BOARD MEMBERS PRESENT

Jeffrey S. Young, Chairperson
Russell M. Jeffries, Vice Chairperson
Gary C. Shallcross
Daniel M. Press
John H. Hayashi
Monica S. Hunter (recused)
Leslie S. Bowker (recused)

BOARD ADVISORS

Michael Thomas, Assistant Executive Director
Sheryl Schaffner, Attorney

WATER BOARD PROSECUTION STAFF

Roger Briggs
Lori Okun
Matt Thompson
Sorrel Marks
Harvey Packard

LOS OSOS COMMUNITY SERVICES DISTRICT

John McClendon, Attorney
Jon Seitz, Attorney/Consultant
Dan Bleskey, Interim General Manager
Robert Miller, District Engineer
Lisa Schicker, President, Director

PETERS SHORTHAND REPORTING CORPORATION   (916) 362-2345
LOS OSOS COMMUNITY SERVICES DISTRICT

Chuck Cesena, Director

John Fouche, Director

Bruce Buel, General Manager on administrative leave

ALSO PRESENT

Ed Moore, Monterey Mechanical

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PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345
CHAIRPERSON YOUNG: Welcome, everybody, here. I'm Jeff Young, Chair of the Regional Water Quality Control Board. And, yes, I have been reappointed; came in at the last minute --

(Applause.)

CHAIRPERSON YOUNG: But the way things work in Sacramento, sometimes you have to hold your breath.

Let's have roll call. Carol.

MS. HEWITT: Thank you. Monica Hunter.

BOARD MEMBER HUNTER: Here.

MS. HEWITT: Gary Shallcross.

BOARD MEMBER SHALLCROSS: Here.

MS. HEWITT: Russell Jeffries.

VICE CHAIRPERSON JEFFRIES: Happy holidays.

MS. HEWITT: Thank you. Jeffrey Young.

CHAIRPERSON YOUNG: Here.

MS. HEWITT: Daniel Press.

BOARD MEMBER PRESS: Present.

MS. HEWITT: John Hayashi.

BOARD MEMBER HAYASHI: Present.

MS. HEWITT: Les Bowker.
BOARD MEMBER BOWKER: Here.

CHAIRPERSON YOUNG: Okay. Mr. Thomas, would you like to do some introductions?

MR. THOMAS: Sure.

CHAIRPERSON YOUNG: You know what, I'm going to make sure my cellphone is on vibrate or silent, so I would appreciate it if everybody else would do that right now.

MR. THOMAS: Okay. I'll introduce myself. I'm Michael Thomas, the Assistant Executive Officer for the Regional Board. I'll be assisting the Board for the Los Osos CSD hearing.

I'll introduce the prosecution staff. Sorrel Marks on my left; Roger Briggs, the Executive Officer; Lori Okun, Staff Counsel; Matt Thompson.

We have Carol Hewitt; John Goni [phonic]; Harvey Packard, our Division Chief; Burton Chadwick is in the back along with Sheila Soderberg. They're helping to hand out cards to folks. So if you would like to speak on this item, or any other item, if another item should happen to come up today, which I doubt that it will, you would talk to Sheila. She has her hand up with those cards.
Normally Roger Briggs, the Executive Officer, is sitting here advising the Board. On this case we have a separation of functions that the Chair will talk about in a few minutes or now.

CHAIRPERSON YOUNG: Okay, and I'd like to also have us introduce -- I think we have all five members of the Los Osos CSD here. So, welcome. Are they here? There's four, okay, four are here. And then Mr. Bleskey and Mr. Seitz and Mr. McClendon.

And at this point we have a couple of Board Members that need to make a statement, and they're not going to be participating in this proceeding. So, Dr. Hunter, would you like to say a few words?

BOARD MEMBER HUNTER: Yes, thank you. Some of you know that I'm a homeowner in the prohibition zone, and as a result I'll recuse myself from the proceedings today. And just wanted to make a statement for the record that I have not spoken with either the staff, with the prosecutorial team, or with any of my fellow Board Members about the enforcement action today. Thank you.

CHAIRPERSON YOUNG: Okay. And then, Dr.
BOARD MEMBER BOWKER: On the advice of Board Counsel --

MS. HEWITT: Your microphone, please.

BOARD MEMBER BOWKER: All right, is that better? Technology.

On the advice of Board Counsel I am recusing myself from this matter. Although I'm not in the prohibition zone, I do live in the community of Los Osos. Both my wife, Rosemary, and I have been active in community service for many years.

Previously I have served on the County Service Area CSA 9 Board, which was still wrestling with wastewater issues. And before my wife's terminal illness, Rosemary served on the Los Osos CSD Board, was its first president.

And as these facts do not constitute a conflict of interest in the legal sense, I wish to avoid even the perception of bias in these proceedings.

Thank you.

CHAIRPERSON YOUNG: Thank you, Dr. Bowker. And then Sheryl Schaffner was not introduced. She is the Board's attorney in this
And Mr. Thomas briefly told you about the separation of functions, and that is done when we do enforcement proceedings like this. And that is to wall off discussions between the Board and staff which does take place all the time on other matters that don't involve adjudicative proceedings.

So my contacts are then with Sheryl Schaffner, not with Lori Okun and not with Mr. Briggs, or any of the other prosecution team members. My contacts are then with Sheryl and Michael. I think that has been about it. We're kind of enclosed in our own world in trying to prepare for this hearing.

I had a couple of comments that I wanted to address really to the public.

(Pause.)

CHAIRPERSON YOUNG: How many of you have a lot of anxiety and are pretty uptight and nervous about what may or may not happen today? Okay. I'm in that group with you, all right. And I think everybody in this room is in that group. I think all the lawyers are; I'm sure the Board Members are. And I'd like to try to get the
emotion level down somewhat so we can kind of get
through this and not make it a personal event.

I'd like us to stick to the facts and
the issues through this, and I really need your
cooperation in doing that.

And I want to start off by telling you
that the regional water boards are not the same as
the State Water Board. The State Water Board,
there's only one State Water Board. That's in
Sacramento. Those five members are paid; they
have a full-time job. And we are not paid for
doing this work. We get paid $100 a day; we don't
get paid for all the review and preparation that
we do.

And we are not accessible to the public
because we have, in a legal sense, the role of
administrative law judges. Unlike the city
council or your supervisors, county supervisors,
who you can approach and call up at any point in
time, you can't do that with us.

And the reason is we can't be engaging
in ex parte contacts, talking to people off the
record and getting information. I know you can do
that with the Coastal Commission, but you can't do
that with regional boards. And so we're walled
off additionally in that sense.

But we’ve volunteers basically to do this, and we really come with a quite varied experience and background. The five of us that are going to be participating as essentially hearing officers, with me as the Chair, and I’ll start with Dr. Press over here, just for those of you who don’t know who we are, and present new faces to you.

He was appointed in 2002, Dr. Press. He's an Associate Professor environmental studies at the University of California at Santa Cruz. It's a position he's held since '92. He's authored several articles relating to water, environmental studies, including developing hazardous waste capacity and the greening of industry achievements and potential.

He is a member of the board of directors of the Open Space Alliance. And I think also, Daniel, you are now the chair of the environmental studies department?

BOARD MEMBER PRESS: That's right. And you can promote me to full professor now.

CHAIRPERSON YOUNG: Okay. All right.

(Laughter.)
CHAIRPERSON YOUNG: I wish things were that easy. Okay.

Mr. Jeffries, right over here.
Appointed in '92, he is our longest serving Board Member. I consider him to be the institutional member. He goes back a long way with this Board. And he is formerly the Mayor and a Council Member of the City of Salinas, which is the largest city in our Central Coast Region.

He also sits on the Moss Landing Harbor Board as an elected member. He's also previously served as a commissioner for the Salinas Valley Water Commission, and as a member of the Monterey County Resources Agency.

Mr. Hayashi down on the end, appointed in 2000. He is the former president of the State Board of Food and Agriculture; is a member of the Agricultural Education Advisory Committee and the California Institute for the Study of Specialty Crops.

And his family owns and farms about 1000 acres of vegetables -- something like that. In Oceana?

BOARD MEMBER HAYASHI: We farm from Arroyo Grande to Morro Bay.
CHAIRPERSON YOUNG: Okay, in the fog belt.

BOARD MEMBER HAYASHI: Yeah.

CHAIRPERSON YOUNG: And then Gary Shallcross over on this end. Appointed in 1999. He has served on several water-related task forces and boards. He was district director for Assembly Member John Laird from 2002 to 2004. And for Assembly Member Fred Keeley from 1996 to 2002. From '93 to '94 he was a volunteer attorney for the Santa Cruz AIDS project.

And I'm also an attorney, as well as Mr. Shallcross. So collectively, we've got a lot of experience and a lot of qualifications to sit here and to try to get this nut cracked, and try to see what we can do to get things, you know, resolved, if possible, and moved in a direction that at least the Water Board feels it needs to get going in.

There are long-standing issues with Los Osos and the septic tanks and et cetera, et cetera. The Board, itself, has direct involvement with this because we've issued some orders in the past. There have been some things that have come up before us. And I have represented this Board
in front of the Coastal Commission on occasion.

But today the issues are limited as to what we're going to be addressing. And those are addressed in the staff's civil liability complaint that addresses alleged violations of the time schedule order that was issued a few years ago. And that's really what we're focused on here today.

I've read all of the letters that were submitted to the office. I think there's about 126 of them. I know generally where everybody stands on this. We've got two camps: those that want to see things proceeding as quickly as possible; and those that really want to go to another site, look at other technology, and basically asking for more time.

I would urge you, when it's time for public comment, and depending on how many cards we have, I'm going to have to decide how much time I can allot everybody. So, I would urge you to help this process along, I would briefly tell us where you sit on the fence, but then it would really be helpful if you listen to what the attorneys and the witnesses have to say, and then be ready to use your time to offer you critique and comment.
and other information that you may have that may
help the Board in evaluating the credibility or
believability of any of this testimony.

   So, use your time as you want, but I'm
just kind of encouraging you, because we're going
to have to listen to as much as we can --

MR. KING: Are you going to introduce
Roger Briggs?

CHAIRPERSON YOUNG: He was introduced.

MR. KING: Oh, he was --

CHAIRPERSON YOUNG: This is Sorrel
Marks, this is Roger Briggs, this is Lori Okun,
this is Matt Thompson. Okay? And who are you,
sir?

MR. KING: My name's Wayne King.

CHAIRPERSON YOUNG: Wayne King, okay.

MR. KING: I'm a taxpayer.

CHAIRPERSON YOUNG: Okay, good, I'm a
taxpayer, too, Mr. King. I'm glad we're on the
same side of that.

(Laughter.)

CHAIRPERSON YOUNG: Okay. Now, I just
want you to know that when today is concluded or
tomorrow, most likely this is going to go on past
today, just because of everything that's got to be
covered.

    But when the hearing is concluded, if
any party is not satisfied with the result there's
an appeal process that has been built into this.
It applies to all administrative proceedings. And
the State Water Board will have review capability,
if any party feels that that needs to take place.
And then there's further review in Superior Court.
So this is not necessarily the end of the line,
but we would like to move in the direction where
we are getting the water quality issues addressed.

    Something else I want to address, and
that is the decorum I'm going to expect throughout
this proceeding. I don't want to see anyone raise
their hands when they agree or disagree with a
speaker. I just don't want to see it in here. It
is distractive, and it takes away from our ability
to focus on what the witnesses are saying or what
the lawyers are saying.

    I don't want to see placards held up; I
don't want to hear noise in the background, and
people verbally trying to participate in what's
going on. If you feel the urge that you've got to
do that, please step outside. And if that is not
going to be possible, then I will have to ask you
to please leave. I don't want to do that. But I have been to some Coastal Commission hearings, and I do know what can happen in an emotion-filled situation. Let's try to get the personal part out of this and let's focus and get this resolved.

I want to tell you a little bit about what I see as our time schedule constraints in this process. The District has asked for two hours to put on their case. They're going to have two hours to do that. That's extended to the staff, the Prosecution Staff to do the same thing. That's four hours right there, with a break in between, and questions. We'll probably go right past 5:00 I would say.

My goal would be to get through as much as we can as quickly as possible and get to public comment. And, again, depending on how many cards we have, may have to limit public comment in terms of the time per speaker, and that's so everybody can be heard.

And targeting stopping at about 7:45, because I'm going to lose a Board Member and we're not going to have a quorum. And we'll see where we're at at 7:45. I'm anticipating that we've got to continue this tomorrow, and I'll check with the
lawyers and see whether it should be at 8:30 in
the morning or whether it should be at 1:30 in the
afternoon. It has been noticed for tomorrow, so
we can go ahead and do that. I just want to give
you that heads-up.

Okay, I think that covers everything I
wanted to say. So I'm going to go sit down and
we're going to get into a more formalized
beginning of these proceedings.

One thing I would also suggest, if you
guys have questions that are just burning and
comments that you really want to make because
you've heard something, write them down on the
paper. You can give them to Michael Thomas when
there's a break. And the lawyers and I will
decided whether we want to address those comments,
whether they want to kind of bring them up, get
them addressed, or if I want to do that. Or you
can save that and wait for your own public
comment.

Okay, thank you for your attention.

(Pause.)

MR. THOMAS: I'd also like to point out
that there are a few chairs up here in the front
that are open, for those of you standing in the
back. There are also some chairs here reserved for the press, so if you're with the press and want the front-row seat, there's some reserved. If those chairs are not filled by the press, then others should feel free to take them.

The bathrooms are out through that door in the back, on my left where it says exit. And there is an overflow area out in the front of the office in our atrium area. There is a television out there, and the Board hearing is being televised over that television.

And also I'd like to thank Tim Hedges and the San Luis Obispo Police Department for being here today; we greatly appreciate it.

And that's it.

CHAIRPERSON YOUNG: Okay. Here we go.

This is the time and place for a hearing by the Central Coast Regional Water Quality Control Board for consideration of the proposed administrative civil liability for the Los Osos Community Services District.

This matter has been duly noticed and two parties have been designated for this proceeding, the Los Osos Community Services District and the Regional Water Quality Control
Board Prosecution Staff.

Since this is a prosecutorial matter, staff functions have been separated into two teams which I previously alluded to. This is done to insure that the Board has neutral advisors who have not been personally involved in the prosecution of the proposed enforcement action.

Everyone has been introduced. And I've told you that both sides are going to have two hours to put their cases on. And, by the way, the Board can ask questions at anytime. And the way I do this is when we start to ask questions and are eating into your time, I'm going to stop the clock. So I don't want you to get worried that we're trying to take time away from anybody. That's not what we're trying to do. But sometimes it's better for the flow of what's happening that we interrupt and ask a few questions to get something clarified. So I'm going to stop the clock when that happens.

Okay, the order of presentation will be as follows: Witnesses called by the Prosecution Staff, cross-examination of staff witnesses by the CSD. And I'm going to use the acronym CSD which everyone, I'm sure is familiar with.
Witnesses called by the CSD; cross-examination of CSD's witnesses by staff. Policy statements by representatives of agencies. Policy statements by other interested persons. Summation or closing statements by the discharger and Regional Board Staff. Again, it's looking like closing statements will be taken tomorrow, not today. And that will also give both sides an opportunity to collect notes, develop their closing arguments, and to kind of let everything kind of filter in.

Board Members and Board Counsel and Michael Thomas and Board Counsel may ask questions of witnesses and representatives at any time.

Each person who testifies at this hearing -- and this is what's different, folks, about this hearing than what you normally see go on, everyone who is going to testify is going to take an oath. The same oath that you would take as if you were in a court of law. Everyone is expected to tell the truth.

Each person who testifies at this hearing shall begin by stating his or her name and address, unless the address has already been given. All persons who may testify at this
hearing, please stand. And I assume that's most
everybody, including public comment people. If
you're going to come to the podium, please stand.
Even if you don't plan to testify, but are
involved in this matter, I still want you to raise
your right hand and take the following oath:
Whereupon,

                    ALL PROSPECTIVE WITNESSES
to be called as witnesses and to testify herein
were thereupon duly sworn, en masse.

                    CHAIRPERSON YOUNG: Okay, thank you.
                    All right, the next thing we're going to
address, or what we would call in civil court,
superior court, kind of in limine matters. And
these are matters that have been raised by the
parties where they have some concerns about issues
or procedure or things of that nature that they
want to get some redress for.

                    And I know that the attorneys for the
CSD have made, in their correspondence to Sheryl
and myself, have raised some issues about what is
going to happen today. And I want to address
those now in front of the whole Board so we can
get concurrence on how we're going to proceed.
And then we can kind of clear that away, and then
we can actually begin with the testimony.

And first I'm going to deal with the documents. There's a lot of documents in this case. There's hundreds of them. Both the documents in the Regional Board's files and then the CSD has offered, or at this point marked as exhibits, documents that they would like to use in this proceeding.

Those documents and their disposition is all handily summarized in a table that Michael has prepared on my behalf. And the parties and the Board Members have been provided that table. And, Michael, who -- and the CSD, the staff? Okay.

(Whereupon, aforementioned table was distributed.)

CHAIRPERSON YOUNG: This is the Board's effort at getting its hands around the documents. It's not the prosecution team's efforts. I did this in consultation with Michael and with Sheryl. And I want to summarize what my rulings are as reflected in that table. Everything submitted after the applicable deadlines provided in the hearing notice is excluded.

In this category are several dozen
public comments submitted after November 17th, and still coming in as of last night. And I want you to know that to the members of the public that have been submitting emails and letters up until last night, you know, I appreciate your interest in this. I can understand why you want to get your comments in.

At some point it becomes unruly for the Board to deal with a lot of papers coming to us. That's why we have a cutoff. It's simply so we can manage the flow of information.

I want the Board to really be focusing on what happens here live, and not to be trying to thumb through what came in last night. It detracts from what needs to be done.

And those that have submitted letters late, you have the opportunity to still tell us those concerns and issues in public comment. Okay?

Any item that was requested for inclusion in the record by reference, but not provided, is excluded; unless the requirements of regulation section 648.3 of title 23 have been met. Specifically the requirement to identify where in the existing files the document is
located, and the portion of the document upon
which the party relies.

All of the documents excluded in this
category were requested for inclusion by reference
by the CSD. The CSD, however, made no effort to
meet the standards set out in section 648.3 upon
submittal of the documents on November 17th, nor
when I gave the CSD some additional time to make
the showing by November 28th.

So, as of all those documents, except
the ones noted in the chart, which prosecution
staff made the showing for the CSD, are excluded.

Some documents, specifically newspaper
articles, are being excluded on my own motion.
They are hearsay, not meeting the statutory
standard in Government Code section 11513.
Newspaper articles are not the sort of evidence on
which responsible persons are accustomed to rely
in the conduct of serious affairs. And there has
been no showing that these articles are offered to
supplement or explain other evidence, so they are
excluded, as well.

And, folks, it is the language of that
Government Code section which sets out the
standard by which hearsay can be used in an
administrative proceeding.

Yes, Sheryl, go ahead.

MS. SCHAFFNER: On the first category of documents that the Chairman described, the late-submitted documents, I'd add that comments actually continued to be received as of the start of the hearing. I believe they've been handed to Carol. And it's my understanding that the Chairman includes those in that general category of exclusion, as well, for the same reasons.

CHAIRPERSON YOUNG: Yes.

MS. SCHAFFNER: Okay, thank you.

CHAIRPERSON YOUNG: Okay. So, --

MS. OKUN: Mr. Chairman, before we move on I have a minor correction on the master documents list 2, the prosecution staff's direct evidence.

CHAIRPERSON YOUNG: Okay.

MS. OKUN: That was actually submitted on November 10th, not November 17th. Just so the record's clear it was submitted by the due date.

CHAIRPERSON YOUNG: Okay. Can you lead me to where you're referring to?

MS. OKUN: It's master documents, list 2, the entire list of staff's direct evidence.
It's items 1 through 149.

CHAIRPERSON YOUNG: Okay. But, it's accepted anyway.

MS. OKUN: Right.

CHAIRPERSON YOUNG: It's just the date you're correcting?

MS. OKUN: Right, I just wanted the record to be clear that it was on time.

CHAIRPERSON YOUNG: Okay. All right.

MR. SEITZ: Mr. Chairman, I just have a point of clarification.

CHAIRPERSON YOUNG: Of course.

MR. SEITZ: Thank you. My name's Jon Seitz. I'm an attorney in San Luis Obispo. I hope I just have to say this once. My residence is at 350 Estuary Way in Grover Beach; and my lawfirm is at 1066 Palm Street, commonly known as Shipsey and Seitz. And I am the former District legal counsel to the Los Osos Community Services District.

The prosecution team designated the entire administrative record regarding the CalCities litigation. And if these documents that are rejected in this list were in that particular, if I remember, six volumes that were designated,
they're clearly within the possession -- and I know that there's a number of newspaper articles that are in that, and a number of other documents. Am I assuming that you're excluding their documents, too? Or if they are in the administrative record of the CalCities litigation, and they appear to be rejected here, are they, in turn, now accepted because they were designated by the prosecution team?

I just want to make sure I'm clear on -- because we have --

CHAIRPERSON YOUNG: I'm going to let Sheryl --

MR. SEITZ: Thank you.

CHAIRPERSON YOUNG: -- kind of respond to that.

MS. SCHAFFNER: Chairman Young can correct me if I don't understand this correctly, understand your intent correctly. But my understanding is the intent was that any document that was in the file is in the record through that method of introduction into the record, because they are in existence, identifiable and they're there.

However, if they're incorporated by
reference and there was no way of confirming that
they are actually in the file because the location
wasn't added, they don't get added in by means of
that incorporation by reference. If they're
there, they're there. And they did come into the
record.

MR. SEITZ: So I have a clear
understanding here, if the document is in the
CalCities administrative record, and it's
reflected as being rejected here, the actual
outcome is that it's accepted into the
administrative record for these proceedings?

MS. SCHAFFNER: Yeah, the rejection is
through the motion to incorporation by reference.
But if it exists in the file, it is in the record.
So, you're correct --

MR. SEITZ: I still don't think I'm
getting the clarity that I'm trying to request
here.

The prosecution team designated the
CalCities administrative record, which is
approximately six volumes, I forget the exact
number, but it's a large number of volumes.

So my question is, my fear is that there
are documents that are in that administrative
record that have been offered by the prosecution
team without objection by the Los Osos Community
Services District.

And if they are -- my fear is that some
of those documents that are shown up here as being
rejected may well be in that CalCities
administrative record. I just want to make sure
that if they're shown up as rejected here in the
list, and they are, in turn, in the CalCities
administrative record, that they are, for lack of
a better word, not rejected.

MS. SCHAFFNER: You're --

MR. SEITZ: So that they are in the
administrative record for these proceedings. I
hope I'm making myself clear.

MS. SCHAFFNER: I think so, but just one
moment.

(Pause.)

MS. SCHAFFNER: Let me see if I can
clarify it for you.

MR. SEITZ: Okay.

MS. SCHAFFNER: The problem with the
motion you made for incorporation by reference was
without identifying the location in the file and
the portion you're relying on, we don't know --
you hadn't provided it as an attachment or in hard copy or electronically to say, here it is, you can put it in your record, we don't know for sure that it's there. So we can't say we're incorporating it by reference. That's why the regulation requires that.

But if the prosecution team -- if it was admitted into the record as part of a file, which it sounds like it is, everything that's in that portion of the record is not rejected. So the answer to your question is correct.

MR. SEITZ: Okay, I just wanted to -- thank you.

CHAIRPERSON YOUNG: And so if what Mr. Seitz, if what Sheryl just said doesn't jibe with the list, we will correct the list.

MR. SEITZ: Okay.

CHAIRPERSON YOUNG: Okay?

MR. SEITZ: I appreciate that; thank you.

MS. SCHAFFNER: Yes, it sounds like we may need at least a footnote to clarify that.

MR. SEITZ: Yeah.

MS. SCHAFFNER: Okay.

CHAIRPERSON YOUNG: Ms. Okun, do you
have any comments?

    MS. OKUN: We can provide a copy of the
reference list of the CalCities record, a copy of
the administrative record index tomorrow if that
would be helpful.

    CHAIRPERSON YOUNG: Mr. Seitz, would you
like that?

    MR. SEITZ: Yes, thank you.

    CHAIRPERSON YOUNG: Okay, fine. And
then we can maybe look at that and make sure that
those documents that you're concerned about are
coming in.

    MR. SEITZ: Thank you.

    CHAIRPERSON YOUNG: All right. Okay, so
to the Board, I have made that ruling, you know,
in advance on the documents. If anyone doesn't
object, then I would go ahead and we'll move on to
the next issue.

    MS. SCHICKER: Wait a second, please.
We have another thing we need to say about --

    CHAIRPERSON YOUNG: About those records?

    MS. SCHICKER: Yes.

    MR. SEITZ: And I guess -- I'm sorry to
keep interrupting here. This is the first time
that we have all we've seen, I think as of a week
ago, Ms. Okun's list of documents here for this list.

But it says that certain documents, like I'm just taking a look at page 18, document 269.

MS. SCHAFFNER: The staff documents or the district's documents?

MR. SEITZ: No, the documents that are listed in this document that was just handed to us regarding the Chairman's rejection and acceptance of documents.

MS. SCHAFFNER: You should have three tables. There's a list one, list two, and list three. And if you could zero in on which list you're talking about?

MR. THOMAS: He's referring to list one, --

MS. SCHAFFNER: Okay, thank you.

MR. THOMAS: -- page 18, document 269.

MR. SEITZ: Okay. Now, we may have had a computer glitch, so we're not -- I'm not trying to represent anything to the contrary. But we submitted electronically on the date that we submitted the documents, the ten copies here, I burnt my computer up; I'm sure I burnt other people's computers up, transmitting every document.
electronically.

And I also submitted a CD with those documents to the Regional Water Quality Control Board on that same date.

And what I'm concerned about here is that for example, if you take a look at page 9, document 132, it's shown as red, and it is shown as being not submitted.

I'm curious as to whether or not, how that determination was made. Because it's our belief -- we hired a professional server to do these disks, you know, of documents. And we submitted them.

And I had what I thought were assurances that all those documents that were in those stacks were also on this disk.

So I'm just curious to know how, like document 132 shows not submitted. I grant you, we probably -- you probably were unable to copy the videotapes that are referenced in here, and I understand that objection.

But I just want to make sure to certain clarity here on these documents that say not submitted and are actually documents and not videotapes, how was that confirmed that they
weren't actually submitted?

MS. OKUN: I've got a copy of the CD here. And I --

MR. SEITZ: Okay.

MS. OKUN: -- just checked it and neither of those two documents are on there. Our staff did go through and compare the CD to the hard copies that were provided to make sure that, you know, that there weren't some that were only on the CD or only in hard copy, and they all matched. And so the list of documents is up on the screen now.

This particular document, number 269, the August '04 transcript, I believe I do have a copy of that. I forgot to check before I came down here, but I think I do have it, and Ms. Marks thinks that we have it, as well. And we can try to verify that before tomorrow.

CHAIRPERSON YOUNG: Mr. Seitz, did someone from your office cross-reference to make sure that what was on the CD --

MR. SEITZ: That is --

CHAIRPERSON YOUNG: -- was what was in the list?

MR. SEITZ: This is what I can represent
to the Chair. That my office, I believe, submitted documents 1 through 30. And, of course, we cross-referenced those. And I think they're tabbed, individually tabbed for the record.

We also submitted a number of documents and -- and believe me, I know that there was like eight or nine bankers boxes that were in those documents -- my office did not cross-reference those documents to make sure that they were in.

But what we did was hire a professional, I think San Luis Process Serving, for legal work, to photocopy those documents for the record. And also, at the same time, create a CD so that we could both deliver electronically to the Regional Water Quality Control Board Staff, and have a copy for ourselves. Hopefully we can use it up here.

So my question really is, is I'm not questioning whether or not they were submitted. Believe me, I'm just questioning the methodology of making that determination that they weren't submitted, when the District went through some extraordinary last-minute, under an extreme amount of pressure, to get these documents before your body, that they weren't actually submitted.

CHAIRPERSON YOUNG: Okay. That's a fair
question. And the question then that I would pose
back to you is did anyone then just check on what
the photocopy service did for you, just to make
sure they carried out your directions? And maybe
you didn't have time to do that, but, you know,
did anyone check?

MR. SEITZ: I can represent to the Chair
that as to those documents after 30, no one in my
office checked.

CHAIRPERSON YOUNG: Okay. Well, Michael
and Sheryl, --

MS. SCHAFFNER: I guess one observation
I would add, I think that we have the CD here.
And it's up on the screen; and if you'd like to
take, during a break, you know, examine the CD,
yourself, to see whether any of these things that
cconcern you, actually the way it's represented in
the chart matches up to what's on the CD, maybe
that would help. I don't know.

But what comes to my mind in this
discussion is just the difficulty of trying to put
into the record on the last day of the submittal
deadline such a huge volume of documents, and what
the purpose for those documents was, and how they
tie into the defense, it illustrates how helpful
it would be if the District could explain what
evidence they're relying on in their argument as
they present their case.

And that way the Board can pull out of
that massive volume of documents what's germane.
Because as it is it's just boxes holding down the
floor, unless there's some reason to think that
it's tied to an argument in defense.

And that's the part that's made it hard
to sort through on top of -- this just illustrates
that problem, I guess, is --

MR. SEITZ: And I don't disagree, but
it's one of the reasons why the District
continually requested a continuance. Because of
the large volume of documents that are associated
with these proceedings, and the tight time
schedule that the District -- and I know the Chair
granted us some exceptions, and I'm not trying to
argue that I don't appreciate that -- but the fact
of the matter is we requested a continuance of the
hearing date.

And when you ask a small District like
the Los Osos Community Services District to
prepare for what appears to be either a $44
million or an $11 million, depending on the high
and the low, what's in there, to respond to damages at that level, and then we have these timeframes that are extraordinary in nature for the District to respond to.

And taking into account that the Regional Water Quality Control Board Staff actually submitted volumes by designating the CalCities record, you've put an extraordinary amount of pressure on a small District to appropriately prepare and respond to the gravity of this hearing.

