's ability to control. Based on available information at this time, if the CSD violates the compliance schedule due to such controllable delays, staff would recommend enforcement of Order No. 00-131 to the Regional Board."

Although Order No. 00-131 allows the Water Board to extend compliance dates for delays beyond the CSD's reasonable control, the Water Board has not done so, nor has the Water Board ever waived enforcement of violations that the CSD incurred before stopping work on the project.

In spite of clearly stated consequences for any delays by the CSD, the CSD chose to stop construction work by all three prime contractors and delay efforts to invalidate Measure B. This action by the CSD was a knowing violation of orders of the Water Board.

Discharges of Waste: The Basin Plan prohibits all discharges after November 1, 1988, from on-site disposal systems within the prohibition zone depicted in the Prohibition Boundary Map included as Attachment "A" of Resolution No. 83-13 (included with Attachment 3). The Prohibition is set forth in Section VIII.D.3.i of the Basin Plan, page IV-64. Since its formation in 1998, the Los Osos CSD has operated an on-site disposal system at its Fire Station and community on-site disposal systems at Bayridge Estates and Vista de Oro subdivisions. The CSD previously operated an on-site system at the Water Division. Each of these facilities are located within the Basin Plan Prohibition Zone.

The Bayridge Estates subdivision generates approximately 27,000 gallons per day of wastewater. The CSD's wastewater treatment and disposal system consists of multiple septic tanks and associated leach fields.

The Vista de Oro subdivision generates approximately 11,000 gallons per day of wastewater. The CSD's wastewater treatment and disposal system consists of multiple septic tanks and associated leach fields.

Wastewater generated at the Fire Station, located at 2315 Bayview Heights Drive, Los Osos, passes through a septic tank before being discharged to a leach field.

Since at least October 1, 1999, the Los Osos CSD has discharged waste at the Fire Station, Bayridge Estates and Vista de Oro in violation of the Basin Plan prohibition. Since these facilities include on-site septic tanks and leach fields, wastewater is continuously discharged at each facility.

These wastewater treatment and disposal systems discharge waste that migrates to groundwater. Each leachfield is set in Baywood fine sands, a porous formation through which septic tank effluent readily percolates. Thus, as noted above, waste discharged from each of the three systems ultimately migrates to groundwater. Therefore, the District is liable for administrative civil liability of up to \$5,000 per day for each of the three facilities, or \$15,000 per day, from October 1, 1999, to the present, pursuant to Water Code section 13350. Alternatively, Section 13350(e)(2) allows the Water Board to assess liability on a per-gallon basis, at \$10 per gallon of discharge in violation of the prohibition. The Bayview Heights and Vista de Oro systems, discharging at 38,000 gallons per day, have discharged 83,220,000 gallons of waste in violation of the prohibition (38,000 per day for 2,190 days), for a maximum total liability through September 30, 2005 of \$830,220,000.

Los Osos residents, businesses and agencies discharge approximately one million gallons of wastewater through their on-site systems daily in violation of the Basin Plan prohibition. This figure indicates the community has discharged about seven billion gallons of wastewater in violation of the prohibition since 1988. The CSD's discharges represent almost four percent of ongoing discharges.

Administrative Civil Liability Complaint: Water Code Section 13308 authorizes the Central Coast Water Board to administratively impose civil liability in an amount not to exceed \$10,000 per day for each day of violation of compliance dates specified in a time schedule order. As described above, the Central Coast Water Board adopted Time Schedule Order No. 00-131 with the compliance

schedule specified above. The Time Schedule Order specifies \$10,000 per day penalty for failure to comply with the schedule. As of October 1, 2005, this penalty based upon violations of Order No. 00-131 amounts to \$11,190,000. It should be noted, however, that violations of Time Schedule Order No. 00-131 and consequent liability continue to accumulate each day that the project is delayed. Water Code Section 13308 provides that the Central Coast Water Board may impose a penalty in an amount less than \$10,000 per day (the amount prescribed in Order No. 00-131) only if the Water Board makes express findings setting forth the reasons for its actions based on specific factors set forth in Section 13327. The Discharger has the burden of proving that liability should be less than \$10,000 per day. Although Section 13308 does not require consideration of the factors in Water Code Section 13327, staff has set forth its analysis of the factors in the Revised Worksheet for Assessment of Civil Liability (Attachment 4). This analysis was also included in the Complaint (Attachment 3).

Water Code Section 13350(a)(2) authorizes the Central Coast Water Board to impose administrative civil liability in an amount not to exceed \$5,000 per day for each day the CSD has discharged waste in violation of the Basin Plan prohibition. The maximum amount applies to each violation, i.e., each of the CSD's three discharges. The total maximum liability is therefore \$15,000 per day. In determining the amount of the penalty, the Water Board must consider the factors set forth in Section 13327. These factors are described in the Revised Worksheet for Assessment of Civil Liability (Attachment 4).