And, I guess I'm maybe trying to renew my motion to continue here, is that these are the types of issues that should have been worked out, and there should have been ample time for all to work out, prior to conducting this type of evidentiary hearing on such, what I consider, extraordinarily short notice.

CHAIRPERSON YOUNG: Mr. Seitz, let's do this. Do you have copies of those documents?

MR. SEITZ: They're in my office and on my CD here.

CHAIRPERSON YOUNG: Okay, well, here's what I think is fair and the way I would like to approach this. If there are documents that you
want to use with witnesses or discuss or do cross-
examination with, you know, get them out and then
we can look at them. And we can deal with those
documents at that point in time.

But, you know, when I see the list --
folks, we have like 400 documents, that's a lot of
documents -- and, you know, we're not trying to
litigate and deal with everything that's happened
to Los Osos in the past 30 years.

And so there's some limited things we're
trying to deal with today, and I'm just trying to
make sure that the documents are really relevant.
And that is the test for admissibility into this
proceeding, is whether they're relevant to the
facts and issues that are at issue.

So, Mr. Seitz, let's look at the
documents if you've got them; and you want to use
them with witnesses, you can share them with the
prosecution staff. Let us look at it. And we
can, you know, rule at that point in time.

But, what I sense is you've got a lot of
boxes of documents that we're never even going to
talk about in this proceeding, except in the
abstract. And they're really there for an
appellate review process. And so --
MR. SEITZ: And, Mr. Chair, I agree with your statement in its entirety. The reason why we have these documents here is to create a diminished rate of record on the chance or likelihood, no matter how you want to take a look at, that whatever decision is reached here today is going to be appealed.

And, of course, when you create an administrative record before an evidentiary hearing such as this, it's taken for granted, and I'll admit, we're not going to use every document here to cross-examine witnesses with. But we still have a vested interest in having those documents in the record for the purposes of arguing them potentially before a court. That's why I think that we had this requirement to get these documents submitted to this Board consistent with your requirement that they be submitted on the 17th. So that we would have them here; they would be part of the administrative record primarily for the basis of further court action.

(Pause.)

MR. McCLENDON: Mr. Chairman, may I just --

CHAIRPERSON YOUNG: Of course.
MR. McCLENDON: Thank you.

MR. THOMAS: Would you identify yourself?

MR. McCLENDON: Oh, I'm sorry. I'm John McClendon.

MR. THOMAS: And what's your relationship to this hearing?

MR. McCLENDON: I'm the Interim District Counsel to the CSD.

Granted, it's a CEQA case, but I recall a case from I think two years ago, 2003; it's County of Orange v. Superior Court, and it was a fight over an administrative record. And there the court said very strongly that when fighting over whether or not to admit materials in the administrative record the proper way is to always err on the side of over-inclusion, rather than under-inclusion.

And there was another case called Protect Our Waters, the POW case, where the court rather humorously, but pointedly, made the same point.

So I just wanted to bring that case law to your attention.

CHAIRPERSON YOUNG: I appreciate that.
I think what I'll do, since perhaps these are
documents that you're not going to be relying upon
for the presentation of your case, why don't we
set aside, you know, for later determination, as
to what you want to get into the administrative
record for any appeal that might take place. I'm
not going to close the door on that, if you need
more time to go over those records.

I will, though, and I had asked this earlier, for some showing of relevancy and
probative value, which still is going to be the
standard that I'm going to apply on all these
records. And as long as it has some relevancy,
then, you know, we'll reconsider that.

So, maybe we can get past that. We
won't exclude those that you are concerned about
that may not have shown up on the list.

MR. SEITZ: I hate to keep doing -- I
just want to make sure that, you know, my job here
is to create the administrative record, --

CHAIRPERSON YOUNG: Right.

MR. SEITZ: -- and to represent the Los
Osos Community Services District. We always had a
problem with that request for relevancy, not that
we don't understand it, but what our concern, and
again, it's the same reason why we keep requesting
a continuance, is that burden of identifying
documents and going through the relevancy issue
was only served on the Los Osos Community Services
District.

While on the same hand, the prosecution
team designates volumes from the CalCities case.
And it's just, it's difficult for me to sit here
and swallow that. That the burden wasn't placed
on both sides, when both sides have actually
submitted volumes of documents.

And I object to the thought that Los
Osos should now be placed in a position of going
through each document and providing a statement of
relevancy and so on and so forth, when the same
volumes of documents have been submitted by the
prosecution team and they're not under the same
burden.

And on that basis, and I continue to
believe this, that in order to have an appropriate
hearing here, this hearing needs to be continued
to allow the prosecution team and the Los Osos
Community Services District team to go through
that exercise.

I'm not a big fan of volumes and volumes
of administrative record; I'm a big fan of having relevant documents. But how do we make those determinations without having an equal time for the prosecution time to sit down with their documents, and the Los Osos Community Services District going through their documents; and then if there's going to be a fight over relevancy, then we can at least bring it to this Board for determination.

BOARD MEMBER SHALLCROSS: Mr. Chair.

CHAIRPERSON YOUNG: Yes.

BOARD MEMBER SHALLCROSS: Why can't we do this. Why can't we go ahead with the hearing. They can offer any documents they want, either side. And if there's, you know, a relevancy issue we can deal with it at the time.

And then what I would suggest is at some point in the near future, both the prosecution and the CSD, if they want other documents in the administrative record, they work that out with you and our counsel.

But there's no reason to hold up this hearing just because of documents. And I agree, I mean, I think it's onerous, but if documents aren't relevant to this hearing, we don't need to
rule on their relevancy today.

    CHAIRPERSON YOUNG: Well, I think that was my point earlier that --

    BOARD MEMBER SHALLCROSS: I know, but --

    CHAIRPERSON YOUNG: -- there are documents they're concerned about for the appellate review --

    BOARD MEMBER SHALLCROSS: Right.

    CHAIRPERSON YOUNG: -- process that is not going to really have a play today.

    BOARD MEMBER SHALLCROSS: And what I'm addressing is the CSD's contention that the burden is only on them and not on the prosecution.

    What I'm saying is the prosecution needs to do that same job if they want these other documents that aren't going to be presented today or tomorrow, but they want it in the administrative record, they're going to have to show, just like the CSD, that they're somehow relevant.

    CHAIRPERSON YOUNG: I think before we actually jump to that conclusion --

    BOARD MEMBER SHALLCROSS: Okay, sure.

    CHAIRPERSON YOUNG: -- I think my understanding is, and, Sheryl, you'll have to set
me straight on this, that in these administrative
proceedings, because the agency's actions are
being targeted, that the agency's files
automatically come into the record.

RS. SCHAFFNER: That's correct. And
that's one thing I wanted to distinguish. I
wanted to speak to Mr. Seitz' concern about the
perception of a disproportionate burden.

This isn't a civil court proceeding.
This is an administrative proceeding. And it's an
administrative agency action. And it is arising
out of an administrative file, out of an
administrative permit, and out of an
administrative enforcement order.

And all of those elements that give rise
to this action are rooted in a file. And that
file is the basis of the proposed action. It is
inherently relevant, and the source of this
action. So, the file automatically comes into the
record on that basis.

It would be an unnecessary consumption
of time to go through and make that showing each
and every time, because it is the foundation of
what's at issue today.

What you are presenting, in theory in
most proceedings in this setting, would be a
defense to what the file -- what the agency is
asserting. And you would be presenting evidence
to support your defenses, to say why they were
incorrect, why you have an equitable defense, why
the facts are different than purported.

And you would be presenting documents
that aren't already in the record to support that,
while referencing documents that are already in
the record to support that.

To go beyond that into an entire realm
of other information that may -- or we don't even
know why it's being presented, I would argue,
Isn't, by itself, a basis for saying that's unfair
or that the record needs to be continued. But the
continuance is a separate matter for Jeff to
handle.

MS. OKUN: Could I address the document
issue?

CHAIRPERSON YOUNG: Yes.

MS. OKUN: Looking through the responses
to the request to admit documents, it looks to me
like the rejected documents weren't rejected based
on relevance. They were rejected because they
weren't provided to the Board or to its staff. So
they can't be the basis for the Board's decision because the Board's never seen them; its staff has never seen them. And in many cases, based on the description, we couldn't even tell what the documents were.

So it's really an issue of what's in the hearing record. And if either side wants to present documents as the hearing goes on, I think that's a separate issue then, whether the Chair has rejected anything based on relevance, or whether either side has been requested to make a showing of relevance, because you did request that information, but neither side did that. And the documents were still admitted, the ones that were provided.

CHAIRPERSON YOUNG: I think Mr. Seitz' position was that they put everything onto the CD, and so their understanding is it should be there; it should be part of what was presented.

MS. OKUN: The CD is what's up on the screen and --

CHAIRPERSON YOUNG: Okay.

MS. OKUN: -- Matt Thompson is here; he's under oath. He was the staff person who went through the CD and compared them to the hardcopy
documents. So, if anybody wants to ask him about that process he's dying to answer your questions.

CHAIRPERSON YOUNG: Okay. The question was posed as to what procedure was used. Matt, do you want to tell us what you did?

MR. THOMPSON: Yes. On November 17th and 18th we received six banker boxes full of documents. On each document was -- on the top of each box was posted the list of about 380 or 390 documents.

Also accompanying those six boxes was a CD that contained a pdf version of everything that was in those six boxes. I first checked the pdf's, a copy of which -- I checked the CD, a copy of which is posted here, and noted those that were missing.

Mr. Seitz noted document number 132. You can see from this list that 132 is missing.

I then compared the ones --

CHAIRPERSON YOUNG: And those notations do match up, then, with the Bates stamp numbers on the documents? Is that what you're telling us?

MR. THOMPSON: Correct. I went --

CHAIRPERSON YOUNG: Okay.

MR. THOMPSON: -- to the hardcopy -- I
then went to the hardcopy and verified that the
pdf -- the CD matched the hardcopy content, and
that's how we verified which documents were
missing.

CHAIRPERSON YOUNG: Well, here's a
question I have, Mr. Seitz, as I scan that list I
see 123 is not there, 121 is not there, 129 and
130. And, you know, we didn't create the
numbering system.

MR. SEITZ: I agree.

CHAIRPERSON YOUNG: So I don't know
what's going on. But, you know, if there are --
I'd like to get through this, but I want to give
you time, if you need it, and we can do that after
today or tomorrow, to make sure that, you know,
you feel you've gotten your documents into the
record, you know, that are relevant and you really
want to rely upon. I want to give you time to do
that.

MR. SEITZ: I thank you.

CHAIRPERSON YOUNG: Okay.

BOARD MEMBER SHALLCROSS: Can I ask
another question?

CHAIRPERSON YOUNG: Yes.

BOARD MEMBER SHALLCROSS: So if a
numbered document, say 132, is not on the CD,
you're saying that it also wasn't available in
hardcopy?

MR. THOMPSON: That is correct.

BOARD MEMBER SHALLCROSS: Okay, thank
you.

CHAIRPERSON YOUNG: Okay. And then this
kind of leads us right into the second request,
and the over-arching request by the CSD for a
continuance of this hearing.

And part of that is a claim by the CSD
that their due process rights may be violated in
the process of what has been set up today to
adjudicate the prosecution staff team's ACL.

And I should probably, at this point,
let the rest of the Board know, and then the
public, that I, prior to receiving the District's
written answer, which contained the third request
for a continuance, I did participate in two
meetings with both prosecution team and CSD
representatives and/or their lawyers, wherein they
asked me for a continuance of this hearing.

The first one took place October 25th or
26th, I believe. Mr. Briggs, do you recall? And
Mr. Bleskey was there and Mr. McClendon were
there. And Sheryl was not there, as our attorney, but Steve Blum, another attorney with the State Water Resources Control Board was on the phone.

Mr. Briggs, what date was that?

MR. BRIGGS: That was 10 --

CHAIRPERSON YOUNG: 10 --

MR. BRIGGS: 10/26.

CHAIRPERSON YOUNG: 10/26. And at that time that was essentially two weeks after the notice had been sent out for the hearing. And I had reviewed a letter that was dated October 21 from Mr. Bleskey laying out a number of issues that were of concern to the District. We discussed the letter, and I had asked both Mr. McClendon and Mr. Bleskey exactly what was needed in terms of additional time for the preparation of their case.

My chief concern was whether they needed more time to get witnesses together or to get documents together. And I think, if I recall correctly, and I'm going to ask you also to put your thoughts in on this, both sides, was that the main issue was that Gary Grimm was not going to be available to actively participate throughout the preparation of the District's case.
And I had noted down that he was going
to be gone from October 25th to November 24th. Is
he here today, by the way?

MR. McCLENDON: (Negative head nod.)

CHAIRPERSON YOUNG: Okay. Is he still
employed by the District?

MR. McCLENDON: He returned from Europe
yesterday, we understand.

CHAIRPERSON YOUNG: Okay. All right.

And how many people in his lawfirm, do you know?

There's one?

MR. SEITZ: Yes, one.

CHAIRPERSON YOUNG: Okay. He must be a
really special guy. My concern was that what was
stated to me was the issue for Mr. Grimm's
involvement, and I believe Mr. McClendon had told
me this, that he wanted to prepare the District's
answer in the format of like a motion for summary
judgment, with a list of disputed and undisputed
issues.

And so my concern with --

(End Tape 1A.)

CHAIRPERSON YOUNG: -- that was that Mr.
Grimm could give directions to get that developed.

That I did express my preliminary take on what was
in the complaint, because that had already been
issued, that it appeared to be fairly
straightforward in terms of what the prosecution
team was alleging, that these were time schedule
date violations and basin plan discharge
prohibitions. And that the defense to those need
not be very complicated or elaborate.

And I had asked if, you know, more time
was needed for true preparation, and I was not
satisfied, really, what the response that I got
from this. I know the District has lots of
lawyers that it can rely upon, and has had them
from time to time. I know that Mr. Seitz has been
intimately involved with the District going back
for a number of years.

But I did extend the deadline for the
submission of the District's, and I think the
staff's further documents. Forget, I did not the
staff, just the District? I think I gave the
District some more time to get their answer in.

MR. BRIGGS: Right, we did not have an
extension.

CHAIRPERSON YOUNG: Right. There was
then a second request that was made to me, and
that took place, I believe, on November 9th. And
I think that's when we spoke with Mr. Seitz -- you
know what, before I shift to that, Mr. McClendon,
would you like to add anything -- well, before
we -- Mr. McClendon was present at the first
request.

MR. McCLENDON: Right.

CHAIRPERSON YOUNG: I just want to make
sure he can add anything to the discussion, or Mr.
Bleskey, if he wants to, about what we discussed.

MR. McCLENDON: Yes, Mr. Chairman. The
primary issue that I had was coming in as a brand
new Interim District Counsel; being told by the
those with institutional memory, like Mr. Seitz
and Mr. Buel, that Gary Grimm was our go-to
attorney for Regional Board and State Board
matters. This was his niche.

And having him gone in Europe for a
month-plus, right during this critical time, was
very troubling. You probably recall when you
questioned me, I acknowledged that Mr. Grimm had
offered to take his laptop, and from time to time
he'd be places where he could have web contact.

He could be out a pocket a day or so at a time.

So, with that, there was a certain
dergree of optimism -- I'm being very candid
here -- that we could do a lot more interfacing back and forth.

You were gracious in allowing us, I believe, an extra two weeks extension to accommodate the delays. The experience I ended up having was it was a little more difficult to get back and forth with Gary than we found. We ended up basically dividing the labors, Mr. Seitz and I. And I'm not sure that we actually were able to get it to Gary to get his comments, to get them all incorporated before we were able to file. And I recall a general spanking on some of the stuff I said from Gary.

And so we didn't have quite the ability to go back and forth across the internet that we'd anticipated.

MS. SCHAFFNER: Can I ask a quick question, Mr. Chairman, --

CHAIRPERSON YOUNG: Yes.

MS. SCHAFFNER: -- an actual question. Just to be clear that I'm recalling the correct person, Mr. Grimm is the former Board Counsel for the State Water Resources Control Board Office of Chief Counsel that used to work for the Water Board as an attorney, is that correct? The same
Grimm?

MR. McCLENDON: He's got a really low Bar number.

MS. SCHAFFNER: Yeah, I believe he is, yes. Thank you.

MR. SEITZ: Mr. Chairman, I just want to add, if I might, a little bit to what Mr. McClendon just said. I am the original attorney for the Los Osos Community Services District.

One of the things that we did at the very onset of facing the different challenges that the District was going to face is attempt to hire experts in each field that we thought that we were going to have difficulty in.

And, of course, one of those was the regulatory gauntlet that the District had to hurdle. And we did hire Gary Grimm. I believe that, and I'll leave Mr. Buel, who can testify to this maybe better, because I was not actively involved in those situations in which Mr. Grimm was actively involved.

For example, I think Mr. Grimm was actively involved in TSO-131. He was certainly active in making presentations; and he was certainly active, along with myself, in facing
regulatory challenges and litigations in hopes of avoiding why we're here today, quite frankly.

He brings a certain amount of expertise, I think, as your counsel has pointed out, in the area of these types of proceedings in particular, and water quality issues generally. And we believe -- and I believe that the District's inability to have Mr. Grimm here clearly affects the District's ability to understand and address the issues that are presented in the administrative complaint. This is what Mr. Grimm does for a living. That's why we hired.

Although I think Mr. McClendon and I will probably do an adequate job, it certainly will not rise to the level as if Mr. Grimm was here in this background in this project, his background with 00-131, and his ability to -- and his expertise in these issues.

CHAIRPERSON YOUNG: Mr. Seitz, did Mr. Grimm have a chance to review the ACL before he left on his trip?

MR. SEITZ: I am not aware that when he reviewed the ACL. I am relatively confident that he did review the ACL complaint, though. I don't want to --
CHAIRPERSON YOUNG: Did he draft up a memo or anything? I mean did he take any time to -- knowing that there was going to be a hearing, that --

MR. SEITZ: Right.

CHAIRPERSON YOUNG: -- it was noticed that way, I'm just wondering if he took any time to try to put together his thoughts that might direct the rest of you.

MR. SEITZ: I think that Mr. McClendon can answer that. I can answer for what I received on my emails at my office. He did respond to some of my emails, but they were, you know, small blurbs. They were like a paragraph or two.

What was curious is, of course, he was normally sending them at 3:00 a.m. in the morning, because I think that's European time, when he could get next to a web thing; and we'd be sending them out. Sometimes there'd be a day or two later.

But I don't remember my office ever receiving what you would classify as a long-term memo.

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: But maybe Mr. McClendon has
one here. I see he has a document.

MR. McCLENDON: Mr. Chairman, I --

CHAIRPERSON YOUNG: I don't expect you
to share anything that's confidential with --

MR. McCLENDON: No, this --

CHAIRPERSON YOUNG: I'm just --

MR. McCLENDON: -- attorney work

product --

CHAIRPERSON YOUNG: -- interested

because he had, there was two weeks, and knowing

there was a deadline coming --

MR. McCLENDON: Well, he --

CHAIRPERSON YOUNG: The notice went out

by the time we had our meeting October 26th, at

least that was about two weeks from when the

notice was sent out. I'm assuming that you would

have gotten him involved in the loop pretty

quickly.

But, go ahead.

MR. McCLENDON: I did receive a

confidential attorney/client memo addressed to me

and the General Manager, but not to Mr. Seitz --

CHAIRPERSON YOUNG: Okay.

MR. McCLENDON: -- on October 17th,

where he says he would like to provide some of his
initial thoughts and strategic considerations.
This, I believe he was running off to Europe, or
may have already even left by this date.

But at any rate, and again without
divulging any confidences, the two categories were
the petition for review with the State Board
that's held in abeyance and considerations
regarding that; and then there was the second
issue was some initial, as he put it, initial
thoughts on the ACL complaint.

Obviously one thing he didn't have
access to was any of the record, over in Europe.

CHAIRPERSON YOUNG: Right. Mr. Seitz
had mentioned that two things were kind of a
concern to him, and that was his expertise in
water quality issues and regulatory issues.

Can you expand upon that? What really
is it, in terms of this proceeding with the time
schedule violations, that you see, you know,
need[ing] expertise in water quality issues?

MR. SEITZ: Well, I was hoping that the
Chair would take my comments broadly and not
narrowly. But, that's okay, I understand why it
would be taken this way.

I guess what I was trying to say is Mr.
Grimm's practice, as I understand it, is solely related to Regional Water Quality Control and State Water Resources Control Board issues. It's that general expertise that he brings.

I mean, he, you know, he knows the code sections; he knows these procedures; he knows the game. And that's why attorneys specialize, of course, is that they understand the intricacies, the timings, when do you object, when do you make particular types of arguments, when and how do you object to document production. I mean it's just a general thing that, you know, I'm sure your prosecution staff has expertise in this area.

We know that when we started on this project, that we were going to need expertise in this area, and that's why we hired Mr. Grimm.

And the Board did retain Mr. Grimm, the new Board did retain Mr. Grimm specifically to represent the District, as I understand it, for this particular hearing here today. And he's not available.

I know this isn't a court of law, and I know this is an administrative hearing, but it's been my experience that courts often grant continuances for the unavailability of counsel.
And I think -- and the reason why they do that is because it protects the due process rights. And if they have expert counsel, the judge or the hearing officer is going to get a better presentation; it's going to be much more narrow. It's going to be much more -- hopefully more narrow, hopefully more focused presentation to a Board, because that's what they do. So, I think that's my only comment in response.

CHAIRPERSON YOUNG: Okay. I just wanted to say that this Board has gone through lots of hearings over the years. And we frequently get lawyers, you know, representing parties that have no expertise at all. I mean it is not a prerequisite. It is helpful, and I do grant that. But, you know, I do civil litigation; I'm familiar, myself, with, you know, the Code of Civil Procedure, and how intricate that is. But there's a few statutes that apply in this arena. And the hearing notice has reference to certain time cutoffs that we noticed. And I think things are pretty clear in that regard. But, anyway, Sheryl, did you --

MS. SCHAFFNER: I actually just wanted
to ask about one more lawfirm that I see referenced in your materials. There's a McDonough, Holland and Allen, a very large, reputable, competent firm in Sacramento, I see represents the District in the litigation. I don't know whether they were available to you in this process.

I happen to be familiar with Harriet Steiner and Stacy Sheston (phonetic) as being both intimately familiar with water quality and regulatory function. I don't know if they were available to you or not.

MR. SEITZ: Let me respond. First of all, I will send on your regards to Harriet and Stacy, and thank you on their behalf.

We hired McDonough, Holland and Allen to address certain issues that came up during the prosecution. Again, that lawfirm, myself and your staff worked feverishly to avoid where we are here today.

They worked primarily on issues of litigation, in fact solely on issues of litigation that were before a court, on various motions, hearings. And I think during my presentation I'm going to go into that in a little more detail.
Gary, on the other hand, was hired for his expertise in the regulatory area, and providing assistance to the District before the Regional Water Quality Control Board and the State Water Resources Control Board. Harriet or Stacy or Kimberly or Iris or any of those folks that helped the District, to my knowledge never appeared in front of a regulatory body regarding any permitting process, time schedule orders, things like that.

And I want to make sure everybody understands here, Harriet and Stacy and McDonough and Allen are certainly familiar with time schedule order 00-131, I don't want to make any dispersions there. But they were not hired to address regulatory issues in front of regulatory bodies. They were hired, once again, to represent -- to assist me, essentially, in representing the District before various courts.

CHAIRPERSON YOUNG: Okay, well, certainly things are more relaxed and flexible in this proceeding than if we were in Superior Court. So, you know, there's a lot more leeway to do different things and to continue things.

I want to get into the next --
MR. SEITZ: Mr. Chair, just so you know, I withdraw that motion for continuance based on the December 14th — if you were going to get on to our conversation — I'm sorry, maybe I jumped ahead.

CHAIRPERSON YOUNG: Well, I was going to get to our discussion on the phone.

MR. SEITZ: Right.

CHAIRPERSON YOUNG: Because you did state in your — in something that was presented to me, that this was now the third request for a continuance. So if you're going to put that at issue and raise that at some point, I think it's fair that we, you know, kind of address what the context was of that.

MR. SEITZ: Yes, and I apologize. I may have gotten ahead of you. I recognize that I had a separate discussion with the Chair and the prosecution team requesting a continuance based on this hearing being premature in light of the December 15th Appellate Court hearing.

CHAIRPERSON YOUNG: Yes, Measure B.

MR. SEITZ: Measure B.

CHAIRPERSON YOUNG: You felt that the --

MR. SEITZ: Well, under the
circumstances, as I understand it, Measure B has
been dismissed from the Appellate Court, so I
believe that issue --

CHAIRPERSON YOUNG: Right.

MR. SEITZ: -- is moot. And all I'm
saying is I withdraw any --

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: -- idea of continuance based
on --

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: -- Measure B and the
Appellate Court.

CHAIRPERSON YOUNG: All right. And also
as part of that phone call you were also concerned
that the State Board kind of resolve its stand
with the state revolving fund loan, and I had
said, well, it looks like that hearing is going to
take place anyway before December 1st, so that's
going to get resolved.

And so --

MR. SEITZ: Mr. Chair, I do believe,
though, that there is another hearing set before
the State Water Resources Control Board.

CHAIRPERSON YOUNG: Well, that hearing,
from what I understand, is simply for the State
Board to potentially just reallocate money. So, I think the State Board position has been made clear to everybody where they stand on that revolving fund loan.

But the point was we did have the discussion; those were the two items that we discussed, all of us, for about 30 minutes or so. And again, based on that discussion, I did not grant the continuance after that.

MR. SEITZ: And I agree with that. And, again, I just renew my appreciation to the Chair for hearing a very long discussion on a very narrow issue.

CHAIRPERSON YOUNG: Okay. I think he way I want to handle this with the request for the continuance is to get through as much of the hearing as we can at this point in time with the witnesses. And we can take this back up again, if the District feels, you know what, we really need some more time. If we need to continue this, at least we can, you know, consider that. The Board will help me in that deliberation, the prosecution team has got to weigh in on that.

And if you can, at that point, articulate with some specificity exactly what you
need to do, then we'll look at it again. And I have a feeling we're going to do that anyway for the documents, till we get those resolved.

This proceeding may kind of take place where we start to get through witnesses, cross-examination, things of that nature, and we may start to limit things down. And then get it continued for more narrow issues that may need to be addressed. So I'm quite willing to consider that at that time.

MR. SEITZ: Thank you, Mr. Chair. As I understand, the prosecution team is going to put on their evidence, or their showing before the Board. And after their presentation, and before we put on our rebuttal, we would have the opportunity to renew the motion for a continuance basically? Is that the understanding?

CHAIRPERSON YOUNG: Well, I was thinking after -- I want us to get through as much as we can in the way we have laid it out. If we get to the end of that time period, and you feel strongly that you haven't been able to get something into evidence, there's something else you want to cover, you know, we'll consider it.

MR. SEITZ: I guess my guess is, I hate
to be picky, but we want to have a clear understanding.

CHAIRPERSON YOUNG: Well, that's okay, Mr. Seitz. As a lawyer I can appreciate pickiness.

MR. SEITZ: We would like the opportunity at the end of the prosecution team presentation to renew our position as to having Mr. Grimm here. Because obviously this is -- or is that ruling now off the table?

CHAIRPERSON YOUNG: Well, let's go ahead. You'll have the opportunity to renew the motion.

MR. SEITZ: Thank you.

CHAIRPERSON YOUNG: And we'll take it up at that point. And articulate as best you can with specificity exactly how, you know, it's going to help you. Okay?

MR. SEITZ: Thank you.

CHAIRPERSON YOUNG: Now, let's see what else is on my list.

Okay, just lastly I know that there are some witnesses that are under subpoena. And I just want to make sure that those witnesses, if we do continue this hearing tomorrow, that they show
up tomorrow. Is there anybody who's under
subpoena that can't show up tomorrow? Please
stand up or raise your hand if you cannot, because
I will expect anyone under subpoena to show up
tomorrow.

(No response.)

CHAIRPERSON YOUNG: Okay. All right.

Mr. Seitz and Mr. McClendon, are there any other
due process-type issues that you would like us to
consider at this point?

MR. SEITZ: I just have one.

CHAIRPERSON YOUNG: Go ahead.

MR. SEITZ: And in order for me to bring
this I would like to have the -- vanity -- turn to
page 9 of Ms. Okun's rebuttal brief.

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: And this is paragraph 8.

And the reason why I bring this up is because it
does affect a major portion of our response, if
any, and probably the prosecution's team.

As we explained in our responsive
pleadings the Los Osos Community Services District
operates various specialized functions within very
specialized zones of benefit.

One of those zones of benefit is, I
think, what we call zone B, which is the fire
operations of the District. And in this response,
it says, first the complaint does not allege any
violations at the fire division system.

So, my first observation is, is it fair
for us to assume and for our residents to assume,
within the Los Osos Community Services District
that this Board will not seek or consider
penalties that would impact the District's fire
department?

CHAIRPERSON YOUNG: Ms. Okun or Mr. Briggs, do you want to respond to that?

MS. OKUN: Actually that statement was erroneous. The complaint does allege violations
at the fire division. It doesn't allege violations at the Water District. The District
originally had four discharges, and the Water District discharges were terminated at some time.
We didn't have enough evidence to allege any violations because we don't know what date those
discharges stopped. But the fire division is still discharging.

CHAIRPERSON YOUNG: Mr. Seitz.

MR. SEITZ: Well, so let me back up
then. Before we get on to the fire department,
can the Board provide our water customers in this 
zone of benefit that the prosecution team will not 
seek, nor will the Board consider fines that would 
impact the District's ability to provide water 
service within its water service jurisdiction?

MS. OKUN: What the Board's considering 
is the assessment of fines. And the staff alleged 
the discharges and the order, the time schedule 
order that are the basis of those fines, part of 
the District's defense is that it doesn't have the 
money to pay those fines. But how it ultimately 
allocates the fines among its ratepayers is up to 
the District, not the prosecution staff.

CHAIRPERSON YOUNG: Mr. Seitz, how is 
this a due process issue?

MR. SEITZ: Well, it's a due process 
issue because it's a motion in limine. We need to 
figure out on the run here precisely what it is 
that is in the complaint.

And when you take a look at this 
paragraph 8 here, and this is, you know, one of 
the reasons why we continue to raise our 
objections, is how fast this all came together, 
and how there's a moving target as to what the 
District is attempting to respond to.
First, we look at the complaint and we say, okay, the water department isn't mentioned, so our water customers can feel free that their reserve account that we depend on to provide water service to our residents isn't going to be subject to the potential for being responsible for paying whatever fines that may be enacted here.

Then we read this in number 8 and we see that the fire department and our customers -- or not our customers, but our clients, actually, within the fire department that receive emergency services, they don't have to have fear that their reserves are going to be subject to the orders of the Regional Water Quality Control Board to pay fines.

And so from our perspective, we want to have, and I think the Chair wants to have the same thing, that is to have a very narrow issues here presented to your Board. If we don't have to worry about our fire department, then we don't -- when we haven't called CDF here, because I think they'd have a lot to say about their ability with their budgets, to respond to fines.

And I think maybe our water department would love to be here if they could respond to
fines. But when you read these pleadings it seems like we don't have to be concerned about our water department responding to fines, and we don't have to worry about our fire department responding to fines.

CHAIRPERSON YOUNG: Let me ask you some questions, Mr. Seitz. Does the District own fire and water in these departments? Aren't they under your umbrella? Don't you own their assets?

MR. SEITZ: We view this complaint, and this is one of the other things that's always been a moving target for us, is the complaint addressed solely at time schedule order 00-131. Every time we take a look at the pleadings we get -- I get confused. Maybe Mr. McClendon is more omniscient than I am. But when I look at this complaint, I say, okay, we're worried about 00-131, and we're worried about Regional Water Quality Control Board order 8313. That is the prohibition zone.

And then we get mixed in here, because within that prohibition zone, the District operates four septic tanks. One for the first department, one for the water department, one for
Vista del Oro and one for Bay Ridge Estates.

And it makes a big difference to us as to -- I think you'll see it more in our presentation, is what is being asked to be fined here by the Regional Water Quality Control Board? Is it these individual operations that the District does not operate district-wide, but only operates in regards to a particular zone of benefit? Or is this much broader, are we just looking at the enforcement of 00-131?

And every time I read these pleadings I get more confused about that.

CHAIRPERSON YOUNG: Okay. Let me ask a question of the prosecution staff. Are you pursuing with testimony today and witnesses both the basin plan prohibition violations, as well as the time schedule order violations?

MS. OKUN: The complaint is pled in the alternative. There's a time schedule order that's based on violations of the basin plan prohibition by these four facilities.

The way the complaint is drafted, we calculated the $10,000 per day penalty for all the days that they've been in violation of the time schedule order, and that was the amount we
alleged.

In the alternative the District was also violating the basin plan prohibition at these three facilities. But, again, those allegations are against the District, not the facilities.

We will talk about the basin plan prohibition because it's relevant to the violations of the time schedule order, but our recommendation is that penalties be assessed based on the daily violations of the time schedule order.

So, yes, we will be addressing both, but we're not arguing that the Board should impose penalties for the prohibition as opposed to penalties for violation of the time schedule.

CHAIRPERSON YOUNG: Say that last part again? Your recommendation is --

MS. OKUN: We will be discussing the basin plan prohibition.

CHAIRPERSON YOUNG: Right.

MS. OKUN: But we are recommending that the Board assess penalties based on the $10,000-a-day penalty and the time schedule order only.

CHAIRPERSON YOUNG: No, I understand.

Penalties for both, but we can only -- should the
Board decide on penalties, it would only be for one or the other category, not for both.

But I think Mr. Seitz is somewhat confused, and I don't know if it's a relevant thing at this point, as to the divisions underneath the CSD that it controls, and how an enforcement action may or may not affect those services.

I don't know how that information is relevant at this point.

MR. SEITZ: If it please the Chair, can I just renew this objection when I make my presentation on how a community service district, particularly the Los Osos Community Services District is actually formed and operated with the various zones of benefit, including the prohibition zone, rather than hashing it out here that may be a little more obtuse?

CHAIRPERSON YOUNG: Sure.

MR. SEITZ: Thank you. That's fine.

CHAIRPERSON YOUNG: Okay. Mr. Seitz, any other issues that we should consider at this point before we start?

MR. SEITZ: I guess -- no, I think that's it. I thank the Chair for its patience --
CHAIRPERSON YOUNG: Okay. Should we take a break at this point before we start, or --

MS. OKUN: Before we take a break, could I ask a quick question?

CHAIRPERSON YOUNG: Sure.

MS. OKUN: We have Darrin Polhemus of the State Board standing by in his office to testify. And I'd like to give him some idea of when we think we're going to get to him. We don't intend to call him as a witness, but I gave him an estimate that I thought that you would want to talk to him sometime between 2:00 and 4:00.

He can be available later than that, but I don't know about 7:45.

CHAIRPERSON YOUNG: Is Darrin there right now?

MS. OKUN: Yes.

CHAIRPERSON YOUNG: Darrin?

MS. OKUN: Oh, no, he's not on the phone.

CHAIRPERSON YOUNG: Yeah, okay.

MS. OKUN: I have his cellphone number and --

CHAIRPERSON YOUNG: Okay.

MS. OKUN: -- two secretaries' phone
numbers.

CHAIRPERSON YOUNG: Well, Mr. Seitz and Mr. McClendon, do you want to -- should we take a break for a few minutes before we launch into this? Because I would like, once we start with both sides, I'd like that time just to roll. And we'll break in between that.

MR. McCLENDON: (Affirmative head nod.)

CHAIRPERSON YOUNG: Is that fine with the prosecution team? Take a break for --

MS. OKUN: Right.

CHAIRPERSON YOUNG: -- ten minutes.

MS. OKUN: Right, but my question is during the break can I call Darrin --

CHAIRPERSON YOUNG: Oh, of course.

MS. OKUN: -- and ask him if --

CHAIRPERSON YOUNG: Yes, of course.

MS. OKUN: Do you still think before 4:00, or I'm not sure when you want to call him.

CHAIRPERSON YOUNG: Let me pull my crystal ball out.

MS. OKUN: Excuse me?

CHAIRPERSON YOUNG: Ms. Okun, my crystal ball, and -- I don't know. Yeah, probably before 4:00.
MS. OKUN: Okay.

CHAIRPERSON YOUNG: Yeah, I would say maybe from 3:00 to 4:00 he should be online.

MS. OKUN: Okay, thanks.

CHAIRPERSON YOUNG: All right.

(Brief recess.)

CHAIRPERSON YOUNG: We are going to resume our hearing. Please, everybody, take your seats.

Mr. Seitz, is Mr. McClendon on his way back in here? Okay. And Ms. Schicker, too? I don't see her and I know she was sitting up there with you.

(Pause.)

CHAIRPERSON YOUNG: All right. We are going to start with witnesses called by the Prosecution Staff. Still waiting for Mr. McClendon, so --

MR. SEITZ: Mr. Chair, I'm told he'll be here momentarily.

CHAIRPERSON YOUNG: Okay, well, we'll wait for him.

(Pause.)

CHAIRPERSON YOUNG: Here he comes. And how about Ms. Schicker, was she going to -- is she
coming?

MS. SPEAKER: Yes.

CHAIRPERSON YOUNG: Okay. Okay, folks, we're going to start with the Regional Board Prosecution Team case. And we're going to go for two hours. If the Board has any questions that they're dying to ask, go ahead. But we'll try to get through this maybe without interruption.

MS. OKUN: I think our case was only about 40 minutes. The rest of our time is for cross-examination and rebuttal.

CHAIRPERSON YOUNG: Okay, and that's -- you're right about that. And you know that, Mr. Seitz, that the time is divided up --

MR. SEITZ: Yes.

CHAIRPERSON YOUNG: -- like that, so. Okay, everybody is present. Mr. Briggs.

MR. BRIGGS: Thank you, Mr. Chairman.

Making our initial presentation is Water Resource Control Engineer Mr. Matt Thompson.

CHAIRPERSON YOUNG: You'll have to hold on one second so that I can get my clock working.

Michael. There we go; always helps to turn on the switch.

Okay, we're going to keep track. Does
this go up to 120? It doesn't, so why don't we do this in 60-minute bites. And will you keep track, also.

All right, go ahead, Mr. Briggs.

MR. BRIGGS: As I said, Mr. Matt

Thompson, Water Resource Control Engineer for Regional Board Staff will be making our initial presentation.

DIRECT TESTIMONY

MR. THOMPSON: Yes, good afternoon,

Chairman Young and Members of the Board. I'm Matt Thompson.

The matter before you today is really quite simple. The 2000 time schedule order for Los Osos Community Services District specifies a schedule for implementation of a Los Osos Community Wastewater Project. The time schedule order specifies liability of $10,000 per day for failure to comply with the schedule.

The District is over three years behind on its compliance schedule. On October 3rd the District suspended construction of its community wastewater project. The District is wilfully violating its time schedule order.

The Executive Officer issued an
administrative civil liability complaint on October 6th in the amount of $11,190,000. The proposed administrative civil liability is intended to compel the District to complete the community wastewater project in a timely manner, and to hold the District accountable for ongoing water quality degradation resulting from project delay.

Today we are recommending adoption of an administrative civil liability order in the amount of $11,190,000. The matter before you today is simply whether to assess liability and in what amount.

In order to provide some background, I'm going to discuss the Los Osos water quality problems, and our history of enforcement. However, please keep in mind what is not before you today. This is not a hearing on whether the prohibition was a good idea. Or whether the time schedule order was necessary. Or even whether the District should have chosen a different project five years ago.

The issue before you is whether the District violated its time schedule order, although you have discretion to consider other
factors. In the alternative you can elect to impose penalties based on the District's violation of the basin plan prohibition.

Los Osos is a suburban community of 15,000 residents that uses septic systems for waste disposal. Approximately one million gallons per day is discharged from these septic systems into a sandy groundwater basin, which is the community water supply. Groundwater is shallow and flows towards the Morro Bay National Estuary.

Many lots in Los Osos are too small for conventional leach fields, therefore must use seepage pits, which discharge directly to groundwater, or with very little separation to groundwater. These waste discharges have polluted shallow groundwater with bacteria and nitrate.

Nitrate concentrations in shallow groundwater have increased dramatically in the last 50 years. The vertical bars on this chart represent the population of Los Osos. The trend lines represent the mean and median concentrations of nitrate in shallow groundwater. You can see the nitrate concentrations have increased in lockstep with population growth.

Although nitrate concentrations
fluctuate somewhat with weather cycles, nitrate concentrations are clearly trending upward over time.

Los Osos groundwater has exceeded the drinking water standard of 45 mg/L nitrate as nitrate since the early 1980s.

This is the District's contour map of nitrate concentration in shallow groundwater in October 2004. I've highlighted areas where groundwater exceeds the drinking water standard of 10 mg/L nitrate as nitrogen.

These darker highlighted areas show where nitrate concentrations are 50 percent or more greater than the drinking water standard. As expected, these areas of highest concentration correlate to areas with greatest septic system density. Several water supply wells have been shut down due to nitrate exceeding drinking water standards.

But there is no dispute about the water quality problems in Los Osos. Even the current District acknowledges this problem must be solved. At the November 16th State Board hearing, District Director John Fouche stated that, we know we need a sewer. Water quality is of the utmost
importance. That is not even a question. The District does not dispute the need for a wastewater system.

In order to understand how we got here today we must first consider the decades-long history of violation, enforcement and delay in Los Osos.

In 1983 the Central Coast Water Board adopted a resolution which amended the basin plan and prohibited discharges of waste from septic systems in the densest area of Los Osos, which is now commonly known as the prohibition zone. This prohibition effectively required Los Osos to build a community wastewater system. That prohibition became effective in 1988.

After many years of alternative evaluation, public input and legal challenges, the San Luis Obispo County Board of Supervisors voted unanimously to proceed with the community wastewater project in October 1995. The project was scheduled to begin construction in 1997. And included a treatment plant to be built on a site outside of town, easy of South Bay Boulevard.

However, the community decided during the permitting process that it wanted the
treatment facility to be built inside of town. So in November 1998 Los Osos voted to form a Community Services District to replace San Luis Obispo County as the governing body for community services.

The District chose not to proceed with the County's wastewater project and began anew the process for project development. After several years of alternative evaluations and countless public meetings, the District developed a technically, environmentally and financially sound community wastewater project.

Meanwhile in 1999 this Water Board issued cease and desist orders to the District for its fire station, Bay Ridge Estate Subdivision and Vista del Oro Subdivision, which are discharging in violation of the basin plan prohibition.

The District decided to address these discharges through installation of a community wastewater system.

And lastly, in order to insure timely construction of a wastewater system the Water Board issued a time schedule order in 2000.

This history indicates that further delay in constructing a wastewater treatment
system is unacceptable. The District stated in its comments on the complaint that we are trying to hold them responsible for community-wide violations and violations that occurred before the District was formed. That is not correct. The complaint does not allege any violations prior to September 2002.

The time schedule order includes compliance dates for completion of vital project components and specifies that if the District fails to complete a task in compliance with the time schedule order, the District shall be liable in the amount of $10,000 per day.

The District has completed most of the vital project components to date. The District completed and certified an environmental impact report in March 2001. In June 2001 voters formed an assessment district with 85 percent voter approval to finance those portions of the project not funded by the state revolving fund loan.

The District has completed its wastewater system design. The District obtained all permits in August of 2004. Permits were delayed by a string of unsuccessful lawsuits.

The District and the State Board entered
the low-interest loan agreement that was specific to the Tri-W site in August 2005. And finally, nearly three years behind the time schedule order, construction of the community wastewater project began in August 2005.

Considering repeated alternative evaluations by the District, we began warning the District of penalties as early as December 2001, with a letter stating that delays due to reevaluating alternatives are not beyond the District's ability to control.

We repeated those warnings in letters in September 2003 and December 2004, in person at the January 2005 District meeting, and in letters in March and May of 2005.

In the May letter we stated that delaying construction would clearly be within the District's ability to control. If the District violates the compliance schedule due to such controllable delays, staff would recommend enforcement of the time schedule order.

The point here is that we have clearly and repeatedly warned the District that delays to evaluate alternatives would result in enforcement action.
In a recall election held September 27th this year, Los Osos voters replaced the majority of its District Directors with project opponents. The voters also approved Measure B, which requires the site of any new treatment facility to be approved by the voters.

In spite of clearly stated consequences for any delays, the District Directors and representatives have stated that the District will not build the plant at the current site with or without Measure B. The District suspended construction on October 3rd.

Just before the election the San Luis Obispo County Superior Court ruled that Measure B was invalid. That decision was appealed. Due to a stay, Measure B was placed on the ballot. The Court of Appeal was scheduled to hear the appeal on October 26th. The District agreed to continue the hearing for almost two months.

In the meantime, as we learned only this week, on November 18th the trial court dismissed the action at the request of the District. On November 28th the Court of Appeal dismissed the appeal at the request of the Measure B proponents.

Counsel was available to answer
questions about Measure B, but the bottomline is
the District cannot claim that Measure B prevents
it from moving forward with the project while
doing nothing to try to invalidate it.

In the days prior to the recall election
the recall candidates advertised their intent to
stop construction and relocate the treatment
facility. Candidates Chuck Cesena, John Fouche
and Steve Sennet distributed the contract with Los
Osos, which laid out their plans for their first
100 days in office.

It states that they: will seek legal
authority to review and cancel sewer construction-
related contracts.

Despite clearly stated consequences for
any delays, the District stopped construction of
the entire wastewater project with a letter to its
contractors dated October 3rd.

One director later stated that the
purpose of the suspension was: to get an
inventory, take a breath, and audit of our
situation. How many pipes are in the ground, how
many streets are torn up." End quote.

However, virtually no work has resumed.
And if their intent was to relocate the treatment
facility there was no reason to stop work on the collection system.

The District argues that Measure B makes it impossible for them to proceed with the treatment facility and that they continued the October 26th hearing as a professional courtesy, and not due to pending settlement discussions. In the meantime the District settled the case.

Although the District argues that Measure B makes it impossible to proceed with the treatment facility at the Tri-W site, its comments suggest it will not proceed with the project, even without Measure B.

At the October 20th District meeting President Lisa Schicker states: We feel so strongly and are committed to moving the project out of town, that is our goal. We are not hiding behind Measure B. We've all been very clear about our goals to get this project out of the center of town. That is just a non-negotiable."

This evidence demonstrates that Los Osos Community Services District is wilfully violating its time schedule order and the basin plan prohibition.

As he repeatedly warned, the Executive
Officer issued an administrative civil liability complaint for these violations on October 6th. As explained previously the time schedule order specifies $10,000 per day penalty for failure to comply with the schedule.

As of October 1, 2005, this penalty amounts to $11,190,000. Note that violations of the time schedule order and consequent liability continue to accumulate each day that the project is delayed.

The primary purpose of the administrative civil liability complaint was to insure that the District resumes construction of its wastewater project. In the letter transmitting the complaint the Executive Officer states: that if the wastewater project proceeds immediately I am prepared to recommend that the Water Board apply the assessed amount to project costs." It is not too late for the District to resume construction of the treatment facility at the Tri-W site, or to resume construction of the collection and disposal system."

Since issuance of the complaint we've received about 126 letters and emails from the public, most of them from Los Osos residents.
These comments are too numerous to detail here, so we've posted them on our website and will only summarize them here.

About half the letters request that you do everything within your power to compel the District to complete the wastewater project. Requests for support for completion of the wastewater project are based upon the fact that current project is the least costly means of resolving water quality problems in Los Osos; that pollution of Morro Bay and groundwater resources will continue until the community sewer is complete; that there is no viable alternative plan available; and that delays are wasting millions of dollars. Many commenters say the penalties are apparently necessary to get the District to proceed.

The other half of commenters request that you not assess monetary penalties and allow the District to pursue an alternative project. Requests for project delays are based upon the objection to the in-town location of the treatment facility, and a contention that moving the treatment facility will reduce total project cost. These commenters also generally believe that an
out-of-town location is environmentally superior.

First of all, the comments requesting additional time to pursue alternative projects are irrelevant to the issue before you, which is simply whether to assess liability and in what amount.

Secondly, even assuming cost savings or aesthetic benefits by relocating the treatment facility, these savings do not justify the additional water quality damage and threat to public health that will result from substantial delays. Or the deliberate disregard of the basin plan prohibition and other Water Board orders.

Comments requesting additional delay reflect a misunderstanding of project development time and associated costs. Based on the history of this project, significant modifications such as changing the treatment plant location, would undoubtedly result in many years of delay. As demonstrated by this chart, past delay has only contributed to increased project costs.

Any modified project would be subject to similar environmental permitting, appeals and litigation, and associated cost increases. Any modified project would likely be met with
community opposition due to additional costs or
from neighbors of any new location who may not
want the facility in their backyard, either. Or
who may never receive any benefit from the
facility. It is also likely that yet another
group pledging to develop a better and cheaper
project will appear.

We believe the current contractors' bids
were higher and there were fewer bids submitted
because of controversy surrounding the project.
We believe that ongoing controversy, the loss of
low interest financing, payment delays under the
current contracts and the uncertainty that the
District could fund contracts for a new location
will dissuade would-be bidders such that bids on
future projects would include a premium. That is
if bids could be secured at all. Clearly,
relocating the treatment facility will not
decrease project costs.

On November 14th the District submitted
a lengthy written response to our complaint which
is a part of your record. The District concludes
that you should reject the complaint and take no
action to fine the District. Continue the matter
until Measure B is resolved, and amend the
compliance dates of its time schedule order.

These conclusions are based on a series of irrelevant, incorrect, or out-of-context claims. We have provided you detailed responses to these claims in our written rebuttal dated November 28th, so I will not belabor our response now. However, we are prepared to discuss our responses later if you wish.

The District essentially states that its Board is new; that it needs to reassess its options with a fresh start, and must comply with Measure B. The District urges you to help the community and the District rather than penalize it. And to work with the District to develop some other ideas for a new project.

We ask you to instead consider whether the District has helped or hurt the community with its actions since receiving the complaint. And whether it has worked with the Water Board towards compliance.

Once a violation becomes critical enough for the Executive Officer to issue a complaint for administrative civil liabilities, most dischargers take immediate action to put their best foot forward before the hearing. They typically come
into this hearing explaining how they've attempted
to mitigate past violations, are back on track to
compliance, et cetera.

In such cases you have imposed only a
percentage of the maximum penalty, or have
suspended a significant portion of the penalty
contingent on timely steps towards compliance.

In this case, however, the District has
not only shunned this typical strategy, it has
actively sought to continue the pattern of
noncompliance. The District still has an
opportunity to resume its prior efforts towards
compliance and the community still has the
opportunity to support those efforts.

We urge you to insure they do so by
adopting the administrative civil liability order
before you today.

Thank you.

CHAIRPERSON YOUNG: Okay. Mr. Briggs,
anything else as part of your case?

MR. BRIGGS: Yes. We have questions --

CHAIRPERSON YOUNG: Yeah.

MR. BRIGGS: -- for Mr. Ed Moore at this
point.

MS. OKUN: Did you want to do the cross-
examination of Mr. Thompson or staff first, or
should we proceed with Mr. Moore?

CHAIRPERSON YOUNG: Proceed with who?

Mr.?

MS. OKUN: Mr. Moore, Ed Moore.

CHAIRPERSON YOUNG: Okay. He's one of
your witnesses?

MS. OKUN: Yes. He's our only other
witness.

MR. SEITZ: Mr. Chair.

CHAIRPERSON YOUNG: Yes.

MR. SEITZ: At least it would be my
preference that we get a chance to talk with Mr.
Thompson at this point. Otherwise we're going to
be sitting here taking notes. I think it's better
for us and I think for the prosecution that we get
to ask our questions after they make their
presentation, as opposed to trying to take notes
on everybody, and then trying to -- here's my
scribbles --

CHAIRPERSON YOUNG: Is that okay with --

MS. OKUN: Yes.

CHAIRPERSON YOUNG: -- you, Ms. Okun?

MS. OKUN: Yes.

CHAIRPERSON YOUNG: Okay. That just
means we have to do a little accounting here of
time with --

MR. SEITZ: Does our cross-

examination --

CHAIRPERSON YOUNG: Yes, --

MR. SEITZ: -- count towards our time?

CHAIRPERSON YOUNG: Oh, of course.

Yeah, cross-examination time goes to each of the
cases-in-chief.

MR. SEITZ: I just want to register my
objection at this point. This is a quasi-judicial
hearing, and limiting our ability to cross-examine
the prosecution's team by placing a time schedule
I think violates our due process rights.

CHAIRPERSON YOUNG: Mr. Seitz, they have
the same restriction on their time. You can raise
that issue, if you want, later.

MR. SEITZ: I intend to, --

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: -- because the Regional
Water Quality Control Board Staff isn't being
subjected to an $11 million fine, so.

Okay, I'm prepared to talk to Mr.
Thompson at this point.

CHAIRPERSON YOUNG: Okay. And we're
treated the District no differently than we have,
as far as I know, in history with how we handle
these proceedings.

MR. SEITZ: Mr. Chairman, I'm not really
questioning your integrity. I want you to
understand that, or the Commission. This District
is looking at huge fines. And to say, well, wait
a minute, if you really want to cross-examine what
Mr. Thompson -- not cross, I'd ask him questions
is a more fair way of saying that -- asking him
questions, but if you do so, our planned
presentation is going to be shortened.

It seems to me that we should have the
opportunity to explore the testimony of each of
the prosecution team's witnesses without it
impinging or impacting our ability to put on our
defense.

MS. OKUN: Mr. Chair, I have two
responses to that. One is that you asked the
District to estimate the amount of time it needed,
including cross-examination. And two hours was
the estimate they gave you.

Also, our procedures allow for
prehearing depositions and they didn't take any.

MR. SEITZ: That's -- I appreciate Ms.
Okun, and believe me, I respect her ability to put on a case. The point of the fact is that when you don't honor requests for continuances and you have this truncated short period of time there is not opportunity for depositions, number one.

And number two, I think if you take a look at our response, we didn't -- we weren't asked to put in time for cross-examination. I think if you take a look at our response, we didn't put in a timeframe at all.

Mr. McClendon, is that right?

MR. McCLENDON: (Affirmative head nod.)

MR. SEITZ: So we're not arguing here the two-hour time limitation on our ability to put on our case-in-chief. What we are arguing is that we should not be put in a position of truncating our case based on our cross-examination of the prosecution's witnesses.

MS. SCHAFFNER: Mr. Chairman, --

CHAIRPERSON YOUNG: Yes.

MS. SCHAFFNER: -- if I might? The request for the District to estimate the amount of time needed did specifically include cross-examination. And the District asked for two hours and was given two hours.
With that said, that's entirely up to the Chair whether he believes more time is appropriate.

CHAIRPERSON YOUNG: What we'll do is we'll keep track as we have always done with these issues. Mr. Seitz, when we get to the end of this, wherever we're at, then you can state a case for continuance because you need more time for whatever, we'll entertain it, we'll hear it.

MR. SEITZ: Thank you.

CHAIRPERSON YOUNG: You know, anyone who's watched the Water Boards, and how this Region handles things, regardless of the size of the penalty, I'm sure if it was $1 million, you don't have the million dollars, it's a lot of money.

And regardless of how high the millions get, I mean it's kind of, you know, over the top. So I can appreciate the concern, but we're going to do this by keeping track of everybody's time and make sure time is used efficiently and not wasted.

And if there's some issue that needs to be addressed that you feel strongly about, I'll consider it.
MR. SEITZ: Thank you.

CHAIRPERSON YOUNG: Thank you. Okay, you have --

MR. SEITZ: Okay, --

CHAIRPERSON YOUNG: Go ahead.

MR. SEITZ: So, if --

CHAIRPERSON YOUNG: Yes, you're going to be able to cross-examine.

MR. SEITZ: Right.

CHAIRPERSON YOUNG: And when they cross-examine we're taking off from their time.

MR. SEITZ: That's fair.

CHAIRPERSON YOUNG: Oh, yeah. Yeah.

Did you think this was one way?

MR. SEITZ: No, not at all.

CHAIRPERSON YOUNG: Okay, this is both ways.

MR. SEITZ: I agree.

CHAIRPERSON YOUNG: They cross-examine, their clock is coming down.

MR. SEITZ: I agree with that a hundred percent.

CHAIRPERSON YOUNG: Yeah.

MR. SEITZ: So there's no argument; fair is fair. I'm not asking for you to treat us
differently --

CHAIRPERSON YOUNG: Right.

MR. SEITZ: -- than you would treat the prosecution team. And if you took my comments that way, I apologize, because I --

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: -- misstated them.

CHAIRPERSON YOUNG: Okay. Did you have another comment? You were starting to --

MR. SEITZ: No, I just wanted to start with Mr. Thompson.

CHAIRPERSON YOUNG: Okay, let's make sure that -- we have 41 minutes and 27 seconds on their clock. So we're going to start this back at 60. And we'll start with Mr. Seitz' examination, cross --

MR. SEITZ: Thank you.

CHAIRPERSON YOUNG: -- cross-examination of Mr. Thompson. Go ahead.

CROSS-EXAMINATION

MR. SEITZ: I'm going to try and work backwards here just because I can probably read my notes a little bit --

(End Tape 1B.)

MR. SEITZ: -- better. Mr. Thompson,
you made some type of representation that this
current Board is not helping the community. My
question to you is do you know what the -- based
on the recall, who did the community put into
office?

CHAIRPERSON YOUNG: Are you asking him
which new directors?

MR. SEITZ: No, I'm asking this of Mr. Thompson.

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: I'm trying to -- I was just
trying to go back through. He said you have to
ask yourself whether or not the actions taken by
the Board hurt the community. And I guess the
point I'm trying to get from Mr. Thompson in
response is the community elected the current
Board, is that correct?

MR. THOMPSON: Yes.

MR. SEITZ: Okay, thank you. Now, you
made a statement that fines will facilitate the
cleanup of the basin.

And I want everybody to understand here,
I believe the basin needs to be cleaned up, and
I'm not trying to do this.

But how, in this particular situation,
are fines going to facilitate the cleanup of the basin?

MR. THOMPSON: I'd prefer to refer that question to Roger Briggs.

MR. BRIGGS: If that's all right with the Chair, --

CHAIRPERSON YOUNG: Actually, Mr. Seitz is cross-examining this witness, so --

MR. BRIGGS: We collaborated on the presentation and Matt Thompson simply presented it. He's actually the junior person --

CHAIRPERSON YOUNG: Is that okay with you, Mr. Seitz?

MR. BRIGGS: -- in terms of the prosecution team.

MR. SEITZ: Yes. And as long -- I think this is a fair procedure. I think that if Mr. Thompson -- I'm probably going to call him Matt because I know him -- but Mr. Thompson wants to defer then I think Mr. Briggs should put on a presentation in response and then allow me to discuss it with him, or Mr. McClendon. It's fine with me. I just don't want to be asking questions of Mr. Thompson, and if he wants to defer, that's fine. But I'd like to have Mr. Briggs answer the...
questions at the conclusion of my presentation, my
cross-examination. Does that make sense?

MS. OKUN: The staff presentation was on
behalf of the entire prosecution staff, and it's
our general practice that when there are questions
from a discharger being addressed to staff,
they're answered by the staff person most
knowledgeable and most able to respond to the
question.

MR. BRIGGS: Some of them could be legal
questions, and of course, we'd like our counsel to
be able to answer those.

MR. SEITZ: Well, I'm just trying to
cross-examine Mr. Thompson, as what we were told
by the Chair we were going to have the ability to
do. And if he says he wants to defer, that's a
perfectly fine response with me.

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: I'm not here to argue that.
I just want to think that if Mr. Briggs wants to
put on a brief presentation after I cross-examine
Mr. Thompson, that's fine with me, too.