Water Code Section 13350(a)(1) authorizes the Central Coast Water Board to impose administrative civil liability in an amount not to exceed \$5,000 per day for each day the CSD violates any cease and desist order. Cease and Desist Orders Nos. 99-53, 99-55 and 99-56¹ required the CSD to comply with the following schedule, for each of the three facilities where it currently discharges from onsite disposal systems:

¹ Cease and Desist Order No. 99-54 contained a similar schedule for the Water Division. The CSD is not currently discharging from this location, although it is technically in violation of the Order.

1. Submit complete facility plan/feasibility study and funding plan by January 31, 2000.
2. Submit final California Environmental Quality Act (CEQA) document by July 30, 2000.
3. Submit County Use and Coastal Development Permits by July 30, 2001.
4. Submit approved complete construction design plans (100% design) by May 31, 2001.
5. Commence construction of community sewer system by July 30, 2001.
6. Complete construction of community sewer system by July 30, 2003.

The Water Board has not rescinded or amended the Cease and Desist Orders.

Water Code Section 13308 authorizes a regional water board to issue a time schedule order if there is a threatened or continuing violation of any cease and desist order, and to specify a daily penalty for violation of the time schedule. In 2000, the Central Coast Water Board adopted Order No. 00-131 with the compliance dates specified above.

Water Code Section 13308(f) provides: "Civil liability may be imposed pursuant to [Section 13308] only if civil liability is not imposed pursuant to Section 13261, 13265, 13268, 13350, or 13385." There are two ways to interpret Section 13308(f) in this case. First, it could mean that the Water Board cannot impose liability for violating the Time Schedule Order under Section 13308 and also impose Section 13350 liability for violating the Cease and Desist Orders that gave rise to the Time Schedule Order, but it can impose liability under Section 13350 for violating other provisions, such as the Basin Plan prohibition. In this case, Section 13350 liability for violating the three Cease and Desist Orders would be far greater than \$11,190,000. Alternatively, Section 13350 could be read to mean that liability under Section 13308 is exclusive of liability under Section 13350 for any related violation. The second interpretation does not make sense since Section 13308(f) also refers to liability under other provisions. For example, a discharger subject to a time schedule order to upgrade might escape liability for spills to surface

water (Section 13385) if the Water Board chose to enforce the time schedule order.

Water Board staff wants to avoid unnecessary litigation over this point. Staff therefore recommends that for any given period of time, the Water Board impose liability under Section 13308 or 13350, but not both. Thus, the proposed Order conservatively provides that the maximum civil liability that may be imposed by the Central Coast Water Board in this case on a per-day basis is \$32,850,000, which is the maximum liability for violating the Basin Plan prohibitions under Section 13350, calculated through October 1, 2005. The maximum liability on a per-gallon basis is over \$830 million. The maximum liability under Section 13308 is \$11,190,000.²

The proposed Administrative Civil Liability Order (Attachment 1) and associated Worksheet for Assessment of Administrative Civil Liability provide additional detail regarding the violations and resulting liability.

COMMENTS

At report preparation time, no formal comments have been received from Los Osos CSD.

Letters supporting wastewater project: Since issuance of the Complaint for ACL, some Los Osos residents have sent letters to staff or the Board requesting that the Water Board do everything within its power to compel the Los Osos CSD to complete the wastewater project. Requests for support for completion of the wastewater project are based upon:

- a) Current project is the least costly means of resolving water quality problems in Los Osos.
- b) Pollution of Morro Bay and groundwater resources will continue until the community

² An additional \$915,000 in potential liability under Section 13350 has accrued since the Complaint was issued (61 days x \$15,000/day since October 2, 2005). As of the date of the hearing (December 1, 2005), the maximum liability for violating Order 00-131 is \$11,800,000 (\$11,190,000 through October 1, 2005 and an additional \$610,000 for 62 days from October 2, 2005 through December 1, 2005).

sewer is complete.

- c) No viable alternative plan is available.
- d) Delays are wasting millions of dollars.

Many email messages and telephone calls have also been received reflecting similar sentiments. Many commenters say that penalties are apparently necessary to get the CSD to proceed. Due to their volume, these comment letters and emails (those both for and against penalties) are not attached to this staff report. However, they may be viewed on the Water Board's website at www.swrcb.ca.gov/rwqcb3/.

Staff Response: For the same reasons articulated in these comment letters, Water Board staff continues to pursue all available options for resolving water quality problems in Los Osos by completion of the community sewer project as soon as possible. As described in the Staff Report above, the Los Osos CSD has spent seven years, hundreds of hours of public meetings, and approximately \$25 million developing a technically, financially and environmentally sound project that meets the community's goals (those stated during the project development phase). There is no question that further project delays will result in cost increases and continued water quality impacts.