CHAIRPERSON YOUNG: Okay, but I don't
think that's what Mr. Briggs is proposing to do.
I think he's simply trying to answer the question.
that you would like to have from Mr. Thompson.

So.

MR. SEITZ: But Mr. Thompson made the statement, that's the problem I'm having here.

CHAIRPERSON YOUNG: Yeah, but what they're saying is that it's the joint statement of the prosecution team. So, I'll give you the opportunity. You can ask questions of Mr. Briggs right now on this topic.

MR. SEITZ: Well, I --

BOARD MEMBER SHALLCROSS: Mr. Chair, --

MR. SEITZ: -- I'd be happy to come back to Mr. Briggs and ask Mr. Briggs, but I'd just as soon keep my train of thought relevant to Mr. Thompson's testimony.

BOARD MEMBER SHALLCROSS: Mr. Chair.

CHAIRPERSON YOUNG: Yeah.

BOARD MEMBER SHALLCROSS: Was this a statement, like an opening statement by the prosecution, or was this actual testimony?

CHAIRPERSON YOUNG: This is testimony.

BOARD MEMBER SHALLCROSS: So Mr. Thompson is the witness?

CHAIRPERSON YOUNG: Yes.

BOARD MEMBER SHALLCROSS: To everything
he told us?

CHAIRPERSON YOUNG: That's right.

BOARD MEMBER SHALLCROSS: Okay.

CHAIRPERSON YOUNG: But he's telling us he's also relied upon other prosecution team members to develop his testimony.

BOARD MEMBER SHALLCROSS: Yeah, I mean that's the way we always do it. I don't know what the problem is. You're going to get the answer that you want. It doesn't matter who answers.

CHAIRPERSON YOUNG: Mr. Seitz wants to cross-examine Mr. Thompson, and, you know, if he is going to defer to Mr. Briggs, and you don't want to ask Mr. Briggs at this point any questions on that, but want to do it --

MR. SEITZ: Okay, --

CHAIRPERSON YOUNG: -- later, you have the chance to call Mr. Briggs as a witness.

MR. SEITZ: That's fine. That's fine.

If Mr. Briggs -- I will withdraw my objection on the basis that we can call Mr. Briggs. And I guess if Mr. Briggs wants to answer the question as opposed to Mr. Thompson, based on Mr. Thompson's testimony, we'll live with it.

CHAIRPERSON YOUNG: Do you want --
MS. OKUN: I don't think he's proposing to answer the question based on Mr. Thompson's testimony. I think he's proposing to answer the question based on his own knowledge.

I think that if the District has cross-examination for staff, they can just do it all now, as opposed to calling other staff members later as witnesses.

CHAIRPERSON YOUNG: Well, Mr. --

MS. SCHAFFNER: Can I offer a suggestion?

CHAIRPERSON YOUNG: Yes.

MS. SCHAFFNER: I'm not sure if the prosecution team would want to do this, but if CSD really wants to hear Mr. Thompson's response to the question because he's the one who delivered the comments of the prosecution team, they could hear his response on their time. And if Mr. Briggs wants to add to that, since they aren't planning to use all their time, you could add to that on his time. I don't know if they'd want to do that.

And my understanding of what's presented by the prosecution team is a collective summary of evidence already in the record; no new evidence,
correct?

MS. OKUN: That's correct.

MS. SCHAFFNER: Okay.

MS. OKUN: And also, as Mr. Briggs pointed out, if there are any legal questions it's not appropriate for staff to answer those, --

MS. SCHAFFNER: Right.

MS. OKUN: -- on anybody's time.

MS. SCHAFFNER: Okay. And I just wanted to clarify from the dialogue I heard between the Board Members that this is not new evidence being presented. It is a summary of existing evidence in the record because the time for submitting documentary evidence already passed. And this is just a summary of that.

And if there's anything new here we would want to have that pointed out, I suppose.

CHAIRPERSON YOUNG: Okay. Mr. Seitz, the clock has not been running while we get this kind of straightened out.

MR. SEITZ: Okay.

CHAIRPERSON YOUNG: Do you want to ask Mr. Thompson any more questions?

MR. SEITZ: Oh, yes.

CHAIRPERSON YOUNG: Okay.
MR. SEITZ: My feeling is what we've come upon is how will -- my question to Mr. Thompson was in response to his statement that the purpose of the fines was to facilitate the cleanup of the basin.

And the question I've asked him -- which lawyers don't like to ask open-ended questions that they don't know the answers to, but I feel that this is the opportunity that I'm going to have -- is I want to ask Mr. Thompson how will fines facilitate cleaning up the basin.

Now, if the deal is Mr. Briggs gets to answer it, I guess we'll have to live with that.

CHAIRPERSON YOUNG: Is that all right? Mr. Thompson, do you want Mr. Briggs to answer the question?

MR. THOMPSON: Yes.

CHAIRPERSON YOUNG: Go ahead.

MR. BRIGGS: Thanks. It's imperative that we have an enforcement program for our water quality control efforts. If we didn't have an enforcement program we could be assured that we would have massive noncompliance. We've seen that over and over again.

And as we said in our statement, part of
the reason for the penalty was to try to compel compliance which would accomplish cleanup. Part of the reason was for the violations that have already occurred and are actually ongoing at this moment. But our clock on the ACL stopped at time certain before we issued the complaint.

But this Board has seen time and time again that we need to have enforcement in order to compel compliance. It's unfortunate; it would be nice if that weren't the case, but it's absolutely necessary in order to have an effective water quality control program.

And I think Mr. Seitz may be saying that the penalty, itself, does not clean up the basin. However, the fact that there are penalties for noncompliance, the idea is that that consequence does cause dischargers to take actions for cleanup.

MR. SEITZ: I feel in an awkward spot here. I guess I'm going to address that. I want to read from Mr. Briggs' staff report on July 9, 2004 to the Regional Water Quality Control Board:

Los Osos Community Services District has gone to great lengths to address each and every question and objection raised by project opponents. Los
Osos Community Services District has rigorously and successfully responded to each appeal of discretionary approval in each court challenge. Project delays and noncompliance with time schedule order are clearly beyond Los Osos Community Services District's ability to control. Assessment of penalties under order 00-131 would result in bankrupting the Community Services District and their responsibility for the community wastewater project."

How does bankrupting the community facilitate the cleanup of the basin?

MR. BRIGGS: First of all it's up to the Board to determine the appropriate amount of penalties. The District has certainly the ability to provide evidence in terms of its ability to pay. That's one of the factors that the Board has to consider with penalties.

However, one of the things that we, as Mr. Thompson said in our presentation, were telling the District, that if they took a certain action, that was to purposely delay or delay for reasons that were within their control, that they would be subject to substantial penalties. Huge penalties.
And it was certainly our hope that the District would realize that those penalties were real and something that they should be concerned about. And that they would take appropriate actions, and not choose to incur the consequences of those penalties.

Unfortunately, the District has decided to take a course of action where they basically caused us to follow through with what we said we would do, which was issue penalties.

I view that as the District's choice. Why the District would choose to bankrupt itself, I don't know. I think that's a question for them to answer.

MR. SEITZ: So, let me just ask this a little different way. Does, in your opinion, bankrupting the community facilitate the cleanup of the water basin?

MS. OKUN: He's already answered that question.

MR. SEITZ: I'm asking this as a leading question, as a yes-or-no answer. I don't want to argue with Mr. -- his response, but I want to know, there's one statement that issuing fines at any level is going to bankrupt the community and
it's not going to achieve water quality.

We have a statement by the prosecution
team that basically says fines will facilitate
cleanup of the basin.

My question is, as a leading question,
will bankrupting the community lead to the cleanup
of the groundwater basin?

MR. BRIGGS: I think part of the problem
is the context in which Mr. Seitz is looking at
that staff report. At the time we were looking, I
think that was July of 2004, is that correct -- we
were looking at the point in time in July when the
District was proceeding towards the project.

We were asked by the Board to provide a
status report on options that were available
through enforcement. We felt that with the
District moving ahead as quickly as they could
that it did not make sense at that time to impose
penalties. And as we said, bankrupting with fines
mammoth enough to bankrupt the CSD would certainly
not enable the District to proceed with the
project.

The circumstances have obviously
changed. The District has stopped the project
that would obtain compliance. And so we simply
followed through with what we said would happen if they chose to delay.

MR. SEITZ: I take it from your response then that bankrupting the community will not achieve cleanup of the groundwater basin. And I'll move on.

CHAIRPERSON YOUNG: That wasn't a question, was it, Mr. Seitz?

MR. SEITZ: No, but it was a statement, because I asked for a yes or no and I get this --

BOARD MEMBER SHALLCROSS: Isn't this cross-examination? Why is he making statements?

CHAIRPERSON YOUNG: Well, you know, it's all --

MR. SEITZ: I'm interjecting --

CHAIRPERSON YOUNG: Mr. Seitz, let me say this. I think we up here appreciate that assuming a number of things happened and bankruptcy is faced, that it's going to complicate things tremendously, okay?

I think that is reality. No one can say that that's not something that we will probably deliberate about.

MR. SEITZ: Okay.

CHAIRPERSON YOUNG: Okay?
saying thank you doesn't mean I withdraw my
statement.

Mr. Thompson, you talked about the
District entering into a contract with the state
revolving fund. Did you have an opportunity to
review that contract in preparation for your
testimony here today?

MR. THOMPSON: No, sir.

MR. SEITZ: Okay. There was a time
schedule that you had up there, I forget what
slide it is, but I'm wondering if you could
somehow -- the latest one is the one I'd really be
interested in. No, no, keep going, that one.

Thank you.

In 1983 the Regional Water Quality
Control Board adopted resolution 8313, and they
made a number of findings, and we'll probably
present this during our case-in-chief, regarding
the water quality in the Los Osos Community
Services District.

But yet the prohibition effective date
was, as pursuant to your chart, was five years
later. Based on that timeline and your
experience, why was there a delay in enforcing?
MR. THOMPSON: I think I obviously cannot answer that question -- five years old.

MR. BRIGGS: Roger Briggs, the Regional Board Staff. The Regional Board heard a lot of testimony in the 1983 hearing regarding the severe economic impact that a prohibition would have on the community, and that the County project would take five years by the County's estimate to complete.

And even though the staff report and the recommendation that the Regional Board had before it called for an immediate prohibition, which was kind of the norm in terms of this Regional Board and other regional boards, the Regional Board tried to be responsive to the concerns of the community in terms of economic impact and the well being of the community, and agreed that the resolution would be that they'd adopt the resolution but that it would be effective with a time schedule. And there were dates in the interim there for accomplishing the cessation of discharges from the septic systems in 1988.

So it simply allowed the County the time that the country said it would take to build the project until 1988.
MR. SEITZ: And I take it the County did not comply by 1988, is that --

MR. BRIGGS: That's correct, --

MR. SEITZ: I guess I'm --

MR. BRIGGS: That's correct.

MR. SEITZ: I guess I'm now back to Mr. Briggs, Roger.

So, in 1988 the County did not comply with what I'd typically call Regional Water Quality Control Board 8313.

So, what happened in 1988 against the County? What action was taken by the Regional Board?

MR. BRIGGS: The Regional Board made the prohibition effective in 1988. So there were no more discharges allowed after that date. That was the enforcement action that was taken, which was pretty severe.

MR. SEITZ: And in 1995 the County votes to proceed with the project. Am I back to Matt or am I back to Mr. Briggs?

MR. BRIGGS: Depends on the question.

MR. SEITZ: Okay. When -- did the Regional Water Quality Control Board ever issue a time schedule order against the County to proceed
with the project, and at what point in time did
that occur?

MR. BRIGGS: My recollection is that the
Regional Board did issue a time schedule order to
the County and it was in -- I'm getting a little
help -- 1996. It was basically the same time
schedule order.

MR. SEITZ: So is it correct for me to
assume then between 1988 and 1996 there was a
moratorium on building within the prohibition
zone?

MR. BRIGGS: It's not a moratorium on
building, it's a discharge prohibition.

MR. SEITZ: Okay, thank you for the
distinction, a discharge. And that discharge
prohibition is in effect today?

MR. BRIGGS: Correct.

MR. SEITZ: So for seven years between
1988 and 1995 there was a prohibition in effect,
but no action by the Regional Board to compel
basin cleanup? Except for the discharge
requirement.

MR. BRIGGS: The Regional Board also
adopted cease and desist orders again, pretty much
a parallel action to the 1999 cease and desist
orders that Mr. Thompson described in the timeline. And the prohibition was in effect, which actually is one of the most severe enforcement actions a Regional Board can take.

MR. SEITZ: But again, just so I have this clear in my mind, for the record, to the extent that there were cease and desist orders between 1988 and 1996, those cease and desist orders were not enforced?

MR. BRIGGS: We also had a time schedule order in '97. And the facilities were subject to the cease and desist orders, they were in effect.

CHAIRPERSON YOUNG: I think Mr. Seitz is asking whether you took any additional enforcement action during that time period between '88 and '96, other than the issuance of the cease and desist orders, is that correct, Mr. Seitz?

MR. SEITZ: That's correct.

MR. BRIGGS: We were in a very similar mode to the mode that we had been in until the first of October of this year with the Community Services District. We were basically in the same mode with the County. The County was being sued and was having very similar -- running into very similar obstacles to what the Community Services
District later ran into.

And so we had the same enforcement stance, as long as the County was proceeding and doing everything that we felt that they could do to comply with the discharge prohibition, we thought that the enforcement action that we had, which I said was pretty stringent that there's a discharge prohibition, was adequate.

CHAIRPERSON YOUNG: So, Mr. Seitz, the answer is no.

MR. SEITZ: Yeah, I --

CHAIRPERSON YOUNG: They didn't do anything other than issue the CDOs.

MR. SEITZ: Okay. Now, so I'll maybe ask this question of Mr. Briggs. Did you have an opportunity to review the State Water Resources Control Board loan documents in preparation for your testimony here today?

MR. BRIGGS: Which loan documents are you referring to?

MR. SEITZ: The SRF -- thank you. The SRF loan documents that were executed by the State Water Resources Control Board and the Los Osos Community Services District, commonly referred to as the ISA agreement.
MR. BRIGGS: No.

MR. SEITZ: So it would be fair to say that you're not familiar with that particular clause in the ISA agreement that provides that in the event the District is in default, the State Water Resources Control Board has the ability to take the project over and construct the project?

MR. BRIGGS: I have reviewed that.

MR. SEITZ: Is what I just said essentially correct?

MS. OKUN: Objection, that calls for a legal conclusion.

MR. SEITZ: No. I oppose the objection. The question is what I said essentially is what is in the document. I can pull the document.

MS. OKUN: The document speaks for itself, so I would prefer to get the document out and read it.

MR. SEITZ: Okay. So, let's -- and there was a time schedule order for the County to construct the project. I don't know whether this is a question for Matt or a question for -- sorry, Mr. Thompson or Mr. Briggs, but between 1996 and 1998 what happened to the County project?

MR. BRIGGS: Between '97 was the time
schedule order and '98, is that what you're --

MR. SEITZ: Right.

MR. BRIGGS: -- referring to?

MR. SEITZ: I think you said '96 was the time schedule order, but I'm not going to hold you to that. I just want to -- I thought your testimony --

MR. BRIGGS: -- a correction. I believe it was '97.

MR. SEITZ: '97, okay.

MR. BRIGGS: As I recall, the County was trying to get their project through various approvals including the Coastal Commission. I think the Coastal Commission was one of the more significant permits in terms of the amount of time that it took.

MR. SEITZ: Did the Regional Water Quality Control Board at that point when the Coastal Commission -- when the County project was before the Coastal Commission, did the Regional Water Quality Control Board object to the actions taken by the Coastal Commission to delay the project?

MR. BRIGGS: Did we object to the Coastal Commission delaying the project?
MR. SEITZ: Yes.

MR. BRIGGS: We thought the Coastal Commission should approve the County permit, and we appeared at that Coastal Commission hearing and expressed that.

MR. SEITZ: Did the Regional Water Quality Control Board take any action, and as I say this, legal action -- let me back this up. And I don't know if there's anybody here who can testify to this, but did the Regional Board have any legal objection to the actions taken by the Coastal Commission related to the Coastal Commission's actions in delaying the project?

MS. OKUN: Mr. Seitz, could you clarify the question? I don't know what you mean by --

MR. SEITZ: Sure.

MS. OKUN: -- did they take any legal action.

MR. SEITZ: No.

MS. OKUN: Did they sue them, or were there objections based on policy versus law, or what?

MR. SEITZ: I'm going to say both. One, based on policy. Again, I know that you've had a
turnover in legal staff, so I'm not -- I don't
know if Mr. Briggs can testify as to whether or
not the Regional Board objected to the actions
taken by the Coastal Commission based on policy.

MR. BRIGGS: As I said, we objected at
the hearing, and I don't recall if there was a
legal follow-up action.

MR. SEITZ: Okay. And then I think I'll
talk about time schedule order 00-131, a little
different time. Could you then sort of flip
through these, a couple where you have a picture
of Mr. Fouche and President Schicker. Yeah.
Okay, and then the next one. Sorry about that.

Okay. Is it your opinion that
individual Board Members can bind the Board to a
particular policy position as opposed to the
District Board taking action regarding policies?

MS. OKUN: Object, that calls for a
legal conclusion.

MR. SEITZ: No, --

MS. OKUN: And I think it also misstates
the testimony.

MR. SEITZ: Well, right here. We're
going to take a look at the testimony right here
in front of us on slide 15.
Is that the position of Ms. Schicker or is that the result of action taken by the Board of Directors instructing her to say that? Or is that just an opinion of a Board Member at a meeting?

CHAIRPERSON YOUNG: Well, you know what, Mr. Seitz, why don't, you know, in your case you can have Ms. Schicker testify and tell us. I don't know if his opinion --

MR. SEITZ: Well, there --

CHAIRPERSON YOUNG: This says LOCSD President Lisa Schicker. I take from that that, as the President, she's speaking for the Board. If that's not correct, you know, you can have her testify and clarify that.

MR. SEITZ: Okay, well, let's move on --

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: -- to the slide with Mr. Fouche.

Mr. Chair, the reason why I'm bringing this up, just so there's no -- we're playing our cards face up -- is if this was testimony as to why you should find the District -- the District, and what you're predicated finding the District on, it looks to me for all the world, is
statements made by individual Directors, and not policy positions taken by a vote of the District. And I'm just -- that's the point of my questions here, is why are these slides being offered for your review if it's not to have these individuals who are making statements, you know, with or without the authority of the Board. But it seems to me that what you are seeking here is to fine the District, not individual Board Members, and you're predicating that, or putting in evidence of fining the District based on statements made by individual Directors and not actions taken by the Board.

MR. BRIGGS: Mr. Chair.

CHAIRPERSON YOUNG: yes.

MR. BRIGGS: With this slide, Mr. Thompson was simply reiterating a fact that this is actually a point of agreement. That there's no disagreement in terms of the need for a system to solve the problem. So it was supposed to be a point of agreement.

MR. SEITZ: Why don't you go back to the one by Ms. Schicker.

BOARD MEMBER SHALLCROSS: Mr. Chair, --

CHAIRPERSON YOUNG: Yes.
MR. SEITZ: I want that -- that one is clearly --

BOARD MEMBER SHALLCROSS: Aren't these hearsay, anyway?

CHAIRPERSON YOUNG: Well, --

MS. SCHAFFNER: No, --

CHAIRPERSON YOUNG: -- hearsay is kind of, there's a broader exception. And, you know, if these are incorrect statements or statements that have been taken out of context I think then the District can, you know, address those clarifications in their presentation.

But I mean, I read this, Mr. Seitz, that, you know, the President of the LOCSD made this statement, not -- an individual speaks, representing the Board. So I don't take anything more from that than this, and I'll be waiting to hear what you have to say when you put Ms. Schicker on and she can tell us.

MR. SEITZ: I just want to make this point or this observation in response to all of this. Is the Community Services District is governed by specific code sections found in the Government Code. And pursuant to those code sections, the only way that the Board can take
action is by motion, resolution or ordinance.

In other words, Ms. Schicker, even as
the President of the Board, cannot take unilateral
action on her own without there being a motion, a
resolution or an ordinance. And I think that's
the point that I want to drive home here is --

CHAIRPERSON YOUNG: Mr. Seitz, this is
your opportunity to cross-examine witnesses. And
I know you want to get that explanation in, but
you'll have your opportunity to do that.

I just want to keep things moving the
way we had laid them out with examination, cross-
examination. So, do you have any more questions
for anyone on the prosecution team?

MR. SEITZ: I've concluded with my
questions at this time, except -- okay, no, I am,
I am.

CHAIRPERSON YOUNG: Okay. All right.

MR. BRIGGS: What was the time?

CHAIRPERSON YOUNG: 34.09. And I did
stop it, you know, kind of awhile ago as we got
into this a little bit, so we could get it kind of
straightened out. But that's where we're at.

All right. Any other witnesses, then?

We're going back to the prosecution staff's
witnesses.

MS. OKUN: Does the Board have questions for staff before I call our witness?

CHAIRPERSON YOUNG: Let's see, Board questions?

VICE CHAIRPERSON JEFFRIES: I have one question --

CHAIRPERSON YOUNG: Mr. Jeffries.

VICE CHAIRPERSON JEFFRIES: -- for Mr. Thompson.

EXAMINATION BY BOARD

VICE CHAIRPERSON JEFFRIES: You stated the amount of the penalty. And can you reiterate how that was calculated, and from what period of time to what period of time? And is it for more than one location, or just one location?

MR. THOMPSON: As you can see from this chart, Mr. Jeffries, --

VICE CHAIRPERSON JEFFRIES: Can you speak up, Matt, a little bit?

MR. THOMPSON: Yes. The penalty amount of $11,190,000 was based on the days the District was out of compliance with the time schedule orders schedule only.

VICE CHAIRPERSON JEFFRIES: Mr.
Thompson, I think my question was, and what I'm trying to do is clarify how you got to that particular number for all the people who are sitting behind you, so they understand exactly how those numbers were derived.

And my question was from what period of time to what period of time. And I think there's some confusion. Is it for the whole CSD? Is it for three locations, four locations, one location?

Because when you were making that presentation I noticed some of the folks in the audience had kind of a puzzling look on their face and they didn't really understand, that's the reason I'm asking the question.

I have it here. I understand.

MS. OKUN: I think I can actually explain that. I think it's a legal question. The time schedule order isn't specific to one location versus another location. It's to correct violations of various prior orders that were already in default based on different discharges.

The time schedule order just set forth a schedule to the District, do this task by this date; do the next task by the next date. And it wasn't allocated between any specific locations.
So the way these violations were calculated is that we looked at the first date that was not met, which was the requirement I believe to obtain all permits. And from the due date to the date they acquired all permits, that's how that was calculated.

There was a requirement to complete construction that was last year. And from that due date until we cut off the time clock in order to issue the complaint, there were that many days of violations.

And then we eliminated any overlaps because it was a sequential schedule. So once they got to task number five, and they were in violation of task number four, we didn't charge them for four and five on any day. There was one per day.

VICE CHAIRPERSON JEFFRIES: Okay. Ms. Okun, could I ask you an additional question?

MS. OKUN: Um-hum.

VICE CHAIRPERSON JEFFRIES: Is that on a calendar day or is that a business day?

MS. OKUN: Calendar day.

VICE CHAIRPERSON JEFFRIES: Calendar day. Thank you.
CHAIRPERSON YOUNG: Any other questions of Matt? You have a question? Go ahead.

MR. THOMAS: On page 2 of the worksheet you make reference to Water Code section 13350(e)(2). And that section allows or authorizes the Board to assess a fine, assess liability of $10 per gallon.

I'm wondering why -- and the maximum, you calculated the maximum. It says $830,220,000 is the maximum fine. And I wondered why you instead used a different section rather than that section.

MR. BRIGGS: Well, as Ms. Okun said earlier, it's in the alternative. And we chose to rely on actually the lower amount that the time schedule order violations generate.

MR. THOMAS: Why? I mean why, just because it's a lower amount?

MR. BRIGGS: No, I don't think so. The maximum liability under the time schedule order is -- is it 32 million -- oh, I'm sorry.

We included the maximum liability for the three discharges, which could run it up to a maximum liability of almost 33 million. And I guess we felt that that was sufficient in terms of
this action.

MS. OKUN: There are two different bases to assess liability for violation of the prohibition. It's either on a daily basis or a per-gallon basis. And usually enforcement actions are on a daily basis. We just didn't do that calculation.

That amount, the 830 million, is not in the complaint. So the Board can't assess $830,000,000 in this proceeding without reissuing the complaint and renoticing it. It's just in there for reference that the penalties actually could be very much higher than $11 million.

MR. THOMAS: Do you think, from a legal perspective, that one of these Water Code sections is more appropriate than another? Or more valid than another, more defensible than another?

MS. OKUN: No.

MR. THOMAS: They're both equally defensible?

MS. OKUN: Yes.

MR. THOMAS: And they're both equally applicable in this case?

MS. OKUN: Yes.

CHAIRPERSON YOUNG: Mr. Shallcross.
BOARD MEMBER SHALLCROSS: So if I understand this right on the two code sections that you're arguing in the alternative, one of them is on the -- would be a violation of the time schedule order. And that would be based on the fact that they violated the time schedule order, and you go to whatever action it was they were supposed to have done.

Now, the other one, as I understand, is the basin plan violation. And that's where you look at the entities, the septic tank systems?

MS. OKUN: Yeah, there's only one entity. The entity is the District, but --

BOARD MEMBER SHALLCROSS: Okay, the --

MS. OKUN: -- we were alleging --

BOARD MEMBER SHALLCROSS: -- the facilities.

MS. OKUN: Right, the facilities.

BOARD MEMBER SHALLCROSS: Whatever facilities. So the --

MS. OKUN: So there were three facilities; the daily maximum is $5000 a day. So for three facilities the daily maximum is $15,000 a day, and we just counted days of discharge.

BOARD MEMBER SHALLCROSS: This is really
interesting because one is a violation of an order
by the Services District, and the other is a
violation of the basin plan, and yet you can only
argue in the alternative.

MS. OKUN: Arguably. And --

BOARD MEMBER SHALLCROSS: Oh, okay.

MS. OKUN: -- there's a reading --

BOARD MEMBER SHALLCROSS: But you are
only arguing in the alternative. Okay.

MS. OKUN: Yeah, there is a reading of
section 13308 that you can allege both the basin
plan violation and the time schedule order
violation, you just can't order the time -- or
allege the time schedule order violation and the
cease and desist order violations.

I think that in this case because the
penalties are very high, and there's, in our
opinion there was no reason to assess 40 million
versus 35 million, that there's no reason to -- it
was cleaner to take the more conservative reading
of the statute --

BOARD MEMBER SHALLCROSS: Right.

MS. OKUN: -- and have one less thing to
argue about.

BOARD MEMBER SHALLCROSS: I see, because
the action under those two code sections, the
action that the CSD would have to take to cure
their violation are completely different actions.
I mean they could have simply turned off
the septic systems and that would have cured that.

MS. OKUN: You can't really turn them
off; you have to --

BOARD MEMBER SHALLCROSS: Not that they
could, but --

MS. OKUN: -- stop using them.

BOARD MEMBER SHALLCROSS: -- not use
them.

MS. OKUN: Yeah.

BOARD MEMBER SHALLCROSS: And on the
other, to cure the violation of the time schedule
would be to continue building the plant. So, it's
sort of interesting that it would take two
completely separate types of actions, and yet
you're arguing it in the alternative.

CHAIRPERSON YOUNG: Well, they're kind
of related. I think that, you know, certainly the
easiest way to stop the discharge is to --

BOARD MEMBER SHALLCROSS: Quit
discharging.

CHAIRPERSON YOUNG: -- get the plant --
well, yeah, you know.

BOARD MEMBER SHALLCROSS: Yeah.

CHAIRPERSON YOUNG: Or pump out septic tanks.

BOARD MEMBER SHALLCROSS: Right.

CHAIRPERSON YOUNG: Don't let the effluent get into the ground. Because that's what the problem was.

BOARD MEMBER SHALLCROSS: But the time schedule order violation isn't based on --

CHAIRPERSON YOUNG: No.

BOARD MEMBER SHALLCROSS: -- the continued basin plan violation.

CHAIRPERSON YOUNG: That's correct. That's the way I read that.

BOARD MEMBER SHALLCROSS: Yeah. Okay.

CHAIRPERSON YOUNG: Okay, any other Board questions? Okay.

Do you have another witness, Mr. Briggs?

MS. OKUN: Yes.

CHAIRPERSON YOUNG: Let me reset this. And, Mr. Seitz, the clock's not running and we'll do the same when the Board starts engaging in all this discussion.

MS. OKUN: Mr. Ed Moore.
CHAIRPERSON YOUNG: That's all of our time being here. Okay, the clock goes back to what, 41.27. Okay.

Okay, I just need to get something straight, now. Are we going to lose Darrin Polhemus?

MS. OKUN: I checked with his secretary and she said he's usually there until 5:00. And I left a message that we thought we would get to him by 5:00; I said between 3:30 and 5:00.

CHAIRPERSON YOUNG: Okay, so we just --

MS. OKUN: He has this cellphone number and that hasn't buzzed.

CHAIRPERSON YOUNG: Okay. All right.

Go ahead, Mr. Briggs.

DIRECT EXAMINATION

MS. OKUN: Mr. Moore, could you state your name for the record, please.

MR. MOORE: My name is Ed Moore; I'm the Project Manager for Monterey Mechanical. We're the general contractor at the Tri-W site for the wastewater treatment plant.

MS. OKUN: And Monterey Mechanical is the contractor to actually build the treatment facility as opposed to the collection and disposal
systems?

MR. MOORE: That's correct.

MS. OKUN: How long have you worked in the construction industry?

MR. MOORE: Twenty-five years.

MS. OKUN: On October 3rd of this year did the CSD direct Monterey Mechanical to stop work on the project?

MR. MOORE: Yes, they did. We received a phone call from Mr. Buel at approximately 6:00 in the morning asking us not to go to work that day. And subsequently we got a letter with more specifics on what we were supposed to do.

MS. OKUN: And then did anything happen between October 3rd and October 20th?

MR. MOORE: On October the 12th I received a cellphone call from Mr. Dan Bleskey, the Interim General Manager, indicating that our contract was going to be terminated, and that he was calling me as a courtesy to let me know. And that he didn't want me to read that in the newspaper the following day.

I contacted the President of our company, Milt Burlson (phonetic) to let him know that. And I also contacted Dillon Wade, the
resident engineer for Montgomery Watson who
confirmed that that was the case and they'd been
asked by Mr. Bleskey to write that termination
letter to Monterey Mechanical.

    MS. OKUN: You said Mr. Bleskey is the
Interim General Manager. He's the Interim General
Manager for the District?

      MR. MOORE: For the CSD, yes.

      MS. OKUN: What was Montgomery Watson's
role in the project, or what is their role?

      MR. MOORE: They were both the design
engineer and our dealings with them was the
construction manager.

      MS. OKUN: On October 21st did the
District notify Monterey Mechanical to resume
work?

      MR. MOORE: We received two letters on
the 21st. One indicated that we were supposed to
return to work. There was a second letter,
though, that also conditioned that return to work
that said that we had to have a preconstruction
conference. And that we also -- it was
conditioned on the resumption of funding by the
state.

      MS. OKUN: And at that time did the
District tell you anything about whether the loan would be funded?

MR. MOORE: No, they did not.

MS. OKUN: When was your next meeting with Mr. Bleskey?

MR. MOORE: We actually met the following day on the 23rd; it was a meeting that they had termed the preconstruction conference.

At that time we indicated that if funding was resumed that we'd be able to go right back to work. And Mr. Bleskey indicated that that wasn't the case, that there were special conditions related to the Tri-W site. There weren't any further discussions at that time. There was a meeting set up on that date where we ended up having a dinner meeting on the 28th with Mr. Bleskey.

MS. OKUN: And what did Mr. Bleskey request Monterey Mechanical to do at that meeting?

MR. MOORE: At the dinner meeting Mr. Bleskey indicated the negotiations with the state had gone well, and that it appeared that there'd be a two-year suspension of the project.

He was wanting to know if we were interested in what he termed standing down for
that two years where the District would release
our bond and allow us to basically demobilize. We
wouldn't be terminated, but we'd be in a, it was
called stand-down, but kind of a suspension mode.

MS. OKUN: Did Mr. Bleskey offer to
terminate the construction contract at that time?

MR. MOORE: No, we asked why that wasn't
going to be done, and he indicated that he
couldn't do that because the state wouldn't allow
it.

MS. OKUN: And what was Monterey
Mechanical's response to this stand-down proposal?

MR. MOORE: We indicated that we had
come to Los Osos to build the project, and that we
really weren't interested in anything else, other
than that.

MS. OKUN: Did you have any further
contact with him before November 8th?

MR. MOORE: I believe there was one
informal meeting with myself and the
representatives from Bernard and Whittaker in his
office.

MS. OKUN: And what happened at that
meeting?

MR. MOORE: He just indicated that -- he
solicited help from us to contact the state to
reinstate the loan. And he had indicated at that
time that he knew that my call to the president of
the company was then forwarded on, passed on to
the state, so they were aware that we had been
called and told that we were going to be
terminated.

CHAIRPERSON YOUNG: What date was that?
MR. MOORE: The date for which?
CHAIRPERSON YOUNG: That you got that
call.
MR. MOORE: I got that call on October
the 12th.
MS. OKUN: So it was before the October
28th dinner meeting?
MR. MOORE: Yes.
MS. OKUN: Okay. And then on November
8th Monterey Mechanical received a resume-work
letter from the District?
MR. MOORE: Yes, we did. It was also
conditioned, though. It said that we had to have
another meeting with Montgomery Watson and the
District to discuss restarting the work and what
the scope of the work would be at that time.
MS. OKUN: And you had that meeting on
November 8th?

MR. MOORE: We had the meeting on November the 8th. At that time Mr. Bleskey indicated that we would have to have a subsequent meeting the following day to go over what our revised scope would be at the Tri-W site.

MS. OKUN: On November 8th did Mr. Bleskey say anything about whether the District intended to construct the project at Tri-W?

MR. MOORE: Yes, he did. I asked during the meeting if the District intended to build the Tri-W site even if Measure B was repealed or found to be illegal. And he indicated that they would not build at Tri-W, even in the absence of Measure B.

MS. OKUN: Did Mr. Bleskey say anything about other funding options available to the District if they lost the State Board loan?

MR. MOORE: He indicated that there were no other options. That they had looked into others, but at that time there were no other options.

MS. OKUN: And then did you meet again on November 9th?

MR. MOORE: Yes, we did meet with again
Montgomery Watson, at the meeting on the 8th
Whittaker and Bernard were also in attendance. On
the 9th it was just ourselves, Montgomery Watson
and the District.

At that time Mr. Bleskey went through
some different scenarios as far as what the
rescoping of our project would be, and indicated
that everybody wasn't at that meeting to make that
determination, that the state would have to be
involved in that.

He also -- we asked again then, because
at that time the District had voted on the
resolution and the proposal to the state, and I
had asked Mr. Bleskey it didn't seem that those
proposals lined up with the statements that he was
making in the meeting. Because he was indicating
that the site would not be built at Tri-W -- or
the treatment plant would not be built at Tri-W.

I asked if even if the Prop 218 vote was
taken did they still not intend to build at Tri-W
and he said that that was the case, the Board
would not build at Tri-W even if the Prop 218 vote
was successful.

MS. OKUN: And even if Measure B was
invalidated?
MR. MOORE: That's correct.

MS. OKUN: Have you received any communications from --

CHAIRPERSON YOUNG: Excuse me, --

MS. OKUN: -- the District since November 9th?

CHAIRPERSON YOUNG: Excuse me, Ms. Okun.

How many times did he make that statement to you?

MR. MOORE: At that meeting?

CHAIRPERSON YOUNG: I mean through your discussions with Mr. Bleskey.

MR. MOORE: At each one of my meeting with Mr. Bleskey --

CHAIRPERSON YOUNG: I mean where he indicated that we're not going to build at Tri-W regardless of Measure B, regardless of a 281 vote.

MR. MOORE: The comment about the 218 vote only happened on the November 9th meeting. But at each one of our meetings I'd been asked to ask Mr. Bleskey or the District that question, if they intended to build at Tri-W, since that was a great concern of ours.

And in each meeting that we had the answer was always the same, that they would not build at the Tri-W site.
CHAIRPERSON YOUNG: Okay.

MS. SCHAFFNER: Mr. Chair, if I might ask?

CHAIRPERSON YOUNG: Yes.

MS. SCHAFFNER: Just to clarify, do you have the dates, can you get the dates of each one of those meetings off the top of your head?

MR. MOORE: It was November the 9th, November the 8th; it was our dinner meeting on the 28th.

MS. SCHAFFNER: October 28th?

MR. MOORE: Yes. And there was another meeting before that but I don't recall the date.

MS. SCHAFFNER: Before October 28th?

MR. MOORE: Yes.

MS. SCHAFFNER: Okay, thank you.

MS. OKUN: Do you have notes that you could look at that have the dates in them?

MR. MOORE: I don't have all my notes with me, no. But I do have notes that I could refer to.

MS. OKUN: With you?

MR. MOORE: Not with me, no, I'm sorry.

MS. OKUN: Okay. What work has Monterey Mechanical done at the site since October 3rd?
MR. MOORE: We followed the District's
direction in the October 3rd letter where we were
supposed to maintain security at the site. We've
also installed the SWPPI measures we were required
to do.

And the Coastal Commission permit
required that we do dust control on the sites; we
water the site twice a day.

But other than that, there's been no
work go on since then.

MS. OKUN: And the SWPPI measures are
the Storm Water Pollution Prevention plan
requirements under the construction permit?

MR. MOORE: That's correct.

MS. OKUN: Why hasn't Monterey
Mechanical regraded the site, the Tri-W site?

MR. MOORE: We've never been given
direction on what to do by the District. We've
sent, I believe it's three letters to the District
asking for clear direction on how we're supposed
to proceed. And we've never been given that
direction.

The last meeting on the 9th, at the end
of the meeting it was agreed that that meeting
would not be deemed a rescoping meeting because
the District was unable to give us any direction on how we were to proceed.
And we made it clear at each of those meetings that we were maintaining the standby posture that we'd been asked to do on October the 3rd.

MS. OKUN: Thank you. I have no other questions.

CHAIRPERSON YOUNG: Any questions by the Board?

VICE CHAIRPERSON JEFFRIES: Yes, Mr. Chair.

CHAIRPERSON YOUNG: Mr. Jeffries.

EXAMINATION BY BOARD

VICE CHAIRPERSON JEFFRIES: You mentioned that you had a meeting and they wanted to change the scope of your work. How did that affect your contract you had with them? Did you have your contract with the CSD directly, or through Montgomery?

MR. MOORE: Our contract's with CSD.

VICE CHAIRPERSON JEFFRIES: Okay. Then my question would be how did it affect your -- did they give you a change list of the scope of work they wanted you to do?
MR. MOORE: We had requested that, a formal notification on what the changes would be, and we never received that.

VICE CHAIRPERSON JEFFRIES: Is your company contracted for the whole project, or just a portion of?

MR. MOORE: We are only doing the wastewater treatment plant at the Tri-W site; we're not doing the collection systems.

VICE CHAIRPERSON JEFFRIES: Okay. So you're just construction management for Tri-W only?

MR. MOORE: We're the general contractors; we'd actually be building the facility.

VICE CHAIRPERSON JEFFRIES: Oh, okay. So you do both, okay. Thank you.

CHAIRPERSON YOUNG: I think I saw some letters. Were they attached to the prosecution team's reply or rebuttal that came in?

MS. OKUN: From Montgomery Watson --

CHAIRPERSON YOUNG: Yes.

MS. OKUN: Yes.

CHAIRPERSON YOUNG: That's his company?

MS. OKUN: No. His company is Monterey
Mechanical. Montgomery Watson is the construction supervisor that designed --

CHAIRPERSON YOUNG: Okay. In your discussions with Mr. Bleskey or anyone else connected to the CSD, did they indicate that they were going to dismiss their complaint in the Superior Court and work to get the appeal dismissed?

MR. MOORE: There was never any indication one way or the other.

CHAIRPERSON YOUNG: Okay. Thank you.

Ms. Okun. Let's see, we'll have cross-examination.

MR. SEITZ: Thank you.

CHAIRPERSON YOUNG: Hang on one second and we'll set our clock. Mr. Seitz, hold on. 31.25. Okay, now I've got to reset this; 34 on that. Okay, go ahead. Go ahead, Mr. Seitz.

CROSS-EXAMINATION

MR. SEITZ: First of all you talked about a number of letters exchanged, letters from the District to you and letters from your company to the District.

Did you bring those with you?

MR. MOORE: I did not bring the letters
with me, no. And to clarify, there's one letter from the District to us on -- well, there's a letter on October 3rd; there was a subsequent letter that was sent to Milt Burlson.

But our letters always were returned to Montgomery Watson, because that's the way the contract was set up. So our letters were sent to Montgomery Watson and then passed on to the District.

MR. SEITZ: Okay, so those letters weren't directly to the District. They required Montgomery Watson as an intermediary to make sure those letters got to the District?

MR. MOORE: That's correct, that's how the contract required correspondence to go.

MR. SEITZ: So, have you given copies of those letters to the prosecution team?

MR. MOORE: Yes, we have.

MS. OKUN: Just to clarify, we received copies of three letters in the last -- this week. And I have those with me if the Board wants to see them. They're letters from the District to the construction contractors, Monterey Mechanical as well as the other two construction contractors. They're in the record.
MR. SEITZ: I guess I'm willing to accept that as long as the statement is that all letters are in the record, and there aren't records that are -- and I'm not saying this mean-spirited or anything. I just want to have assurances that all of the letters that have been exchanged by Monterey Mechanical and the District are in the record.

MS. OKUN: We don't have all the letters. I have three letters, and I'd be happy to have copies made at the break.

MR. SEITZ: I'll take a look --
CHAIRPERSON YOUNG: Mr. Seitz, --
MR. SEITZ: Huh?
CHAIRPERSON YOUNG: -- I don't care to read any more letters, --
MR. SEITZ: Well, I do.
CHAIRPERSON YOUNG: -- myself, but if you want to use them, get them introduced, that's fine with me.
MR. SEITZ: That's fine.
CHAIRPERSON YOUNG: If they want to use the letters and get them introduced through this witness, that's fine, too.
MR. SEITZ: Well, I --
CHAIRPERSON YOUNG: I mean he can refer -- the witness can refer to just a couple of letters.

MR. SEITZ: I don't want to sound argumentative, all I want to do is make sure that the record has all the letters that he is testifying to in the record. That's my only reason to ask this question.

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: Secondly, to your knowledge did your company ever contact the state, the State Water Resources Control Board?

MR. MOORE: I have no knowledge of that, no.

MR. SEITZ: Okay. And by the way, at this hearing hearsay is allowed, so if you heard from your company that they contacted the state, I believe that under the rules here it would be admissible.

CHAIRPERSON YOUNG: Yeah, it would be.

MR. SEITZ: Is it --

MR. MOORE: I'm not aware of any personnel in our company contacting the state directly, no.

CHAIRPERSON YOUNG: And you didn't
overhear any conversations on the phone or --

MR. MOORE: Not a conversation with the
state, no.

MR. SEITZ: Okay. Let me see if I can
clarify. Then how about the State Water Resources
Control Board?

CHAIRPERSON YOUNG: Okay, Mr. Racano,
please, this is not the place for photographs.
Please don't do that again.

MR. MOORE: No, not the State Water
Resources --

CHAIRPERSON YOUNG: Yes, you.

MR. MOORE: -- Control Board.

MR. SEITZ: And lastly, I'm sure you
would agree that your company has an interest in
constructing -- a financial interest in
constructing at the Tri-W site?

MR. MOORE: Yes. As I stated earlier,
that's why we came here was to build the project
there.

MR. SEITZ: Okay.

CROSS-EXAMINATION

MR. McCLENDON: Mr. Moore, when you
spoke to Mr. Bleskey about the, as you put it, the
courtesy conversation, is that your words, a
1 courtesy call?

2 MR. MOORE: That was what Mr. Bleskey deemed it, was that it was a courtesy call.

3 MR. McCLENDON: Were you aware of any Board action? By that I mean the CSD Board authorizing a termination of your company's contract?

4 MR. MOORE: No, I was not.

5 MR. McCLENDON: Had you ever received notification in accordance with the terms of that contract under their termination provisions that your contract was being terminated?

6 MR. MOORE: No, I have not.

7 MR. McCLENDON: Was it your belief that Mr. Bleskey could unilaterally and without any Board action whatsoever summarily terminate your company's contract?

8 MR. MOORE: It was my understanding based on that phone call, and then the follow-up to Montgomery Watson to confirm that they'd been asked to write a letter of termination to us that someone must has authorized that termination.

9 MR. McCLENDON: But you're not aware of any action that you can identify on the part of the CSD Board that would have authorized the
termination of your company's contract. Is that a correct statement?

MR. MOORE: Yes, it is.

MR. McCLENDON: Okay. Are you aware of the fact that the State Board SRF loan folks on October 13th informed the CSD that they were withholding the second disbursement on the SRF loan payment to the CSD Board on account of a call that Monterey Mechanical had made to their office?

(End Tape 2A.)

MR. MOORE: I'm aware that loan payment was held up, but it was not based on a phone call from Monterey Mechanical.

MR. McCLENDON: So you would disagree with the statement that was made by the State Board to the CSD?

MR. MOORE: It wasn't -- that phone call was not made by Monterey Mechanical personnel.

MR. McCLENDON: Do you know who made it?

MR. MOORE: It could have been made by counsel.

MR. McCLENDON: Your lawyer?

MR. MOORE: Yes.

MR. McCLENDON: Thank you.

CHAIRPERSON YOUNG: Can we just take a
one-minute break? I think Mr. McClendon wants to confer with Mr. --

CHAIRPERSON YOUNG: Sure. Okay, stop the clock.

VICE CHAIRPERSON JEFFRIES: Mr. Chair.

CHAIRPERSON YOUNG: Yes.

VICE CHAIRPERSON JEFFRIES: I'd like to ask Ms. Okun, I'd like to see those letters in question.

CHAIRPERSON YOUNG: Do you have copies, Mr. Seitz, of those letters?

MR. SEITZ: We certainly have those records that were attached. I think we have three letters, and they're kind of dark because they were sent -- looks like they may have been sent over the fax.

But what I'm not sure that we have is the letters from the District to Monterey Mechanical.

VICE CHAIRPERSON JEFFRIES: Ms. Okun, are those part of the documents that I have already?

MS. OKUN: We put the Montgomery Watson letters in the record with our staff rebuttal. I think that what Mr. Moore was talking about were
three letters that Monterey Mechanical wrote to
the District via Montgomery Watson. And I have
those. They're not in the record, but I have
them.

There were also letters from the
District to Monterey Mechanical at various times
saying stop work or start work with conditions.

VICE CHAIRPERSON JEFFRIES: Those are
the ones I want to see.

MS. OKUN: Those are -- okay. Those are
in the record, and I can --

CHAIRPERSON YOUNG: Yeah, and those are
part of the rebuttal documents, I believe.

MS. OKUN: The stop-work letters, I
believe, were in both our and the District's
original submissions.

VICE CHAIRPERSON JEFFRIES: Well, there
are some documents I have that are so dark I can't
read them properly.

MS. OKUN: Those are the Montgomery
Watson letters, and those were the best copies we
had.

VICE CHAIRPERSON JEFFRIES: They're a
blue background.

CHAIRPERSON YOUNG: Okay.
VICE CHAIRPERSON JEFFRIES: Hard to read.

CHAIRPERSON YOUNG: Mr. Seitz, or Mr. McClendon, did you want to resume?

MR. McCLENDON: A few more questions.

CHAIRPERSON YOUNG: Sure. Go ahead.

MR. McCLENDON: Do you know who Barbara Evoy is?

MR. MOORE: I've seen that name on correspondence. She's with the state, I understand.

MR. McCLENDON: Yes. She's the, I believe she holds the position of Chief of the Division of Financial Assistance for the State Water Resources Control Board.

Is it your testimony that you've never had a conversation with Barbara Evoy?

MR. MOORE: Yes.

MR. McCLENDON: Are you aware of the fact that Barbara Evoy claims she had a conversation with you?

MR. MOORE: No, I'm not.

MR. McCLENDON: Thank you.

CHAIRPERSON YOUNG: Any other questions, Mr. McClendon? Okay.
BOARD MEMBER PRESS: Mr. Chair.

CHAIRPERSON YOUNG: Yes, Dr. Press.

EXAMINATION BY BOARD - Resumed

BOARD MEMBER PRESS: Could we see the letters to Monterey Mechanical?

MS. OKUN: To Monterey Mechanical?

BOARD MEMBER PRESS: To Monterey Mechanical.

MS. OKUN: Let me put those up on the screen.

BOARD MEMBER PRESS: Thank you.

CHAIRPERSON YOUNG: Now, these are not in the record?

MS. OKUN: Yes, they are.

CHAIRPERSON YOUNG: They are, okay. Can you tell us the document numbers?

MS. OKUN: Yes.

CHAIRPERSON YOUNG: The exhibit numbers.

(Pause.)

MR. BRIGGS: We'll be able to zoom in.

MS. OKUN: Actually the first one is not scanned, but do you have the October 3rd letter?

We can make copies of the October 3rd letter; we don't have a scanned copy of it that we
can put up.

What's the date of this one?

MR. BRIGGS: November 9th.

BOARD MEMBER PRESS: That's not actually what I wanted to see.

MS. OKUN: No, that's -- no.

BOARD MEMBER PRESS: No. That's a letter from Monterey Mechanical. I wanted the letter to Monterey Mechanical, either the October 3rd or the October 12th letter.

CHAIRPERSON YOUNG: Mr. Moore, while they're looking for that I've got a question for you. Is part of your contract, do you know if you have what would be called liquidated damages --

MR. MOORE: Yes.

CHAIRPERSON YOUNG: -- for each day that you have been prevented from working or ordered to stop working?

MR. MOORE: Well, there's liquidated damages for when we don't meet the milestone dates in the contract.

CHAIRPERSON YOUNG: Okay.

MR. MOORE: There's an interim milestone date and then a final completion date for the project.
CHAIRPERSON YOUNG: Okay, so that goes against you if you don't complete. What about if the District puts your work on hold or standby? Do they owe you any money?

MR. MOORE: There's terms in the contract to come to that amount, but it's not a set amount.

CHAIRPERSON YOUNG: How is it configured?

MR. MOORE: There's verbiage that allows certain things to be included in that request for compensation, and they're listed out in, I believe it's section 15 of the contract. I don't have them memorized, though.

CHAIRPERSON YOUNG: Okay. Has the District told you that it's going to compensate your company for those items?

MR. MOORE: No, they haven't. We have had no discussions along that line.

CHAIRPERSON YOUNG: Okay.

MS. OKUN: We have a blurry copy of the October 3rd letter, and we're looking for a cleaner one that we can put on the overhead projector. We'll just put it on the screen.

CHAIRPERSON YOUNG: You might blow that
up as much as possible.

MR. THOMPSON: Would you like me to read
the letter --

CHAIRPERSON YOUNG: Yes, please, go
ahead.

MR. THOMPSON: This is an October 3rd
letter from the Community Services District
General Manager Bruce Buel, although it was signed
by, I believe, Karen Vega for Bruce Buel.

To Milt Burlson of Monterey Mechanical
in Oakland. Subject line, suspension of work
pursuant to specification 15.1. Dear Milt: The
LOCSD Board, on October 1, 2005, ordered immediate
suspension of all work, pursuant to specification
15.1 of our contract, for up to 90 days. This
letter is LOCSD's formal notice to suspend work
subject to the following qualifications."

"First, contractor shall winterize all
work pursuant to the stormwater pollution
prevention plan into specifications in the
contract document. Two, contractor shall maintain
dust control as specified in contract document.
Contractor shall comply with all County permit
compliance requirements. Contractor shall provide
for security protection of materials and equipment
in staging areas. Lastly, contractor shall
maintain a standby posture until further notice.
LOCSD will provide further guidance under separate
cover. Thank you for your cooperation."

CHAIRPERSON YOUNG: Dr. Press.

BOARD MEMBER PRESS: Mr. Moore, could
you tell me if this letter, in your view, was a
stop-work order?

MR. MOORE: Yes, it was.

BOARD MEMBER PRESS: Would you expect
any other kind of letter representing the
District, the CSD, would it have to be signed by a
CSD Board of Directors to be more legal or did you
take it as the official stop-work?

MR. MOORE: That was the official stop-
work. We would take any correspondence from the
General Manager as being official District
correspondence.

BOARD MEMBER PRESS: To your knowledge
are there any requirements in your contract
stating that orders have to come from the District
and not the General Manager, the District Board of
Directors, excuse me?

MR. MOORE: No, there's not. The
correspondence is to come through Montgomery
Watson. And these letters were subsequently passed on to us by Montgomery Watson.

BOARD MEMBER PRESS: But from the General Manager?

MR. MOORE: Yes.

BOARD MEMBER PRESS: I see. Thank you.

CHAIRPERSON YOUNG: Any other questions, Dr. Press? Mr. Hayashi.

BOARD MEMBER HAYASHI: Mr. Moore, what happens at the end of 90 days? Is your contract null and void?

MR. MOORE: That's a legal question, I couldn't answer. There's no terms in that section that say what happens after that 90-day suspension.

CHAIRPERSON YOUNG: Do you go back to work?

MR. MOORE: No.

BOARD MEMBER HAYASHI: I mean it says that --

CHAIRPERSON YOUNG: It doesn't say you don't go back to work.

BOARD MEMBER HAYASHI: Yeah, 15.1 --

MR. MOORE: 15.1 is a section in the contract that talks about suspension and
termination. Originally there was wording in that
section that said after the 90 days we could
terminate the contract. But that was deleted by
addendum. So I honestly don't know after that 90
days what would happen; it's kind of open.

CHAIRPERSON YOUNG: I just have a
question for Mr. Seitz and Mr. McClendon. I
didn't appreciate it until the last few moments
here. Is it the District's position that a letter
such as this was not authorized by the District,

I mean you'll have to help me with that.

MR. McCLENDON: There have been -- and
it's a good question, I appreciate it, Mr.
Chairman. As mentioned earlier, the District acts
three ways, through motions, resolutions and
ordinances. And it's restricted statutorily to
that.

There have so far been -- there's been
one motion October 3rd, allowing for the temporary
suspension. That was two days after -- three days
after the new Board was sworn in, for a brief
timeout. That was done by motion.

Since that time, as you know, there have
been two resolutions that have been approved with
regard to the State Board SRF loan, and I think those are before you, as well.

Other than that there has not been any other motion for termination or anything of that sort.

(Pause.)

MR. McCLENDON: Can I ask Mr. Bleskey to --

MR. BLESKEY: The way construction contracts normally operate, it --

CHAIRPERSON YOUNG: Yeah, Mr. Bleskey, I'm really just trying to cut to the heart of this document. Is it the District's position that this was unauthorized?

MR. BLESKEY: No.

CHAIRPERSON YOUNG: Okay.

MR. BLESKEY: Because the General Manager is the owner's representative, and that was by motion when the contract was awarded and funding was authorized and obligated. Those are key.

The other thing is is that section 15.1 is entitled suspension of work, which is a contractual remedy allowed by the contract, approved by the state, reviewed by the Regional
Board Staff. That allows for suspensions when you come to situations which are common whenever you break the earth that need a timeout.

    We had a situation where we had Measure B. We were abiding by Measure B. We needed time to assess the hydraulic implications on the system as we evaluated which collection system that we could construct and use in any circumstance.

    CHAIRPERSON YOUNG: Okay.

    MR. BLESKEY: And that's what that clause provides.

    CHAIRPERSON YOUNG: Okay. And I understand that. I'm just trying to get to the point as to what your position is with this document. And I just want to make sure it was authorized to be sent out as written?

    MR. BLESKEY: Yes, sir.

    CHAIRPERSON YOUNG: Okay. That's all I wanted to clarify. Okay.

    Any additional questions for Mr. Moore?

    Okay. Ms. Okun?

    MS. OKUN: No.

    CHAIRPERSON YOUNG: And I think that, Mr. Seitz and Mr. McClendon, you're finished with this witness? Okay. Thank you, sir.
Okay. Go ahead. Any other witnesses.

MS. OKUN: We have no other witnesses.

CHAIRPERSON YOUNG: No other witnesses.

Okay. Well, you're down to 27.09, so an hour and 27 minutes on -- that was their clock. Yeah, an hour and 27. So let me just check --

MS. OKUN: Do you want to take a short break and try to get Mr. Polhemus on the line?

CHAIRPERSON YOUNG: Okay. Do we need to ask him any questions?

MS. OKUN: We don't, but if the Board has questions for him, this would be a good time. Or I can see if he's available tomorrow.

CHAIRPERSON YOUNG: Okay. Does the Board have any questions for Mr. Polhemus? He was involved with the state revolving loan fund, and he's available by teleconference in Sacramento.

BOARD MEMBER SHALLCROSS: Yeah, I think we really haven't heard a whole lot of information on that aspect. And I'm wondering if he might be available tomorrow --

CHAIRPERSON YOUNG: Okay.

BOARD MEMBER SHALLCROSS: -- at some point.

MS. OKUN: If we could take a five-
minute break I can --

CHAIRPERSON YOUNG: Take a five-minute break --

BOARD MEMBER SHALLCROSS: I'd like to hear more from, you know, from both sides, or at least from the discharger.

CHAIRPERSON YOUNG: Okay, five-minute break.

(Brief recess.)

CHAIRPERSON YOUNG: Okay, folks, please, we're going to resume. And, Mr. Seitz, what we're going to do at this point before we turn it over to you, I wanted to call Bruce Buel to the stand, ask him some questions, while this topic with these letters and what Mr. Moore just told us is fresh.

MR. SEITZ: Yeah.

CHAIRPERSON YOUNG: You'll have an opportunity to ask him questions, also.

MR. SEITZ: I just wanted to just make a quick observation. I just wanted to move all of the slides that the State Water Resources Control Board prosecution team has left up on the wall, to make sure that they are included in the administrative record, and the Chair agrees.
MS. OKUN: Yes, they are.

CHAIRPERSON YOUNG: Yes.

MR. SEITZ: Thank you.

CHAIRPERSON YOUNG: Yeah, they are.

Okay, Mr. Buel.

EXAMINATION BY BOARD

CHAIRPERSON YOUNG: Were you aware that this letter was going out? Is that your signature on the bottom, or is that --

MR. THOMAS: Could he state his name for the record?

CHAIRPERSON YOUNG: Oh, yeah, go ahead.

MR. BUEL: I'm Bruce Buel, General Manager, Los Osos Community Services District, on administrative leave.

CHAIRPERSON YOUNG: Okay. And when did you start with the Community Services District?

MR. BUEL: I was hired by the District on November 16, 1999.

MS. SCHAFFNER: And when were you put on administrative leave?

MR. BUEL: October 1, however also on October 1 I was directed by the Board to issue these three letters; you have a copy to Monterey Mechanical. I was also directed by motion to
transmit letters to Bernard and Whittaker.

CHAIRPERSON YOUNG: And who gave that instruction to you?

MR. BUEL: The Board of Directors. That was by motion on October 1 at their meeting that evening before they placed me on administrative leave.

CHAIRPERSON YOUNG: Was that an open session or closed?

MR. BUEL: That was open, the open session portion of the agenda.

CHAIRPERSON YOUNG: Okay. Mr. Jeffries, did you --

VICE CHAIRPERSON JEFFRIES: No, I think I was -- I had some concerns because one of the attorneys for the appellant is saying there's only --

CHAIRPERSON YOUNG: You mean the District.