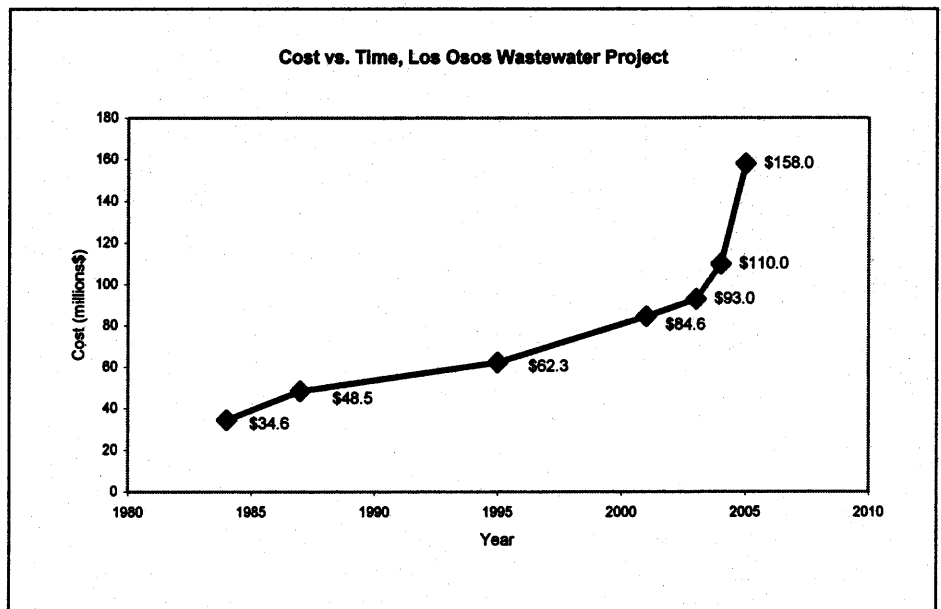
Letters supporting project revision: Since issuance of the Complaint for ACL, some Los Osos residents and some people from outside the County have sent letters requesting that the Water Board not assess monetary penalties and allow the Los Osos CSD to pursue an alternative project. Requests for project delays are based upon:

- a) Objection to downtown location of treatment facility.
- b) Contention that moving the treatment facility will reduce wastewater project cost.

Many email messages and telephone calls have been

received reflecting similar sentiments. As noted above, these comment letters and emails (those both for and against penalties) are not attached to this staff report. However, they may be viewed on the Water Board's website at www.swrcb.ca.gov/rwqcb3/.

Staff Response: The comment letters requesting additional time to pursue alternative projects are irrelevant to the issue before the Water Board, which is whether (and in what amount) to assess liability for violations to date. Even assuming cost savings or aesthetic benefits (from not having the facility in town) would result, these savings do not justify the additional environmental damage that will result from substantial delays in the project or the deliberate disregard of the Basin Plan prohibition and other Water Board orders. In addition, these comments reflect a misunderstanding of project development time and associated costs. Based upon the considerable documented history of this project, significant modifications to the project (such as changing the treatment plant location) would undoubtedly result in many years of delay. As demonstrated by the following chart, past delay has contributed to increased project costs.



There is no credible evidence indicating a modified project would not be subject to similar environmental permitting, appeals and litigation, associated cost increases, or that an alternative project could actually be implemented. Staff

believes the current contractors' bids were higher, and there were fewer bids submitted, because of controversy surrounding the project. Water Board staff believes that the ongoing controversy, the potential loss of SRF Loan funding, the payment delays under the current contracts and the uncertainty that the CSD could fund contracts for a new location will dissuade would-be bidders to the point that bids on future projects would include a premium, if bids could be secured at all.

Given the controversial nature of the project, any revised project would be likely to meet community opposition due to additional cost, or from neighbors of any new location who may not want the facility in their backyard either, and who may never get any benefit from the facility. It is also likely that yet another group pledging to develop a better and cheaper project will appear (in fact, it is already happening; at an October 2005 CSD Board meeting, Al Barrow advocated an unconventional alternative treatment system). Such pledges do not reflect understanding of the complexity of developing a project of this magnitude, or the time needed to complete the project.

As stated above, in 1998, an overwhelming majority of Los Osos voters (87%) chose to form a Community Services District and elected individuals who promised to build a treatment facility at the Tri-W site (in-town location). During that election and after, members of the community had opportunities to provide input about the project location. Recent comment letters, email messages, telephone conversations, and even meetings with new CSD Directors indicate a desire by the District to (intentionally or unintentionally) repeat the project development, permitting and design efforts of the past seven years.

All Central Coast Water Board files, exhibits, and agenda material pertaining to this matter are part of the administrative record for this matter and are incorporated by this reference. Most of the relevant parts of these files are contained in the administrative record filed in the matter of *California Cities Water Company v. Regional Water Quality Control Board, Central Coast Region (Los Osos CSD, Real Party in Interest)*, San Luis Obispo Superior Court Case No. 030735. In accordance with the hearing notice, a specific

list of evidence in support of the Complaint is attached. A copy of the index of record for the *California Cities* case is also attached.

RECOMMENDATION

Adopt ACL Order No. R3-2005-0137.

ATTACHMENTS

1. Proposed ACL Order No. R3-2005-0137
2. Time Schedule Order No. 00-131
3. Complaint No. R3-2005-0137
4. Revised Worksheet for Assessment of Civil Liability
5. List of evidence in support of complaint and *California Cities* record
6. Comment letters and email messages (available online at www.swrcb.ca.gov/rwqcb3/)

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