VICE CHAIRPERSON JEFFRIES: District, excuse me. There was only, I think, quoted three ways of giving direction. And I know, being a chair of a special district, there are other ways of giving direction to a general manager. And it doesn't have to be by motion; it doesn't have to
be resolution; and it doesn't have to be by
ordinance.

And can you give me some insight -- I
think you said it was by motion, and it was a
vote. Was it a 100 percent vote?

MR. BUEL: Yes. There was 100 percent
unanimous vote of the Board of Directors to direct
me to issue these three suspension letters.

VICE CHAIRPERSON JEFFRIES: And then I
see somebody signed that for you. Is that because
you were then placed on administrative leave?

MR. BUEL: No, sir. I had a planned
vacation. I actually drafted this letter in the
lobby of the St. Francis Hotel in San Francisco.
I had made arrangements with Karen Vega, who's my
administrative secretary, to appear at 8:00 a.m.
that morning.

I called Monterey Mechanical, Whittaker
and Bernard at 6:00 a.m., because they are
supposed to mobilize by 7:00. I wanted to give
them time to stand down.

And at 8:00 a.m. I dictated three
letters and directed my secretary to sign them on
my behalf.

VICE CHAIRPERSON JEFFRIES: Are you
under the impression with this letter that it's a permanent work stoppage?

MR. BUEL: No, sir, I am not. My belief, and I believe the Board's motion, was to suspend construction activity, at least at that time. As you know, subsequently Measure B has been deemed valid, and at this point it would be up to the Board to determine if they have the ability to reactivate the contract with Monterey Mechanical.

VICE CHAIRPERSON JEFFRIES: Okay.

CHAIRPERSON YOUNG: Mr. Buel, we heard from Mr. Moore, and he had indicated that he had been given direction by Mr. Bleskey that the contract was going to be terminated. I think he mentioned that on a number of instances.

Can you tell us what you know about that? Did the Board at all or --

MR. BUEL: I apologize that I can't answer that question. Since I wrote this letter I've not been in any of the direct negotiations or in communication with any of the contractors.

I have attended Board meetings, but only the open session portion of those Board meetings. I have not participated in any of the closed
session discussions.

CHAIRPERSON YOUNG: Okay, so basically

the date of this letter kind of highlights for us

when your knowledge of events going on with the

District really came to a conclusion, except what

the public would also know?

MR. BUEL: Indeed.

CHAIRPERSON YOUNG: Okay. While you're

here with us, I'm wondering if you can tell us

something about the operating and maintenance

expenses as they were projected for the Tri-W

plant once it was to be completed. Did you have

that for an annual basis, a monthly basis?

MR. BUEL: Actually, I apologize, I

cannot do that. The Montgomery Watson Harza

developed a O&M projection at $2.5 million per

year for the entire system.

But to my knowledge there was not a

separate breakout for the treatment plant versus

the collection or the disposal works.

CHAIRPERSON YOUNG: Okay, but this is

operation and maintenance for the entire system?

MR. BUEL: Um-hum, that's correct.

CHAIRPERSON YOUNG: And that's the

facility and the collection system?
MR. BUEL: Yes, sir.

CHAIRPERSON YOUNG: Okay.

VICE CHAIRPERSON JEFFRIES: Mr. Buel, while the Chairman is consulting with the attorney, was this discussion or the direction given to you, was that in an open session or closed session?

MR. BUEL: It was open session; this was an agendized item. This was the first formal meeting of the Board. They had had a pre-meeting before they were sworn in. The election was the 27th of September. The Registrar of Voters certified the election results on the 29th. And this meeting was a special meeting held on October 1; I believe it was a Saturday evening.

VICE CHAIRPERSON JEFFRIES: Have you attended other Board meetings since that period of time?

MR. BUEL: Yes, I've attended about half of the additional Board meetings on my own. Now, I did attend one meeting at the direction of the District; the other meetings I've attended of my own interest.

VICE CHAIRPERSON JEFFRIES: The meeting that you attended on the request from the Board,
was that an open session or closed session you attended?

MR. BUEL: Just the open session.

VICE CHAIRPERSON JEFFRIES: The meetings that you attended and the one that you were requested to be there, on the agenda was it noticed on the closed session portion of that agenda that they were going to be discussing the contracts or the work stoppage?

MR. BUEL: I do not remember seeing that item on any closed session agenda.

VICE CHAIRPERSON JEFFRIES: Okay, thank you.

CHAIRPERSON YOUNG: Okay, what can you share with us that you know about the Board's position with respect to Measure B, and what their intent was before the recall election took place?

I mean we know that they had a lawsuit that had been filed. We know it was up on appeal. But I'm interested to know what the individual Directors, you know, the positions that they had with it.

MR. SEITZ: Mr. Chairman, --

CHAIRPERSON YOUNG: Yes.

MR. SEITZ: -- I just want to raise a
little bit of an objection on ambiguity. I don't
know if you're talking about -- maybe Mr. Buel
knows, but whether or not we're talking about the
prior Board before the recall election, the Board
that was running for the recall, or the Board that
was appointed after the recall. All I'm asking
for is to make sure that --

CHAIRPERSON YOUNG: Okay. When Ms.
Schicker and Ms. Tacker were the two newer members
on the Board, with the three recent ones that were
recalled, when it was that Board constitution,
what were the discussions that were taking place
amongst the Board members with respect to
maintaining the lawsuit challenge and positions
that they might take depending on what happened
with the recall or the passage of Measure B?

Do you have any --

MR. BUEL: I do not believe the Board
discussed those in open session. I believe the
only discussion was retention of special counsel.
And I believe --

CHAIRPERSON YOUNG: Were you there in
closed session?

MR. BUEL: Yes. Up until October 1 I
have attended every closed session of the District
since November 16, 1999.

CHAIRPERSON YOUNG: Okay. Mr. Seitz,
you had a --

MR. SEITZ: I was just going to raise
the objection that you were asking for closed
session. Mr. Buel caught it, so --

CHAIRPERSON YOUNG: Okay. All right.

Any other questions from the Board? Mr.
Shallcross.

BOARD MEMBER SHALLCROSS: I just
wondered, are you going to be available tomorrow?

MR. BUEL: Yes, sir.

BOARD MEMBER SHALLCROSS: Okay.

CHAIRPERSON YOUNG: All right, thank
you. Mr. Thomas.

MR. THOMAS: Mr. Buel, you said that you
recall a $2.5 million per year operation and
maintenance cost for the total facility
including -- for the facility and the distribution
system.

MR. BUEL: Um-hum.

MR. THOMAS: You have no feeling for how
that breaks out? Is it 50/50 or 70/30?

MR. BUEL: Tomorrow I can bring the
detail; what the engineer provided is an estimate
of energy, labor, materials; there's a number of contingency requirements and replacement, an obligation that we have under the installment sales agreement.

So, what that would establish is those classifications of OM&R costs into the future. Now, some of those are more heavily leveraged towards the treatment facility and some are more heavily leveraged towards distribution and disposal.

So, tomorrow I could provide a guesstimate of how that would break out.

CHAIRPERSON YOUNG: Okay, I would appreciate it if you would do that, if you could bring the documents then, so that we have them if we need to take a look at -- the District has them?

MR. BUEL: Yes, well, most of my files have been removed from my office, and the only caveat is I would need Mr. Bleskey's permission to access those files.

CHAIRPERSON YOUNG: Have they been identified or marked, Mr. Seitz?

MR. SEITZ: I believe Ms. Schicker --

CHAIRPERSON YOUNG: Ms. Schicker has
them?

MR. SEITZ: -- is representing to me that they're part of her presentation to the Board, so if Mr. Buel's here -- I think he's going to be because he's part of my presentation.

CHAIRPERSON YOUNG: Okay.

(Laughter.)

MR. SEITZ: He's sort of a multi-tasker here. That you will probably get a chance to see those.

CHAIRPERSON YOUNG: Good. Okay. Well, we'll see you tomorrow, then, --

MR. SEITZ: Can I just ask Mr. Buel just one question?

CHAIRPERSON YOUNG: Of course. Yeah, and Ms. Okun, then you can ask him any questions.

CROSS-EXAMINATION

MR. SEITZ: Mr. Buel, you testified that the $2.5 million was for collection and treatment. It also included disposal, did it not?

MR. BUEL: Yes, sir.

MR. SEITZ: It's all three operations?

MR. BUEL: I agree with that.

MR. SEITZ: Thank you.

CHAIRPERSON YOUNG: Okay. Wait a
minute, I think we have one more.

MS. SCHAFFNER: One quick clarifying question. What was the name of that consultant again, Mr. Buel, that prepared that estimate for the District?

MR. BUEL: Montgomery Watson Harza.

MS. SCHAFFNER: Thank you.

CHAIRPERSON YOUNG: Okay, Mr. McClendon.

CROSS-EXAMINATION

MR. McCLENDON: Mr. Buel, is it fair to say that you're not completely retired on administrative leave, that you are actually taking a moderate amount of work as a special projects manager for our District?

MR. BUEL: I have agreed to provide the District with any research that is requested. And I actually end up working about two hours a day to satisfy those requests.

MR. McCLENDON: Okay, and just a last question. As a General Manager, would you have ever terminated a contract without cause without taking that to your Board for direction?

MR. BUEL: No, sir.

MR. McCLENDON: Thank you.

MS. SCHAFFNER: I'm sorry, Mr. Chairman,
can --

CHAIRPERSON YOUNG: Yes.

MS. SCHAFFNER: -- I have one more question.

CHAIRPERSON YOUNG: Of course.

MS. SCHAFFNER: Earlier in your testimony, I'm not sure if I heard you correctly, you said that with Measure B being invalidated by the courts, is that your understanding that the current posture of Measure B is that it is no longer valid, or that it is valid?

MR. BUEL: Well, this is hearsay because the only thing I know is what I read in the papers. The papers have alleged that as a result of the District's action to dismiss the underlying complaint and the appellant's action to withdraw the appeal, that that holds the stay intact from the Appellate Court.

And I'm not an attorney, and this is way beyond my competence, so --

MS. SCHAFFNER: So, what you said was you believe Measure B stands as a result of the withdrawal from the litigation?

MR. BUEL: Um-hum.

MS. SCHAFFNER: Okay. And do you have...
any, in your dealings with the District, have you
had any basis to have an understanding of what
they believe the status of Measure B is?

MR. BUEL: I have talked to Mr. Seitz
and asked his opinion. He also believed that it
was, at this point, standing. But I honestly
don't know if that was in John's role as counsel
to the District, or as an attorney at large.

MS. SCHAFFNER: Okay, thank you, sir.

CHAIRPERSON YOUNG: Okay, Ms. Okun, do
you have any questions?

MS. OKUN: No.

CHAIRPERSON YOUNG: Okay. All right,
thank you, Mr. Buel.

All right, where do I want to set this?
It's going to be Mr. Seitz and Mr. McClendon.

27.09, okay. You guys are on.

MS. SCHICKER: Chairman Young, --

CHAIRPERSON YOUNG: Yes.

MS. SCHICKER: -- and the Board, I'd
just like to start off with the introduction of
our presentation, please.

CHAIRPERSON YOUNG: Go right ahead.

MS. SCHICKER: Thank you. My name is
Lisa Schicker; I'm the President of the LOCSD
Board. And we have four to five presenters today in our presentation. We're going to start out with the attorneys, Mr. McClendon and Mr. Seitz; followed by Mr. Bleskey, the Interim General Manager; followed by Rob Miller, -- we have a slide for the speakers --

(Cellphone ringing.)

CHAIRPERSON YOUNG: Someone didn't hear me earlier.

MS. SCHICKER: And then followed by Mr. Rob Miller, he's our District Engineer; --

CHAIRPERSON YOUNG: Okay.

MS. SCHICKER: -- followed by myself, followed by Mr. Chuck Cesena. And then I'm going to follow again at the end of the presentation.

I have a special request this evening. We also have a Board meeting tonight following this meeting. And you mentioned 7:45, and 7:00 would be a little better for us because we have a long closed session meeting after that that we'll be attending, and we have it televised and agendized, and people are expecting to be there, too. So, -- pardon? Can you also give us a reading on the time? Our presentation is about an hour long, maybe 40, 45 minutes --
CHAIRPERSON YOUNG: You're got an hour and 26 minutes.

MS. SCHICKER: Okay, because we want some time for rebuttal, as well.

CHAIRPERSON YOUNG: Yeah.

MS. SCHICKER: An hour and 20?

MS. SCHAFFNER: Yes.

MS. SCHICKER: Okay.

MS. SCHAFFNER: Thank you.

MS. SCHICKER: Okay, and then I'd like to state for the record and disclosure, disclosure about any Director who's speaking today. We're all speaking as individuals. We have no right to speak on behalf of the Board. All opinions and views expressed are our own, not to be imputed to be that of the District.

So, that's just how it has to be because of the way the District operates.

CHAIRPERSON YOUNG: Okay, then I have a question for you, Ms. Schicker. Is anyone authorized to speak on behalf of the Board?

MS. SCHICKER: The only way the District is authorized to speak is through motion,
resolution or ordinance, as a Board. And we have our District counsel to represent us, as well.

BOARD MEMBER SHALLCROSS: And so you didn't authorize anyone to speak for the Board?

MS. SCHICKER: We're all speaking as members of the Board, that's all we can do; that's the way we're organized.

BOARD MEMBER SHALLCROSS: No, it's not. The Board could have authorized someone to speak for them. And my question --

MS. SCHICKER: And that would be --

BOARD MEMBER SHALLCROSS: My question is did you do that?

MS. SCHICKER: Well, that would be Mr. McClendon, then.

CHAIRPERSON YOUNG: Okay.

BOARD MEMBER SHALLCROSS: Okay.

CHAIRPERSON YOUNG: All right.

VICE CHAIRPERSON JEFFRIES: Mr. Chair, I also have a question.

CHAIRPERSON YOUNG: Go ahead.

VICE CHAIRPERSON JEFFRIES: I believe you have four or all five of your Board members here now?

MS. SCHICKER: Yes, that's true. We
agendized a special meeting so we could all
attend. And we're not allowed to take any action.

VICE CHAIRPERSON JEFFRIES: So this
meeting is noticed?

MS. SCHICKER: Yes, it is.

VICE CHAIRPERSON JEFFRIES: So you could
take action today because you do have --

MS. SCHICKER: No. We can't take action
because we agendized it as a special meeting with
no actions to be taken.

CHAIRPERSON YOUNG: Okay.

MS. SCHICKER: That's how we did it so
we could all attend.

CHAIRPERSON YOUNG: Okay. All right.
I'll resume the clock. Here we go. Go ahead.

MR. McCLENDON: Thank you, Mr. Chair --

MS. OKUN: Excuse me, if the Directors
aren't speaking on behalf of the District, and
only the District's lawyers are speaking on behalf
of the District, it seems to me that the Directors
should be part of the public comment period.

CHAIRPERSON YOUNG: Well, --

BOARD MEMBER SHALLCROSS: I think they
can be called as witnesses.

CHAIRPERSON YOUNG: Yes.
BOARD MEMBER SHALLCROSS: I'm not sure who should -- if she's just speaking for herself now, as a witness? Is that what you're doing right now?

MS. SCHICKER: Mr. Shallcross, we have prepared, very diligently we have practiced for this presentation. We have parts and pieces all allocated and our time has been done. We're ready to go. We would really just --

BOARD MEMBER SHALLCROSS: That's fine, can you answer my question?

MS. SCHICKER: What is your question, sir?

BOARD MEMBER SHALLCROSS: Are you speaking for yourself right now?

MS. SCHICKER: Yes, I am.

BOARD MEMBER SHALLCROSS: Only.

MS. SCHICKER: I'm speaking -- we have a presentation to make to your Board.

CHAIRPERSON YOUNG: But that could be problematic because, I mean I need to know -- they spoke on behalf of the prosecution team as an entity, so are you speaking as a member of the public right now?

MS. SCHICKER: I am the President of the
Board; I am -- generally I am a spokesperson for the Board when it comes to the press. Would that be enough to allow me to speak and do the presentation today? I've practiced, I'm prepared, we're ready to go.

CHAIRPERSON YOUNG: Well, are you speaking on behalf of the Board when you give this presentation? Or is this as a witness? Mr. Seitz, it's a little --

MR. SEITZ: Maybe I can just hopefully clarify this, although I doubt it. First of all, I think that just as these individuals up here we've heard testifying for the prosecution team, and I assume that there's no formal Board action by this Board or any other board designating them to speak on behalf of the whole Board, as the prosecution team.

My feeling is that the speakers that are coming up here are speaking as part of the defense team.

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: But they want to make it clear for the record that there has been no motion with a document says, okay, you can read this document, or you can do this or say this.
I believe that for my purposes is that you can take what they are saying as officers of the District. And being on the defense team.

Our whole issue before, I know this may sound confusing, and I think Mr. Buel in his dialogue with Mr. McClendon pointed it out, the managers have certain inherent authority. I mean you don't have to say sign this letter, go to the Board and say sign this letter, make sure that's okay with the Board to sign that letter. A manager works as the administrative arm of a Board. I mean that's the way it works.

The question is on material substantive issues, if a Board forms a contract can the General Manager terminate the contract. And our position is the answer is no, unless the contract says the manager can terminate the contract, which is what we typically call, as lawyers, the equal dignities rule. You terminate under the same form that you formed the document.

So our position is just this. That when individual Board members speak for the Board in these hearings regarding the formation of this complaint, just because Ms. Schicker says something or Mr. Fouche says something it
shouldn't be imputed to the Board as Board policy, that that was the key policy that triggered this ACL complaint, because it simply wasn't Board action. It wasn't the Board speaking for the Board, it was individuals speaking for themselves.

Now, maybe that's a distinction without a difference, but the reality is that, you know, when somebody says you've breached the contract with the contractors, because Joe Bob -- I don't think there's a Joe Bob in here, hopefully there's not -- who happens to be a director said that.

It's just the same as you folks. You folks can't impose a penalty on your own -- I assume this is the case, is that individual Board members sitting before us can't take action on behalf of the Board as individuals, you need to get to a Board meeting, following the Brown Act, take action.

I think that's a difficult -- I know that there's a fuzzy line in there, and I'm not saying it's perfectly black and white. But the District's position is that only the Board can terminate these contracts.

CHAIRPERSON YOUNG: Okay, and I understand that. I think we do understand that.
But I just want to make sure that if any of the individual CSD Board Members are going to be speaking, that they are speaking as Board members; and that they are authorized to speak as Board members. And whatever they tell us is going to be consistent with Board policy.

MR. SEITZ: Well, --

CHAIRPERSON YOUNG: And that, you know, I'm not going to hear later that well, you know, that's not what it was, you heard something that, you know, is not what you think it is.

MR. SEITZ: I think the best way to handle that, as a practical matter, is everybody is sworn in under penalty of perjury.

CHAIRPERSON YOUNG: Correct.

MR. SEITZ: So, I don't want to speak for the Chair here, but I think when they begin their testimony, are you speaking on behalf of the District or are you speaking as an individual would be the question the Chair would want to ask them so that there'd be absolute clarity at that time.

CHAIRPERSON YOUNG: Okay. And just so you know, our staff doesn't represent the Board. If they did represent us, we probably may not have
had this hearing because they'd have inherent power to carry this out on their own. So, there is a big distinction there.

MR. SEITZ: I agree.

VICE CHAIRPERSON JEFFRIES: Mr. Chair, before you go --

CHAIRPERSON YOUNG: Mr. Jeffries.

VICE CHAIRPERSON JEFFRIES: -- with this presentation I'd like to make a correction. We're not under the Brown Act, we're under the Bagley-Keene --

MR. SEITZ: I know.

VICE CHAIRPERSON JEFFRIES: -- Act.

MR. SEITZ: I know, and I --

VICE CHAIRPERSON JEFFRIES: Just for --

MR. SEITZ: -- appreciate the difference.

CHAIRPERSON YOUNG: Okay. All right. Ms. Schicker, we'll restart the clock and, as the CSD President, go ahead and give us your presentation.

MS. SCHICKER: Thank you very much, Mr. Young.

DIRECT TESTIMONY

MS. SCHICKER: I'd like to start out by
just explaining briefly the organization of the presentation. We kind of have a three-pronged approach. Some of the things have been touched on already in some of the cross-examination. But the three prongs are this:

The ACL complaint is not timely or consistent with enforcement policy.

CHAIRPERSON YOUNG: Could you speak a little louder so all can hear?

MS. SCHICKER: Sure, is this better?

CHAIRPERSON YOUNG: Yes, that's better.

MS. SCHICKER: Okay. The first point of our presentation will be that the ACL complaint is not timely or consistent with enforcement policy. And our attorneys will handle that part of the presentation.

The complaint is not applied appropriately to regulatory standards or requirements.

And thirdly, the complaint should consider actions by the CSD to comply with the regulations and to abate pollution.

Here's the list of speakers that we've already gone over.

And this is a summary to our response.
And this is where Mr. McClendon will begin.

MR. McCLENDON: Good afternoon, Mr. Chairman and Members of the Board. My name is John McClendon. I will be handling this with Mr. Seitz, taking a bifurcated approach here similar to those of you who are attorneys, in a common tort situation you typically bifurcate. And you look at first, liability, is there culpability here, causation. And then secondly, only if you establish that then you go to the issue of what are the damages, what is the liability.

And -- louder? Okay. I'll pull it closer. I would hope -- I was going to use a horrific example from World War II to start off, but I don't think I need to do that. I just want to cut to the chase here and say that what I think I'd like us to all agree on at the get-go here is that whatever our disagreements are, we can have consensus on it's wrong to punish the innocent. And it's wrong to punish them hugely. The culpability has to be demonstrated here.

I think in the common law the old saying was it's better for ten guilty to go free than for one innocent to be punished. And certainly there's a proportionality issue in that, as well.
So I would urge you to please keep an open mind on part one of this. And listen carefully to see if there is that requisite culpability in what has gone on here.

In that regard I'll start with the time schedule order from October 27, 2000. I think you've seen this before. In paragraph 13 of that order it says, at the end of it, this is where it establishes the $10,000 per day penalty. It says, "Furthermore, because the Board does not intend to punish or redress previous violations, this order provides that the Board may extend the time for compliance for delays beyond a reasonable control of the CSD."

Immediately after that was issued, a timely petition to the State Board was filed in November. And one of the -- in fact, the first reason for filing it was saying that the project delays alleged are beyond the reasonable control of the petitioner.

I would like to point out that ever since the year 2000 this staff and this Board has been commendably fair in not punishing the innocent. Granted this CSD wanted, from the get-go, to contest the time schedule order. However,
there appears to be, -- and again I'm new at this,
I've just been with the Board two months today --
but there was some sort of an agreement, a tacit
agreement that forward progress was being made;
the time schedule order would not be enforced.

   And, for example, I think you've seen
this before, in July 9th of 2004 where you do your
quarterly updates at this Board on seeing how was
the CSD progressing, you looked at the fact that
the time schedule order was long since overshot.
But you said, "Los Osos CSD has gone to great
lengths to address each and every question,
objection raised by project opponents. Los Osos
CSD has rigorously and successfully responded to
each appeal, discretionary approval and each court
challenge. Project delays and noncompliance with
the time schedule order are clearly beyond Los
Osos CSD's ability to control. Assessment of
penalties under order 00-131 would result in
bankrupting the CSD and the responsibility for the
community wastewater project would likely revert
to San Luis Obispo County. Such action is not
likely to result in a resolution of water quality
problem at Los Osos in a timely manner."

   Going on, --
CHAIRPERSON YOUNG: Excuse me, what was that document, again?

MR. McCLENDON: That was your report July 9, 2004, staff agenda report.

CHAIRPERSON YOUNG: So that was the staff report?

MR. McCLENDON: Yes.

CHAIRPERSON YOUNG: To the Board?

MR. McCLENDON: Yes, to --

CHAIRPERSON YOUNG: Okay, thanks.

MR. McCLENDON: Yes. You also looked at the idea of what the CSD had been asking for for quite some time, because we knew we were long since beyond the deadlines on the time schedule or the milestones.

You looked at revising the time schedule order. And apparently this was turned down. But even in turning it down you said, quote, "Current delays are caused by the fact that the Coastal Commission took over permitting authority for the project from San Luis Obispo County. And the permit approval timeframe is unknown."

So as of July 2004 you were still consistently on this path of saying they're moving forward, there's no culpability, there's no
liability.

All that changed apparently on October 29th when it became known that a draft ACL complaint was being prepared by -- I'm sorry, thank you, September 29th when it became known that a draft ACL complaint was being prepared the morning after the election. You've seen that in our papers.

In that it doesn't mention the temporary suspension that was mentioned by Mr. Buel on October 1st. However, the worksheet does allude to the temporary suspension.

Then since that time, and this is one of the reasons why we had a real difficulty in feeling like we're shooting at a moving target, we're not really sure is it something that happened prior to October 6th, which triggered the time schedule order issuance, or is it something after that. Because we're talking a whole lot about what happened afterwards.

Arguably that maybe is the business of another time schedule order, and ought to be something for continuance.

But it's questionable what it is that happened after October 6th that creates
culpability. And we've seen a lot, and I think Mr. Seitz was pointing to this, and I'm glad for the questions we had just before we started here about on what basis are these Directors speaking.

And let me just clarify this. This Board is operating as an adjudicatory body, like judges. And the California Supreme Court has said the doctrine -- this is County of Los Angeles v. Superior Court of Los Angeles County, 1975 Supreme Court case, quote, "The doctrine which precludes judicial delving into the subjective mental processes of individual legislators is a corollary of the related legal principle which establishes that the validity of a legislative act does not depend on the subjective motivation of its draftsman, but rests instead on the objective effect of the legislative terms."

The Supreme Court went on and said, "The validity of legislation does not turn a legal legislative motive, the mental processes of individual legislators become irrelevant to the judicial task. Hence, we do not appear into these subjective subjects -- subjective realms."

CHAIRPERSON YOUNG: Could I just ask you, are we dealing with legislative acts of the
CSD?

MR. McCLENDON: Well, that's the issue.

What are the acts of the CSD? How have they acted? Under the code that governs them, and it's in my papers. I could find the code section, if you'd like. It says that a Board only acts one, as a quorum; and two, when a quorum approves something by motion, resolution or ordinance.

And so according to what the courts have said, it doesn't matter what people said in the heat of campaign, it doesn't matter the statements that are made, what matters is what have they done. What actions have they taken.

This is picked up again in a case called Ensign (inaudible) Realty Corporation v. City Council, the City of Livermore, a 1977 case.

CHAIRPERSON YOUNG: And is that also dealing with legislative acts of that administrative agency or board?

MR. McCLENDON: Let me find the quote here.

MS. OKUN: Could you find the cite while you're at it, I didn't get the title of the case --

MR. McCLENDON: Oh, sure. It's
68CalAp.3d, 467. It says, "As often as not, members of administrative bodies make decisions for unarticulated reasons. Often the discussions at a public hearing are guided by the direction taken by members of the public who speak. These discussions may or may not include what is significant to a given member of the agency. There are a host of reasons why the utterances of councilmen at public hearings cannot be said to encompass the totality of their thought processes. It would be manifestly nonproductive to require that once a councilman started discussing the merits of a decision that he was being called upon to make, he must set forth all of his opinions on the subject under discussion. Such an inhibiting factor would lead inevitably to silent council meetings. The members of the public would lose the benefit of open discussion of the public business. Conversely, public statements made by members of the city council to the effect that their decision is based upon considerations of public health, safety and welfare cannot make the decision valid if it is, in fact, arbitrary or unreasonable. The decision of the city council must be found reasonable or unreasonable based
upon its effect in light of the facts as they exist relevant to that decision."

So what courts say is we don't go into the realm of psychiatrists; we don't start trying to understand the psychology, the mentality of what goes on in the thought process or the political agendas or all of that. We're looking at what have they done.

Here, what we have is we have, as you know, the temporary suspension which barely 13 days later, I believe, tried to be lifted. The day after it was lifted, or news got out that we were talking about lifting it, I received a letter from the attorneys fighting the Measure B lawsuit saying, quote, "Because Measure B was successful it is now law and fully applicable to Community Services District activities. In particular, Measure B terminates construction contracts for construction of a sewage treatment plant at the Tri-W site under their own terms. Please be advised that our clients, Case and Al Barrow, are fully prepared to enforce Measure B if the District takes action contrary to its spirit and provisions. Accordingly, we ask that the District terminate the existing contracts and refrain from
further construction activities related to the
Tri-W site. Doing so will avoid yet another
lawsuit requesting injunctive relief."

So here's this District caught between
Measure B, and nobody's denying that there was a
lot of campaign statements that were made out
there, but within ten days after that October 3rd
letter, they're trying to restart the project.
They get this saying, you're going to get sued on
that. They're caught between a rock and a hard
spot.

What happened --

CHAIRPERSON YOUNG: Mr. McClendon, how
could they restart the project? They weren't
going to have funds from the State Water Board. I
mean --

MR. McCLENDON: We didn't know that at
that time.

CHAIRPERSON YOUNG: That was cut off.

Did the District really think that they could
adhere -- excuse me, Mr. Bleskey -- did the
District really think it could adhere to Measure B
and not be in violation of the State Water Board
loan?

MR. McCLENDON: Well, the --
CHAIRPERSON YOUNG: Is that what the District was --

MR. McCLENDON: The District was wrestling with that. This was a new Board. We had initially --

CHAIRPERSON YOUNG: Well, whether it's a new Board or not, there's attorneys advising the Board on the contract --

MR. McCLENDON: Right.

CHAIRPERSON YOUNG: -- and the agreement.

MR. McCLENDON: Right.

CHAIRPERSON YOUNG: And so I'm assuming that they're getting competent legal advice as to how to conduct themselves. And from what I understand, you've told me Al Barrow's group is kind of threatening the District that they're going to go after the District.

MR. McCLENDON: Right, um-hum.

CHAIRPERSON YOUNG: Now, did it make any difference if the Regional Water Quality Control Board, a state agency, had an order in effect that was prescribing certain conduct? How did that play into this?

I'm jumping the gun here a little bit,
but your presentation is raising a lot of
questions in my mind.

MR. McCLENDON: Okay.

CHAIRPERSON YOUNG: You know, so -- you
don't have to answer.

MR. McCLENDON: Oh, okay.

CHAIRPERSON YOUNG: Okay.

BOARD MEMBER SHALLCROSS: Excuse me.

CHAIRPERSON YOUNG: Mr. Shallcross.

BOARD MEMBER SHALLCROSS: I think
there's something that's confusing me, maybe you
can straighten me out. You keep referring to the
CSD and really what you're referring to is the CSD
Board, because the CSD is bigger than the Board.

The CSD can do, as far as I can tell, as
far as I know, the CSD can act in another way, the
people of the CSD can enact an initiative. That
initiative was Measure B. That was an action by
the CSD.

Now, these folks, it sounds to me,
clearly thought that they had to follow that, or
at least were threatened into following it. But I
think we have to look at the action of the people
of the CSD in passing Measure B in the first
place, as a triggering act here.
CHAIRPERSON YOUNG: You can respond to that if you want to.

MR. McCLENDON: Okay. Well, that would be one way to look at it. I mean you could punish the CSD for the sins of the voters, I suppose. The voters voted to adopt this thing. It was a narrow vote.

The CSD is in a position where they're saying, okay, it's now part of our law of our district. It's part of our code. Our code makes any violation of the code a misdemeanor. We have the case that came down in the same sex marriage case, Lockyer v. State of California in 2000, where the Supreme Court made it very very clear that elected officials do not have the discretion to simply assume that a voter initiative is invalid, that that is strictly the purview of the courts, strictly the purview of the judiciary.

BOARD MEMBER SHALLCROSS: Yeah, I understand that. I think you're missing my point. Let me ask you this. Could the CSD Board have passed an initiative like Measure B saying it's illegal to build on this site. Or the other part of it, which is the people will have to vote on any future site. Could the Board have done that
on its own without the people voting on it?

MR. McCLENDON: Well, that's the $64
question. It was up before the court, the Court
of Appeal, I believe.

BOARD MEMBER SHALLCROSS: Well, see what
you're trying to argue is because the voters of
the CSD voted this thing -- this is what it sounds
like to me, correct me if I'm wrong -- then
anything the Board did based on that is okay. And
I'm saying that's fine, but it was the people of
the CSD who voted it in in the first place, is the
action that to me seems like a much more
compelling argument that the time order has been
violated.

You know, whether the Board went along
with that or not, it was up to them. They felt
they had to, I can understand that, if that was
the law. But just because the people pass a law
that violates an order doesn't make them the
innocent voters.

MS. SCHICKER: May I interrupt for just
a minute. We have a presentation that's going to
be covering all these points if we could only get
to it.

BOARD MEMBER SHALLCROSS: Good.
MS. SCHICKER: I'd really like to keep moving.

BOARD MEMBER SHALLCROSS: Okay.

MS. SCHICKER: I'm going to be my timekeeper for my group, because we don't want to lose our time --

CHAIRPERSON YOUNG: Ms. Schicker, I stopped your clock, so don't worry.

MS. SCHICKER: Oh, okay --

CHAIRPERSON YOUNG: -- not eating into yo time --

(Parties speaking simultaneously.)

BOARD MEMBER SHALLCROSS: And, you know, we're allowed to ask questions, okay.

MS. SCHICKER: No, I know that, I know that. I'm trying -- we just have all this great information to share with you, and we're just waiting to get to it.

CHAIRPERSON YOUNG: Okay. All right, I'm going to resume the clock.

MR. McCLENDON: Let me just go to the two actions that you can show, no question about it, these are the two resolutions. You have them in your packet. This is what the Board has officially taken a position on.
And the Board took a position saying we want this sewer built; we want to do it. The State Board has said as long as Measure B is out there, you can't build it at Tri-W. That's the State Board holding that position, the presumption of its validity unless it's proven invalid.

We've said that we want the SRF loan contract; we want to build there. What we didn't get the second time -- we'll get into this in a bit -- is there was an impossibility in performance in one of the points that was given on the second version of the state's offer.

I'll turn to the slides here now. I'm running late, I know. Okay, this is what goes into, under your own requirements, goes into assessing fines. The liability, economic benefit, beneficial use, base amount, adjustment for conduct and other factors, staff costs, ability to pay, checks against statutory limits.

Next slide. Okay, what goes into assessing fines, what are the standards, number of reportable raw sewage spills, --

(End Tape 2B.)

MR. McCLENDON: -- number of beach closures, number of monetary fines and average
amounts, number of TSO and number of violations resulting in monetary fines, average fine for TSO violation, average length of a TSO issued. And these are things the Board needs to know to assure consistency and effective enforcement.

Do we have another slide there?

This is from your staff report. A complaint would be issued based on discharges in violation of the TSO 00-131, the waste discharge order and cease and desist orders.

The difference between a separate ACL order and the TSO is that separate ACL orders provide somewhat more flexibility in the amounts of the penalties. That's from your 7/04 report.

Okay, here the points are CSD has never created any delays in the project. We argue that the temporary timeout was in a contract approved by the state, and I believe it had Regional Board oversight on it, they had seen a copy. That we'd been excused from all previous impediments as beyond our control.

If the previous delays that were excused as beyond the control of the CSD, how are they now resurrected and fines assessed retroactively.

Delays since October 1 are beyond the control of
the CSD. And we never said, as I said earlier, no
to the SRF loan. They said no when they added a
condition which was completely impossible to
perform.

CHAIRPERSON YOUNG: Excuse me, Mr. --

BOARD MEMBER SHALLCROSS: I've got a
question on the last slide. Can you put it back
up?

MR. McCLENDON: Sure.

BOARD MEMBER SHALLCROSS: I know you
might think this is a fine point, I'm beating a
dead horse, but I think that horse is going to
come around a couple more times before this
hearing is over.

The point number one, the CSD never
created any delays to the project. Are you
talking about the CSD Board or the people of the
CSD?

MR. McCLENDON: There's no question that
the adoption of Measure B has thrown a major
wrench in this project --

BOARD MEMBER SHALLCROSS: I'm just
asking if you're talking about the Board there or
are you talking about the people --

MR. McCLENDON: I'm talking about the
CSD Board --

BOARD MEMBER SHALLCROSS: Okay, that --

MR. McCLENDON: -- and what they --

BOARD MEMBER SHALLCROSS: I'd really, yeah, I'd really appreciate it if you'd make that clear, because the Board didn't, you know, when the people vote that's not an action of the Board. When the Board --

MR. McCLENDON: Right.

BOARD MEMBER SHALLCROSS: -- does something that's an action of the Board. And there's a difference.

MR. McCLENDON: Correct.

BOARD MEMBER SHALLCROSS: Even though both of them can be legally binding.

MR. McCLENDON: Correct.

BOARD MEMBER SHALLCROSS: Okay, thanks.

MR. McCLENDON: Thank you. Thank you for the clarification.

Okay, again from your July '04 staff report, it says noncompliance is clearly an action, it's clearly beyond the control of the CSD's ability. This is what I read earlier, the penalties would result in bankruptcy; it would not result in resolution of the water quality problems
we have.

Before I turn it over to -- how much
time do I have, am I running late?

MS. SCHICKER: Yes.

MR. McCLENDON: I'm running late. Maybe
I'll save this for closing.

What I'd like to do is have Jon Seitz,
who has been at the helm of the CSD as District
counsel, I think, since its birth, and he will
cover the second half of the issue of liability.

MR. SEITZ: That must mean I'm dead if
I've -- first of all, can we see, Lori, if my
slides will pop up on the -- I think we've already
kind of proved, shown, Matt, that we can get them
up.

MR. THOMPSON: Do you want them now
or --

MR. SEITZ: Yeah, if they'd just have
the index up there it would be great.

Okay. You're going to have to slide
them over to where they start with number 1.

MR. THOMPSON: It's a separate folder.

MR. SEITZ: Okay. Thank you. That
works great.

The purpose of my testimony here today
is to provide evidence to this Board as to why fines will not achieve water quality.

Before I start I want to start with where there is agreement. Now, the Board Chair issued a number of questions to the respective parties, and both sides answered them. And through my interpretation this is where we found, I think, absolute agreement in response to those questions.

First, the SRF funds are not available to pay the fines. We know that. I think both sides agree to that.

Second, the Los Osos Community Services District Board cannot unilaterally impose assessments to pay fines. I think there's absolute agreement between both the prosecution team and our team that that's the case.

The second one is are members of the assessment district ultimately responsible for payment of fines. This has been the key that I know I've been burning a lot of time on why I'm trying to figure out, is it the fire district that's going to pay fines? Is it the water department that's going to pay fines? Is it the drainage department that's going to pay these
fines? I think this ought to become clearer.

Because it says, are members of the assessment district ultimately responsible for payment of fines? The assessment district is the prohibition zone, I mean, in the question.

And the answer to that is how can they be responsible when you think about this, that the assessment district is made up of both developed properties and undeveloped properties. And that is to say that the undeveloped properties are not violating 8313. They're not discharging to the groundwater table. It's an impossibility.

So, we'll start off with when this all began in 1998, and this is before my time. I suppose we can't blow these up, but this is K-98. I gave you all my exhibits and I tabbed them. This is exhibit number 1 if you want to follow along.

And basically what it says, when you go down there, is that the District assumes all of the obligations of the Country within CSA, I think, 9. And I'm going to get to that, what's there. And also accepted some responsibility to try and comply with Regional Water Quality Control Board 83-13, again State Water Resources Control
Board 84-13.

And this is what the community enacted. The community -- I don't know who drafted this. I can tell you I probably would think I'd do it a little bit different, but that's what ended up on the ballot for our residents to vote on. And they approved it overwhelmingly.

We can go to the next slide. Okay, I'm sorry, go to 3.

CHAIRPERSON YOUNG: Mr. Seitz, this was a different vote than --

MR. SEITZ: This is --

CHAIRPERSON YOUNG: -- recent one?

MR. SEITZ: -- the one we --

(Parties speaking simultaneously.)

CHAIRPERSON YOUNG: Yeah, so here you have property owners --

MR. SEITZ: Yeah, property owners --

CHAIRPERSON YOUNG: -- that even didn't live in the District.

MR. SEITZ: No, actually that is a registered voter vote, much the same way we elect our Board. It wasn't a property owner vote. And I hope if you have questions about Prop 218, I think I'm somewhat, maybe like 70 percent, of an
expert on Prop 218. I could answer your questions.

But, this is what we ended up with. And this shows you the various zones of benefit that were operated by the County. Now, if you take a look at that dark area, that sort of consumes it all. That is zone B, and that's the fire, the old fire district operated by the County. This is the only service that was provided by the District at its formation that was provided District-wide. It was the only service that all the residents enjoyed from the actions of the Board, is that area that is shaded.

Now, it includes -- it's clear, it includes all of the other A, Bs and Cs, but it's only those areas, that each of those areas that is marked out or separate zones of benefit, with specific functions, and separate and specific financing or modes of gaining.

And so when you take a look at -- and I hope I have this -- if you take a look at that chart -- I know I've got so many papers up here, I'm hoping that Bruce can hopefully explain this, I think zone E, which is as you can see right there says drainage, street lighting, septic tank
maintenance. I think that's Vista del Oro.

That's what was in your -- it's just that little zone right there, it's just E. And it works on a separate budget. It's not a District-wide budget, it's a budget for E.

To go to F down there, I think that's what, --

MS. SCHICKER: Bay Ridge.

MR. SEITZ: Bay Ridge, thank you.

that's Bay Ridge. And if you take a look over on the thing there, the District operates drainage, street lighting, septic tank maintenance, open space maintenance. It's that area that is the only area that -- those two areas are the only things that we provide area-wide sewer service to. And that is operating septic tanks for these subdivisions that were approved by the Regional Water Quality Control Board at some point in time. I assume that you were around then; maybe I could be a little bit wrong there, but by some regulatory agency other than the District.

Now, if you go there you see zone A up there. That's the District's water department; it's not District-wide. And as you'll see in a minute, it's a real configuration. G is drainage,
and you can see we have two drainage responsibilities in there.

Subsequent to us forming this District and having these little areas of operation that have their own independent budgets, we did petition LAFCO and we took over solid waste, as I think I said in my pleadings.

So you take a look at how a special district operates, especially this one, the only things that we provide on a District-wide basis to all of our residents is fire and solid waste collection.

If I could see the next slide --

BOARD MEMBER SHALLCROSS: Mr. Chair.

CHAIRPERSON YOUNG: Mr. Seitz, --

MR. SEITZ: Yes.

CHAIRPERSON YOUNG: -- I'm going to stop the clock because Mr. Shallcross has a question.

BOARD MEMBER SHALLCROSS: Yeah, what you're talking about now goes only to the alternative of the basin plan violation, is that right? The claims on the basin plan?

MR. SEITZ: Right. Well, I'm going to show the basin plan up here.

BOARD MEMBER SHALLCROSS: No, no, I'm --
the prosecution is arguing in the alternative. One is the time schedule order violation, --

MR. SEITZ: Right.

BOARD MEMBER SHALLCROSS: -- one is the basin plan violation. So, what you're talking about here is relevant to that.

MR. SEITZ: Right, just so I'm not -- so nobody is misguided here, we believe the alternative is defective on its face. When you talk about the alternative, whether or not we're talking about the time schedule order in the alternative, there's no worksheet data on the alternative. The worksheet is based solely on the TSO violation, and not the individual things.

So I just wanted to show you how this all kind of melds together, and why I believe that the remedy that staff, your staff is asking you to implement will not move us any closer to water quality issues on the basin plan.

So, let me see the next slide.

CHAIRPERSON YOUNG: Could I ask a question, Mr. Seitz?

MR. SEITZ: Sure.

CHAIRPERSON YOUNG: Did my questions that I had posed to both sides, did it trigger
this --

MR. SEITZ: No.


MR. SEITZ: No, no, I was making this response --

CHAIRPERSON YOUNG: Independently.

MR. SEITZ: -- independently. It just sort of fit really nicely into it.

CHAIRPERSON YOUNG: Okay. Because I just want to share with you what my thought process was --

MR. SEITZ: Sure.

CHAIRPERSON YOUNG: Okay. I just wanted to know what would be the practical effect if there's a fine that's assessed, and what happens. Who's responsible for it? Is it the individuals? Is it the District, itself?

I wasn't thinking beyond that like the complexities of the CSD, you've got fire and water and --

MR. SEITZ: No, but --

CHAIRPERSON YOUNG: -- solid waste. I didn't even consider that.

MR. SEITZ: No. I put this together --

I was tasked with the job, so to speak, of
explaining to the Board, your Board, how a
District operates.

Because when I first saw that
administrative complaint, the one thing that
jumped out at me clear as day, that it was meant
to address a corporate agency like a city or a
county that gets bed taxes, gets sales taxes, has
what we typically call in the business a general
fund that oversees all of the operations of a
city.

And generally speaking, and this is just
my guess, that when you fine a city you are
actually getting paid through a general fund.
You're not getting paid -- they're not taking the
fire department money and saying, here's the fire
department money. They're looking at the finances
of a corporate agency as opposed to a special
district.

And that's what I want to present to you
so you have an understanding of how this all fits
together. If you take a look up on this next
slide, this is a picture of the District.

If you go on the outside, that's the
entire District. If you take a look at the white
stuff in the inside that line, that's the
prohibition zone. The outside of the District, or
the orange is the wastewater management zone, but
it is not within the prohibition zone.

So the prohibition zone isn't District-
wide. The prohibition zone is a subzone of the
District.

So when you say tax the residents, or
tax the ratepayers, well, two things I want to
bring to your attention. One is, of course, the
people in the orange aren't violating the
prohibition zone because they're not in the
prohibition zone.

Secondly, when you take a look at the
prohibition zone, itself, there are folks in the
prohibition zone that have undeveloped property.
And they're not violating the prohibition zone.

Thirdly, which even makes this more
complicated, is that you have property owners
within the prohibition zone that are living there,
and then you have renters in there. And your
action, from a lawyer's perspective, would say
it's in rem, because it's the property owners that
are violating the prohibition, not necessarily
anybody else.

And of course, those folks that are not
operating septic tanks aren't violating the prohibition.

Next slide. Okay, this is my favorite one. And the reason why is this thing actually overlies the prohibition zone. And if you take a look at the purple, that's the zone A I showed you on the first map. That's the Los Osos Community Services District water department.

The orange is the CalCities Water Department, which is a completely independent, PUC-operated water district that operates within the prohibition zone.

If you take a look at the, it's off to the left there, sort of a, I don't know, reddish color, that S&T, a mutual water company that provides water within the prohibition zone.

So, you don't have what you would typically think about a public agency or corporate agency where you have a city that's providing water to everybody in the city, sewer to everybody in the city, police department to everybody in the city, land use to everybody in the city and all that stuff.

These districts operate on completely different principles. And not only that, as I
pointed out to you in my papers, they're enterprise funds. You can't take your water department money and say, oh, I'm just going to transfer these over to the sewer department. You have to operate under the law, under Prop 13. And I quoted you the code sections. You have to operate each of these departments, each of those zones as independent zones in independent operations.

That's why I disagree with the prosecution's team is that you can't consider these as businesses. That's exactly what they are. We derive our income from these little zones that we operate. And then we, in turn, manage those zones.

So, when they say the business model doesn't apply, it applies in spades to this special District and how it operates.

So, I wanted to bring that to your attention. And now if we can go to the next slide. And what I want to do here is there's a reserve -- yes, this is it, if you can -- yeah.

This is -- what this shows you right here is how we allocate property taxes to our special zones. We do, as I think you can see up
there, and Mr. Buel maybe can help me with this,
because I'm --

CHAIRPERSON YOUNG: Would you like him
to come to the witness stand?

MR. SEITZ: Sure.

CHAIRPERSON YOUNG: Mr. Buel.

MR. SEITZ: Okay, what was our property
tax intake for last year?

MR. BUEL: Around 1.4 million.

MR. SEITZ: Okay. And where does that
property tax money go?

MR. BUEL: Well, the Board has
historically apportioned that amongst the funds
and the percentages are up there on that sheet.
This is derived historically from the share of the
property tax that went to Fund 200, and that's the
Bay Ridge Estates area; Fund 300 is our fire fund;
and Fund 700 is Vista del Oro.

So what the Board historically has done
is to take the dollars that were available from
property tax and distribute on that formula. The
one exception is the last column labeled 800, that
is drainage. And the Board annually has allocated
a flat amount of $25,000 to the drainage fund to
assist in paying for those costs.
MR. SEITZ: And the drainage projects that we operate, they are related because it's the ponding water that we drain, is that not correct?

MR. BUEL: That is correct. We operate four pumps in specific geographic areas which actually were shown on your screen about five minutes ago.

MR. SEITZ: And that ponding water occurs in the prohibition zone, does it not?

MR. BUEL: Yes, all four of the pumps service areas that are in the prohibition zone.

MR. SEITZ: Okay, and so the reality is if we stop funding the drainage we would not be draining the very surfacing water that everybody's been complaining about, is that not correct?

MR. BUEL: That is correct.

MR. SEITZ: Okay.

VICE CHAIRPERSON JEFFRIES: Mr. Chair.

MR. SEITZ: And -- 

VICE CHAIRPERSON JEFFRIES: Before you go on, I'd like to ask Mr. Buel, because he alluded that the Board appropriates the funds from the property tax. You kind of led me to believe that this was done by statute, some government statute.
What Mr. Buel's testifying, if I'm not correct, that the Board allocates this either on an annual basis or a periodic basis or when they do their budget or whatever, is that not true?

MR. SEITZ: It's part true, and let me see if I can clarify it for you. The District, you'd have to really understand pre-Prop 13 and how this all worked.

VICE CHAIRPERSON JEFFRIES: I do --

MR. SEITZ: The District gets --

VICE CHAIRPERSON JEFFRIES: I understand it very clearly.

MR. SEITZ: Okay, very good.

VICE CHAIRPERSON JEFFRIES: Being a Mayor of a city that was on both, okay?

MR. SEITZ: Okay, good.

VICE CHAIRPERSON JEFFRIES: And I also chair a special district, so I understand districts.

MR. SEITZ: Okay, good. This District receives, when we took over from the County we received the property tax allocation that the County had to our particular District, okay.

And what we are showing you here is, yes, we did receive property taxes. And the
property taxes that we received, I want to show
you, because I thought there'd be some concern
here where the property taxes go. And they go
towards fire protection from the zone B that I
showed you on the big map. And that's historic
from the County, I believe, Bruce, is it not?

MR. BUEL: No, sir. There was a
different allocation that the County had.

MR. SEITZ: What was that -- do you
remember what that allocation --

MR. BUEL: Yes. Of the available funds
the water department got about 20 percent. And
that's not up here because the District Board in
2001 determined that the property taxes shouldn't
subsidize water service to a small area of the
community.

MR. SEITZ: So they were transferred
over to the fire department?

MR. BUEL: That is correct. A hundred
percent of the property taxes previously disbursed
to the water fund were transferred to the fire
fund.

MR. SEITZ: Okay. And how much revenue
do we receive from the residents within the
prohibition zone to provide sewer service there?
MR. BUEL: Zero currently, Jon.

MR. SEITZ: And that's because we don't
operate a --

MR. BUEL: That's correct, as you know, we have an assessment. There's 5226 properties in
the prohibition zone, and they pay an assessment
of about $225 a year. But that's totally
dedicated to the debt service on the bond that was
issued in 2002.

MR. SEITZ: That's what you consider to be a restricted fund?

MR. BUEL: Yes, sir, that is a
restricted fund.

MR. SEITZ: Thank you. Okay, so if we
can go on to the next slide, please. We can go on
to the next one, I'm sorry, that one I'm not going
to bother with. The next one. There's a recap I
want to see if we can get to --

CHAIRPERSON YOUNG: Mr. Seitz.

MR. SEITZ: Yes.

CHAIRPERSON YOUNG: Michael Thomas had a
question.

MR. SEITZ: Sure.

MR. THOMAS: I have a question; it's not
related to what you were just talking about with
Mr. Buel. But it has to do with the complexity that you were describing --

MR. SEITZ: Yes.

MR. THOMAS: -- of the CSD. You said that the CSD is committed to building a wastewater treatment facility?

MR. SEITZ: I -- I have -- first of all, let me just point out something. I'm stumbling here a little bit because I really don't know how to answer that question.

You have to understand, at the same time that Mr. Buel was put on administrative leave, for lack of a better word, I joined him. And so I have not attended Board meetings, I've not been there.

MR. THOMAS: Someone else could answer.

MR. SEITZ: Yeah, I just feel, you know, we have in our pleadings that they are, but I don't -- I can't --

MR. THOMAS: That's fine. That's testimony, and that's fine.

MR. SEITZ: All right.

MR. THOMAS: So the CSD is committed to building a wastewater treatment facility. The CSD has testified to that before the Board.
MR. SEITZ: Yeah, right.

MR. THOMAS: So let's say that the CSD does build a wastewater treatment facility and at some point in the future when it's built and it's operating there's a major spill.

MR. SEITZ: Okay.

MR. THOMAS: And the Regional Board Staff responds to that by issuing a complaint and recommending a fine to the Board.

MR. SEITZ: Can we go back to the slide where I showed the prohibition zone? Next one over, I think. There you go. Okay, there we go. It's a long answer but I think --

MR. THOMAS: I haven't asked the question yet.

MR. SEITZ: Oh, I thought you said if there was a spill and --

MR. THOMAS: If there is a spill, --

MR. SEITZ: Okay.

MR. THOMAS: -- and the Board Staff recommends a fine, a major fine, --

MR. SEITZ: Sure.

MR. THOMAS: -- to the Board. What would your argument be? Would it be we're not responsible because the CSD is a complex system?
MR. SEITZ: No, not at all. Because at
that point in time you make one assumption, and
that is that there is a wastewater treatment plant
sewering the prohibition zone that generates
revenue.

You know, just like you pay for your
sewer charges at home. You get income in and you
have reserves, especially under the SRF agreement,
there's a pretty severe reserve --

MR. THOMAS: Why would you not --

MR. SEITZ: -- what we --

MR. THOMAS: I understand there's funds
available then, so you would be able to --

MR. SEITZ: Sure.

MR. THOMAS: Where does the complexity
argument go?

MR. SEITZ: The complexity is today is
we don't have a wastewater treatment project to
leverage fines because there's no ongoing
operation.

The only income we receive is from those
operations that I've listed up there, which is the
fire department, the water department. And what
are you saying? You're saying that the people in
the water department should pay because -- for all
the folks in the prohibition zone? Because they can't get a sewer.

Or are you saying the people in the fire department should pay a fine because the people in the sewer are violating 8313?

MR. THOMAS: It's a question of where you get the funds.

MR. SEITZ: Yeah, exactly. And what you're hurting. Now, I don't think there's any intention on this Board to bankrupt the fire department. I don't think there's any intentions on this Board to bankrupt the water department.

And that's the complexity of the issues when you take a look at a special district, everybody automatically thinks city, general fund. These revenues pouring in, discretionary spending. And believe me, they don't have a lot of it, so I'm not -- people, especially the Mayor over here, are going to know that, but --

MR. THOMAS: You've answered my question.

MR. SEITZ: Okay. So, I had a --

CHAIRPERSON YOUNG: Mr. Seitz, --

MR. SEITZ: -- fund balance sheet --

CHAIRPERSON YOUNG: My question --
MR. SEITZ: Sure.

CHAIRPERSON YOUNG: -- then becomes to this, essentially what you're arguing is that this Board really has no remedy to enforce --

MR. SEITZ: No.

CHAIRPERSON YOUNG: -- the time schedule order for violations --

MR. SEITZ: No, I --

CHAIRPERSON YOUNG: -- at this point in time.

MR. SEITZ: -- think that if you ask me that question I can answer that question for you. But, am I saying that you don't have remedies? The answer is no. What I'm telling you is that the remedies that staff has presented to you today don't work.

CHAIRPERSON YOUNG: Okay, you're going to one of the mitigation factors, that's really ability to pay.

MR. SEITZ: Ability to pay, but not only that I think what you have to take a look at is where is this money coming from, and what kind of havoc are you going to cause if you leverage an $11 million fine on this District. There isn't, a) between all of those funds $11 million in
reserve. And the extent that you are saying, well, take the money out of reserves. You're going to see in a minute here there's $29,000 in one account; $39,000 in another account.

Those reserves are for catastrophes. A fire engine breaks. Where do you go? You go to that department's reserves, and you don't have it. So, --

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: I'm hoping I can get to the -- if we can find the summary of reserves.

CHAIRPERSON YOUNG: Well, you know what,

Mr. Seitz, --

MR. SEITZ: Yeah.

CHAIRPERSON YOUNG: -- I think your point is understood about the complexity issue.

MR. SEITZ: Okay.

CHAIRPERSON YOUNG: I don't know if you need to spend too much more time on that. I think that is pretty clear.

MR. SEITZ: Okay.

CHAIRPERSON YOUNG: And I think we're aware that because the plant has not been built there's difficulty with getting any more money out of the ratepayers at this point.
MR. SEITZ: Okay, then I want to go to the next issue I was asked --

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: -- to talk on just very briefly is time schedule order 00-131.

There is this, I don't know if it's a rumor, a myth, or an analysis, but everybody thinks that 00-131 and that time schedule order was an order that was agreed to by the District. And that was our timeline and we gave it to the Board, and the Board happily stamped it.

What I want to tell you is I sat at meetings with Mark DeSuzzi (phonetic), at open public meetings where he came to the Board over a period of time and said, this is what they're asking, we can't meet it. This is what we're asking, we can't meet it. Maybe we're at a point where we ought to compromise and come up with it.

It was, as any other time schedule order, it was a negotiated time schedule order, the time schedules that were in there. It was not something the District handed to the Regional Board and they approved it.

I was not, though -- I'm going to testify to this -- I was not intimately involved
in those negotiations. I was a witness at public
meetings, I can tell you that's what I saw.

Secondly, it's -- further, why would we
have filed a petition to hold it in abeyance if we
were so hunky-dory with it and everything that's
in there. So sort of keep in mind to the extent
that you've been led to the thing that this is our
timeframe, we agreed to it, and that's just the
way it is. That is not really how it happened
from a practical perspective.

And now it's Lori's turn to cross-
examine me, so.

CHAIRPERSON YOUNG: Hold on one second.
Okay. You're down to 47 minutes.

MR. SEITZ: Okay, but is there going to
be cross or not?

CHAIRPERSON YOUNG: Oh, yeah, yeah.

MR. SEITZ: Okay.

CHAIRPERSON YOUNG: You have plenty of
time, but I've got to now switch the clock because
they're going to be eating up their clock asking
you questions.

Ms. Okun.

MS. OKUN: I'm just going to address my
questions to the whole panel because there were
two lawyers testifying, and I don't know if they
doctor to being cross-examined, but anyone who
wants to answer should feel free.

CROSS-EXAMINATION

MS. OKUN: There was some testimony that
the --

CHAIRPERSON YOUNG: Could you speak up,
Ms. Okun, so we can all really hear you loud and
clear.

MS. OKUN: There's some testimony that
the State Board Staff reviewed the construction
contracts and approved them.

Did anyone from the State Board ever
represent that stopping progress on the
construction would not violate the State Board
loan agreement?

MR. SEITZ: I had no communication at my
office to that effect.

MR. BLESKEY: Mr. Chair, I can offer on
that -- I can answer that question if you'd like.

CHAIRPERSON YOUNG: Anybody at your
table can answer that question.

MR. BLESKEY: I can answer that
question.

CHAIRPERSON YOUNG: And you're Mr.
MR. BLESKEY: Yes, sir.

CHAIRPERSON YOUNG: Okay.

MR. BLESKEY: The contract language, as provided by the ISA, with the construction contracts incorporated by reference, provides for changes. And --

MS. OKUN: Well, that wasn't my question. My question was did anybody at the State Board ever say that it wasn't a violation of the loan agreement to stop the construction progress for a timeout?

MR. BLESKEY: To say that it was a violation of the contract?

MS. OKUN: Did they say that it was not a violation of the State Board --

MR. BLESKEY: No, they said that it was.

But it is a contractual remedy plain as day, in language written by them.

MR. BRIGGS: Doesn't that language refer to site conditions such as archeological finds?

MR. BLESKEY: No. Let me read the chapter and verse on that in the ISA. It's actually under the notifications clause.

By the way, knowing contracts this well
makes you really not invited to parties, but --

I'll try to be brief.

CHAIRPERSON YOUNG: Mr. Bleskey, just

thinking, before when we allowed Mr. Briggs to

answer for Mr. Thompson, it was because Mr.

Thompson had made some statements; this was on

cross-examination.

Mr. Seitz doesn't have any knowledge. I

think the question, itself, that was posed to him.

So, I didn't want to open this up.

MR. SEITZ: But I think Ms. Okun's

questions are going to issues that I didn't

testify to. But we're perfectly willing to --

CHAIRPERSON YOUNG: Right.

MR. SEITZ: -- respond to them.

CHAIRPERSON YOUNG: But I think maybe

Mr. Bleskey should be your next witness after

maybe they're done cross-examining you. Not that

you don't have the time to do it, but --

MR. BLESKEY: Actually I'll be going

over these and can answer those --

CHAIRPERSON YOUNG: Okay.

MR. BLESKEY: That's actually what I'll

be talking about.

CHAIRPERSON YOUNG: Right.
MS. OKUN: Well, maybe it would make more sense for them to finish their presentation before we start cross-examination, because it seems like they're doing a package presentation.

CHAIRPERSON YOUNG: That's up to you.

MS. OKUN: I would rather do that.

CHAIRPERSON YOUNG: Okay, are you finished asking questions of Mr. Seitz?

MS. OKUN: I'd rather hold all the cross-examination until they're finished with their presentation --

MR. SEITZ: Mr. Chairman, --

MS. OKUN: -- because it sounds like they're going to address some of this.

CHAIRPERSON YOUNG: Okay.

MR. SEITZ: Could I just make a recommendation that maybe we consider adjourning. It is 6:20. I think that the expectation -- I may be wrong on this, I'll let Lisa talk to it -- but the expectation of the Community is that they're going to have a meeting at 7:00.

MS. SCHICKER: We can -- what I asked is you had mentioned 7:45. If we could adjourn at 7:00 or 7:15, that would be great. We have people waiting but we can make a call and we'll start at
8:00 instead of 7:00. We'd like to finish our presentation if we could. But if --

CHAIRPERSON YOUNG: When did you notice this Board meeting tonight? Was that just last night?

MR. BLESKEY: Yes, sir; and we do have the ability to call. It's a special meeting, and we structured the notice as such that it's predicated on the adjourning of this meeting, one hour later, and we have communications.

CHAIRPERSON YOUNG: Did anyone from the Water Board give you any indication that we would be adjourning at any specific time?

MR. SEITZ: We thought you folks were civil. I'm just being, I'm being a little flippant there, but you know, typically courts close at 4:35. I mean this is fine with me, I'm flexible. But I was not under the expectation that we were going to --

CHAIRPERSON YOUNG: Actually, your CSD goes into the wee hours of the morning and I figure stopping by 7:45 was early for you guys.

(Laughter.)

CHAIRPERSON YOUNG: So I didn't think anything of it. But, --
MR. BLESKEY: We've provided for any anticipated change that your Board may need.

CHAIRPERSON YOUNG: Okay, let me just check in here. We can stop at 7:15. Gary, you say no? Why don't we just go down the line.

BOARD MEMBER SHALLCROSS: Yeah, I mean we're going to 7:45. You know, normally on a case like this, we go to 11:00, 12:00 in some cases. So, we're only stopping at 7:45 for one reason, and that's because we're losing our quorum. And that's the only reason.

If you guys, you know, -- notice a hearing or notice a meeting, thinking you're going to get out of here at a certain time, I don't think that's good. I mean, first of all, you should have come and asked someone at the Board and said, what time do you think we're going to get out of there, rather than just basing it on your experiences in the past.

MR. SEITZ: Yeah, that's fine. I'm raising the issue as a matter of convenience, not as a matter of --

BOARD MEMBER SHALLCROSS: We were hoping to get through this tonight. We're not.

CHAIRPERSON YOUNG: Let me just check in
with the rest of my Board. Russ, do you want to
continue to 7:45 or stop at 7:15?

VICE CHAIRPERSON JEFFRIES: No, I want
to go as long as we possibly can --

CHAIRPERSON YOUNG: Okay.

VICE CHAIRPERSON JEFFRIES: -- because
what it'll do is just -- I don't want to --

MS. SCHICKER: That's perfectly fine,

7:45 is great. Let's go.

CHAIRPERSON YOUNG: Okay. All right.

VICE CHAIRPERSON JEFFRIES: But I want
to ask Mr. Seitz a question before we go on.

CHAIRPERSON YOUNG: Go ahead.

VICE CHAIRPERSON JEFFRIES: Mr. Seitz,
don't leave.

(Laughter.)

VICE CHAIRPERSON JEFFRIES: I was trying
to recollect when you made a statement that -- on
the time schedule, that there's been hearsay or so
forth that the time schedule was the CSD's time
schedule.

MR. SEITZ: Yes.

VICE CHAIRPERSON JEFFRIES: And I was at
that meeting when they came forth with that time
schedule. And it was the CSD's time schedule.
And I think I asked a question, are you sure that
this time schedule is adequate.

And I can ask Mr. Buel, because I think
he's the one that presented that time schedule to
this Board. And I think at that particular time I
Chaired this Board. And I wanted to be assured
that we didn't have any delays, that we gave them
enough time, and that the time schedule would meet
the requirements, but yet give them enough time to
do it in case there was delays.

Because I've been through this before,
not only with Los Osos, but my former life as a
mayor. And I understand how government moves,
slowly, mysteriously, and some people don't
understand why.

So, I don't want you to have the idea
that it was our Board or our staff time schedule.
But that's what you were kind of alluding to.

MR. SEITZ: No, what I was trying to
allude to -- and thank you for correcting me --
was that time schedule was a compromise through
negotiations. and wasn't that the District did
not have the luxury of saying the Board saying to
the District, write down what you think you need
and then we'll come in here and we'll approve it.
That's what I'm trying to point out, is that --

VICE CHAIRPERSON JEFFRIES: But, Mr. Seitz, --

MR. SEITZ: Yes.

VICE CHAIRPERSON JEFFRIES: -- this Board is the one that approved it.

MR. SEITZ: I agree.

VICE CHAIRPERSON JEFFRIES: The staff only recommended that we approve it. We're the ones that make the final decision.

MR. SEITZ: I agree.

VICE CHAIRPERSON JEFFRIES: And the question was asked to the CSD at that particular time, is this an appropriate time schedule. And the answer was yes.

If there was any question at that particular time they could have raised it, and we could have either accepted it or not accepted it. But what you kind of put out there to the general public --

MR. SEITZ: Yes.

VICE CHAIRPERSON JEFFRIES: -- was it wasn't your time schedule. Well, I just want to correct you, it was your time schedule.
MR. SEITZ: Okay. Since I wasn't at that meeting I'm certainly happy to accept, without challenge, your testimony as to what occurred --

VICE CHAIRPERSON JEFFRIES: We can ask Mr. Buel.

MR. SEITZ: Well, doesn't matter to me one way --

VICE CHAIRPERSON JEFFRIES: Okay.

MR. SEITZ: -- or the other. My point that I was trying to make is that that time schedule order was negotiated, as opposed to the District giving a time -- and the only reason why I want to say this, and the facts bear it out, if that was the hunky-dory -- sorry, I don't want to be flippant -- if that was such a time order that was agreed to by the District there would have been no reason to have filed a request to the State Water Resources Control Board to hold it in abeyance.

So, I just want to -- I don't want to be contradictory, and I certainly don't want to be argumentative with the Board. But if I mis--testified I'm glad I was corrected.

MS. OKUN: Can I just say one thing to
correct the record on the procedure of the State Board petition?

CHAIRPERSON YOUNG: Yes.

MS. OKUN: The District didn't request the State Board to hold the time schedule order in abeyance. What they did was file a petition to challenge the time schedule order. And rather than pursue that challenge they agreed to hold their petition in abeyance.

The Regional Board doesn't have any ability to agree or disagree to that. So basically this is -- it's like a lawsuit that was filed that's just been sitting there.

The time schedule order has never been put in abeyance; it's never been stayed. And the State Board has never ruled on or considered the petition because the District asked them not to.

So the abeyance refers not to the time schedule order, but to the petition.

MR. SEITZ: And I agree with that.

CHAIRPERSON YOUNG: Could I just ask Mr. Buel if anything that Ms. Okun just said, or Mr. Jeffries had said, you would correct in any way?

MR. BUEL: Thank you, Mr. Chairman. I'm Bruce Buel with LOCSD. I think it's important for
the record to note that the District objected to
the proposal to impose a time schedule order.

We requested that your Board not adopt
that order. But we did concur with the timeline
by Board order. And I'd like the record to note
that it's consistent with the state revolving fund
time deadlines, the milestones that were built
into the state revolving fund loan at that time.

CHAIRPERSON YOUNG: So the State Water
Board had its own requirements?

MR. BUEL: That's correct. Our --

CHAIRPERSON YOUNG: Is that -- okay.

MR. BUEL: -- Board had gone to the
State Water Resources Control Board to resurrect
the loan that had previously been assigned to the
County.

In doing so, the State Water Resources
Control Board not only assigned the new loan, or
transferred the loan to the District, but they
created a timeline that we were obligated to
follow.

And in the discussion with your staff
that is the same timeline that was published in
time schedule order 00-131.

CHAIRPERSON YOUNG: Okay, thank you.
All right, where are we?

Mr. Bleskey, --

MR. BLESKEY: Yes, sir.

CHAIRPERSON YOUNG: Okay.

MR. BLESKEY: We just have one little slide for you.

CHAIRPERSON YOUNG: Okay. The clock is resuming right now.

MR. BLESKEY: Chairman Young, Members of the Board, first of all, thank you for having us here and listening to what we have to say. I hope I can bring my experience to bear in doing what the right thing is.

I've got 29 years of experience in civil service. I'm a Professional Engineer in the State of California; a water treatment plant operator level III. Served as a surveyor. I've got six and a half years of active duty in the Civil Engineer Corps, 17 years in the Reserves. I've had Command over units that now are in Iraq. Organizations, over 650 construction crews supporting the Fleet Marine Force.

I've planned, constructed, sited hundreds, literally hundred and hundreds of miles of pipeline roads, airfields, warehouses, water
treatment plant facilities, you name it. I've been out there doing it with folks for a long time.

Some of my expertise and my interests are seismic lifeline engineering; survivability of water facilities in seismic events. I'm a Federal Warrant Level II Contracts Officer. I've been an expert witness, both for the federal government and others in front of the Tenth Circuit Court for the appeal of government contracts.

And that's my experience, and we're going to start. The first thing we'd like to start is we're going to be talking about some of the things regarding local control and our contract.

(The following video was played:)

"What the local community wants. That is a prerogative of the local government. If you have a problem with the project, this has only happened twice in the six years I've been here, where people have tried to use this Board to get around their own local government's decision. Only twice. No comments. So, the remedy is about local
government, not before this Board."

MR. BUEL: So what we have here is on September 27th the Los Osos Community Services District changed its government.

What I'm going to be speaking about is just -- there's one thing I'm going to be speaking about and that's addressed in the post-elections contract actions. I'm not going to be talking about the pre-election actions of the state revolving fund and those things that happened that led up to the events of September 27th.

that means I'm not going to be talking about the proper securitization of the loan or the state's failure to enact security, other than insisting on revenues for a future construction project that was in peril due to a recall and an initiative that would have re-sited that project.

There were about --

BOARD MEMBER SHALLCROSS: Now, you said you're not going talk about those things.

MR. BLESKEY: That's right.

BOARD MEMBER SHALLCROSS: Okay.

MR. BLESKEY: That's what I'm not going to talk about. But I'll answer questions.

Or about the state's failure to provide
even the minimum reasonable oversight. And this all has to go with the issues that are post-
election in dealing with contracts. And I'm not going to talk about -- we wouldn't even be here today if even the minimum oversight, and what I would expect to be reasonable oversight, would have occurred prior to the election.

So, we have a number of periods here. We have three contracts out there. One that was encumbered by Measure B, and that's the Tri-W contract. To build at that site would have either initiated a temporary restraining order or some type of legal action, and that influenced the contract decisions that needed to be made.

However, the ISA by the SRF that was approved and pretty much in language created by the state and all the construction contracts which are incorporated by reference into that document, the ATA, and just about every other -- and including the language of Measure B, there were contractual remedies compatible with Measure B that would have allowed the entire project to move forward, including the relocation of that treatment plant.

This project is scoped not as a
treatment plant and pipes; it's scoped as a system. And when you have a situation that's provided for in the ISA where a component of the system, and this happens all the time, has to be relocated, you have language there. If it was not the state's intent to provide that contractual remedy, then why did they put the language in the contract.

So, on 9/27 we had an election, and we pretty much know the outcome of that. On October 3rd the prudent thing to do was initiate a suspension, not a termination, not a stop notice, as according to section 15.1 in the construction contracts, to assess what work on the collection system could continue and was compatible with any site out of town. That was a good engineering decision, and also a good business decision, and it utilized the tools available and approved by the state.

On October 3rd or 4th we were notified of a lawsuit regarding seeking a remedy to restart the work at the Tri-W site. With that in mind, and considering that on 6 October the ACL was issued, contractually we were looking at already restarting the work.
Now, we hadn't gotten that out yet to our contractors, and I'm specifically referring to the collection contractors at that time. Because we kind of got busy because we were going to be in court.

How that influenced us was twofold. One is on Tri-W we knew that we faced court action. On the collection system we wanted to get going. We weren't quite ready to get going. But when we were noticed with that hearing it would not have been prudent, and it would have been a waste of taxpayers' money to start the contractor up, demobilize them, and start again if we had some type of an order preventing us from building at Tri-W.

So, we went on Friday, October the 7th, in San Luis Obispo County Superior Court, and we addressed that challenge to restarting at the Tri-W site. And the CSD, in light of Measure B's still being considered the law of the land, the work at the Tri-W site was allowed to not start.

On October 10th we had, with the cooperation of Bernard Construction and Whittaker contractors, we went in and they already had looked at what areas of the collection system, as
designed, could be constructed through January so that we could maintain progress on the collection system.

Keeping in mind, something we don't have up here, is we had two schedule paths. The critical path was the collection system. That's a 720-day duration. The treatment plant is a 550-day -- I think it's what, 720 or 730 for the pipes, 550 days for the treatment plant. But the entire schedule was front-loaded.

However, -- and that had to do with getting the most work in the dirt to make the most progress, which is not prudent construction contracting. However, you're going to find that when it comes to scheduling that 180 days of float, if you challenge that in court, and it's been my experience innumerable times, float goes to who gets it first.

So with the changes clause in the contracts and the float available, the start of that treatment plant could have been delayed 180 days and still finished on time. The state SRF folks have not chosen to use those contractual remedies.

On October 11th initially when we were
looking at, at the staff level we were considering
the termination -- because of Measure B we were
considering the termination of the Tri-W project.

Termination isn't just something that
we can go into and shut a contractor off. Anybody
that knows, when you get into a termination,
you've got a changed condition on the contract.

Doesn't matter what the reason is. But even if
you want to terminate it for convenience, you have
to enter into negotiations, full and open, with
that contractor. To do otherwise is not fair and
reasonable, and it's not in good faith.

All those things were going through our
mind when we notified -- when I made a courtesy
call to Ed Moore which put into motion a whole
series of events where we were accused of breach;
and where now we are not in material breach. And
we're going to make that case with the state. We
filed a claim yesterday.

We held that claim, we were authorized
to make that claim well in advance of the events
that transpired on October 17th, and that was the
negotiations through Sam Blakesley, Assemblyman
Blakesley. We held that as good faith. And the
events that happened with that were somewhat
distressing.

That's why I've now invoked our right. We also believe we have federal rights, because federal monies are involved.

On October 17th, of course we know about the negotiations. That's in the record. The SRF Staff, especially the Executive Officer, issued a letter with nine conditions. And in asking for -- approving structured negotiations, if our Board was willing to accept those nine conditions. And we agreed to that. So we entered in those.

And I've got to tell you, within an hour after the state team, especially Darrin Polhemus, we made a lot of progress. It was good. I mean I can't say enough about the guy; we had a rapport -- and it wasn't easy, he's not an easy guy to get along with sometimes, he's tough, he's smart and he knows what he's doing.

CHAIRPERSON YOUNG: Mr. Bleskey, did you think that Mr. Polhemus was representing the State Board, itself, the Board Members?

MR. BLESKEY: Yes, sir. And the reason why I believed that is because staff -- I know my staff or myself am allowed to enter into negotiations subject to approval by the Board.
And that was represented to us at that meeting.

It's in the letter.

BOARD MEMBER SHALLCROSS: And were his negotiations, or the things he agreed to, subject to approval by his Board?

MR. BLESKEY: Yes, sir, they were.

CHAIRPERSON YOUNG: Well, this is probably why we need to be able to get him on the phone tomorrow, Sheryl, and Ms. Okun, so that we can maybe get any of that cleared up.

Go ahead.

MR. BLESKEY: Do you want to take five or -- it's that good old technology failure.

CHAIRPERSON YOUNG: Switch failed? Do you want to take five minutes to get that straightened out? Okay. Why don't we do that.

MR. THOMPSON: How much time --

CHAIRPERSON YOUNG: Seventeen minutes, 23 seconds.

(Brief recess.)

CHAIRPERSON YOUNG: All right. Michael Thomas, where is he? Mr. Packard, do we know where Michael Thomas is? Okay. We'll continue without him, okay.

All right, Mr. Bleskey.
(Pause.)

MS. SCHICKER: Mr Chair, --

CHAIRPERSON YOUNG: Yes.

MS. SCHICKER: -- while we're waiting for Mr. Bleskey to return, we could skip forward to Rob Miller, is that okay?

CHAIRPERSON YOUNG: Pardon me?

MS. SCHICKER: We could skip forward to Mr. Miller, would that be all right, or --

CHAIRPERSON YOUNG: Sure.

MS. SCHICKER: -- should we wait?

CHAIRPERSON YOUNG: Okay.

MS. SCHICKER: We don't want to waste time.

CHAIRPERSON YOUNG: Okay.

MS. SCHICKER: Okay.

MR. MILLER: Thank you, Mr. Chairman, I'm ready to begin. My name is Robert Miller and I'm the District Engineer, along with the Wallace Group, a local consulting firm. We've been the District Engineer since 1999, and also were the Assessment Engineer for the County of San Luis Obispo. So we do have some history with the project.

I'm primarily just going to provide some
technical data and a few map overlays here this
evening, and make a few key technical points.

First of all, there's a couple documents
I want to make reference to that are in the listed
documents. One is document 40, and that is the
latest groundwater monitoring results that were
performed by Cleath and Associates. And then also
document 133, which is a study that was done back
in '95 by Metcalf and Eddy, looking primarily at
groundwater separation and denitrification in the
soil column below the septic systems.

And we're going to go ahead, in the
interest of time, and forward through a couple of
slides here, and talk about nitrate --

(End Tape 3A.)

MR. MILLER: -- sources here. Again,
this is out of the study that was performed by
Metcalf and Eddy. And I think the critical point
in my discussion here is that one of the systems
that the CSD operates and maintains is the Bay
Ridge Estates system.

And that was one of the subjects of
study within this task that Metcalf and Eddy
completed. And it basically involved installation
of lysimiters, sample points to take groundwater
samples above the actual groundwater elevation. But that's never been done in the Vista del Oro site. And so as I show the maps you can keep that in mind.

We did see some denitrification, significant denitrification, about 67 percent below some of the sites with adequate groundwater separation.

BOARD MEMBER SHALLCROSS: Can I just ask a quick question?

MR. MILLER: Absolutely.

BOARD MEMBER SHALLCROSS: These are issues that go to the part of the complaint that's alleging a basin plan violation, right?

MR. MILLER: I believe that would be correct.

BOARD MEMBER SHALLCROSS: Not against the time schedule --

MR. MILLER: I believe that would be most correct.

BOARD MEMBER SHALLCROSS: -- of alleged violation. Okay, thank you.

MR. MILLER: Right. So, again, looking at some of the nitrate reductions and the denitrification we'll flip through those. And
then we do have information that was generated about the Bay Ridge system back in '95, and those are on file with your staff, also.

Really the key conclusions were that a in a number of these occasions where you did have good groundwater separation, there were times when the leachate that was reaching the groundwater was actually a lower nitrogen concentration than what the groundwater was at selected sites.

That being said, of course, it's very much acknowledged that there is a nitrate problem in the Los Osos groundwater basin.

We did produce a map that might be helpful both to your staff and it certainly is to us. This is a map that shows an overlay, which I don't know that these two have ever been overlaid this clearly, the areas of high groundwater in the community in the blue; and then the areas where we took nitrogen samples in the last sample event. And then in the green you see the Vista del Oro system there where the mouse is, and the Bay Ridge Estate system there with the bigger block over to the right. And then the fire station.

So you have everything on one map so you can really get a good understanding of where the
worst areas are for separation, and then where we
took monitoring samples, and the resulting
nitrogen concentrations.

The big point in the Cleath study that
was done back in April, again document number 40,
was that the trend for nitrogen concentrations in
the groundwater really does reflect the
effectiveness of the prohibition zone and the
prohibition against future construction. Because
since the mid '80s when samples have been taken,
the trends are, for the most part, fairly static.
Within 15 wells we don't see any long-term trends
in that 20-year period.

Two of the wells didn't have adequate
data to make a conclusion. Three of the wells
actually showed a decrease in overall nitrogen
levels; three of the wells showed an increase in
nitrogen levels; one well showed an increase in
total dissolved solids; and then three of the
wells have trends that seem to have reversed. So
you can't pull firm conclusions. And that's out
of 27 monitoring wells in that Cleath assessment.

And I think the point of all that is the
prohibition against future development was
effective of at least stabilizing the nitrogen
levels through that time period. But just the technical data that we're looking at we haven't seen a discernible trend since that time with the samples that we've taken by the CSD.

And this give you, again, a tool to be able to look at how those nitrogen results factor into the separation to groundwater.

So that's essentially the technical information that we wanted to provide here today. And I'd be happy to answer any questions. That completes my portion.

CHAIRPERSON YOUNG: Just so I'm clear, Mr. Miller, are you saying that the septic tanks are not contributing to the nitrate levels in groundwater?

MR. MILLER: No. I think I would definitely make the statement that over time, since the '50s, nitrates certainly have been one source of nitrogen contamination in the groundwater.

I'm merely pointing out what may not be widely understood, and that is the actual sampling data since the mid '80s in that document 40 shows the trend for each and every monitoring well. And I think it's important just to look at those
trends and understand that since the prohibition
against future further development was enacted, we
just haven't seen a sweeping trend throughout
those 27 monitoring wells of increases in that
time period.

CHAIRPERSON YOUNG: The staff, the Water
Board Staff has put up graphs, you know, at
several hearings with the orange circles and red
circles and showing, you know, an increasing trend
of nitrate in groundwater.

Is it your position that those are
inaccurate depictions?

MR. MILLER: You know, those, if I'm --
they did show a graphic earlier which shows a bar
chart that has an increase. Looking at a longer
time period, clearly in the '50s, '60s, '70s, when
development was rapidly occurring in the
community, we did see a significant increase in
nitrogen concentrations in that shallow water, if
that's the graphic you're referring to. I don't
dispute the validity of that graphic.

CHAIRPERSON YOUNG: Right. No, I've
seen graphs where the trend is increasing through
time --

MR. MILLER: I think what you're --
CHAIRPERSON YOUNG: -- to this date.

MR. MILLER: I think what you're referring to then is maybe it's in a plan view and you see a series of red overlays on the community that grow in size --

CHAIRPERSON YOUNG: Yes.

MR. MILLER: I think those would be a good thing to compare with the actual data that's been collected, again, and summarized in that document 40. And we can look at each individual monitoring well. I think that would be a good exercise for the Board to go through.

But if you look at the actual sampled data, again you see 15 wells without long-term trends. You do see three wells with an increasing trend. But just pointing out that physical data, I don't know if that's ever been presented clearly to the Board.

CHAIRPERSON YOUNG: Do these wells correspond with the well data that the staff is relying upon?

MR. MILLER: I believe they do.

CHAIRPERSON YOUNG: Okay.

MR. MILLER: I think this would be the tool that staff can look at to analyze. And they
may have comments on that document 40, which
trended every single well. And so you can page
through well-by-well to look at the actual trends
in the wells.

And so that's the information I wanted
to present.

CHAIRPERSON YOUNG: Okay.

MR. MILLER: I'd be happy to answer more
questions.

CHAIRPERSON YOUNG: All right. Any
questions for Mr. Miller? Okay. You guys have 12
minutes remaining.

MS. SCHICKER: Okay, thank you. I'm
going to go really quickly and I would
respectfully request more time, if we could,
because of technology problems and other things.

Let's show the clip. What I'm -- as the
clip is about to start, I'm trying to make the
point that the TSO -- I'll wait.

(The following video was played:)

MR. SPEAKER: -- directed their efforts
to Broderson, did not include those
other sites, and you did that on purpose
because that was the linchpin, that was
the first thing that you needed to get
done and you needed to get the
groundwater, the specific model, the
finite model, to a point where it was
usable. So, you did that on purpose.
And we've been waiting for them to get
the wrinkles out of that model and to be
able to adapt the same technique to
these other sites. So right now, if you
want to do linear leach fields in the
other areas of the community, you have
no way of knowing what the downslope
impacts are going to be for those areas.
MS. PANDORA: I guess my confusion is
that we don't even know if the soils --
what the percolation rate through these
soils is in these different locations.
I mean we did this extensive testing
that was used at the -- up at the hill
to tell us we couldn't use injection
wells. We have an idea of soil
characteristics, water permeability,
that sort of thing, which is real data.
And I'm having a little trouble
understanding why we don't want real
data, we're just going to use a model
where we haven't even looked at soil
bores or anything from any of these
areas. We're also using a model where
we're using wells that are in the
vicinity to populate the cells of the
model with data. But it's a model. And
I guess I'm not comfortable with using
just the model without any field data.

MS. STAN: I have a question. It's my
understanding that the Vista del Oro
leach field is failing, and that the
Monarch Grove Elementary School leach
field, that there's a problem downslope
of that.

MR. SPEAKER: Yes.

MS. STAN: I agree that, you know, we've
been asking for quite some time that we
look at road rights-of-way, and I have
also, I'm not totally convinced that the
Kai (inaudible) needs the ability to use
that to get us on the other side of the
fault line. It isn't something that we
should be looking at. So it seems like
some of these are appropriate and some
aren't.
MR. SPEAKER: Yeah, and your board can tell Cleath which of these you want them to study. I think -- I'm going to be brutally blunt here. Unless we can get some opinion as to what the downslope impacts are of the sites you want us to analyze, Mr. Clark can't complete his environmental impact report. I don't care which sites you pick next Wednesday or the 21st, but somehow you have to give the information to your environmental consultant from a credible source as to what the downslope impacts are. And whether it's Kai (inaudible) or Santa Maria, almost doesn't make any difference. You have these various sites that could be analyzed.

MS. PANDORA: But we're not doing any field work.

MR. SPEAKER: That is true. You're relying on the knowledge we have in the basin. You don't have time, frankly. We need these analyses done by early October at the very latest for them to be usable."
MS. SCHICKER: Mr. Chair, I have to express my frustration at this time. We have so much information to present to you.

CHAIRPERSON YOUNG: Okay, how much more --

MS. SCHICKER: I feel like I'm rushing and shoving.

CHAIRPERSON YOUNG: -- how much more time do you need?

MS. SCHICKER: I need ten minutes and he needs ten minutes. I mean, I --

CHAIRPERSON YOUNG: Okay, all right.

Hang on, --

MS. SCHICKER: Okay. It's very frustrating.

CHAIRPERSON YOUNG: -- hang on. Okay. And I want to allow you adequate time, you know, for your closing. So, why don't we do this --

MS. OKUN: Well, we still have cross-examination before their closing.

CHAIRPERSON YOUNG: Oh, yeah, oh, I understand. I'm just thinking of allotting more time to both sides. So why don't I do this. I'll just give both of you, both sides, 30 more minutes to use.
MS. SCHICKER: I very much appreciate that.

CHAIRPERSON YOUNG: Yeah, that's fine.

MS. SCHICKER: It's just that we're rushing to hard.

CHAIRPERSON YOUNG: I understand.

MS. SCHICKER: We're not doing a good job, and we'd like to do a good job for you.

CHAIRPERSON YOUNG: Okay. All right.

Is that enough time?

MS. SCHICKER: I hope so, I think it should be.

CHAIRPERSON YOUNG: Okay, good.

MS. SCHICKER: At the rate we're going, it should be okay.

CHAIRPERSON YOUNG: Good.

MS. SCHICKER: So, thank you.

CHAIRPERSON YOUNG: All right.

MS. SCHICKER: Why we showed the historic clip, why it's so important to us, and why we're so concerned about this hearing and this ACL complaint is this.

We believe that the short TSO, the short amount of time that was given to the initial TSO in 2000 is problematic. Because what it did --
and I know we've had some discussion, Mr. Jeffries did mention your TSO -- whose is it -- we understand that many times the TSO was -- requests were made by Mr. Buel to the Board and/or your staff to please revise the time schedule order. Because it wasn't realistic, it wasn't happening, we weren't getting good data before design. That's why we showed the historic clip. All the data, all the research for a good project came out after the design. So therefore, the design of the project does not reflect the goals that will meet the objectives of cleaning up the water basin in the best way for the best amount of money. You know, the best use, you know, all of the things that you folks agree with us on. We're on the same page there. So, that's the premise of these clips, and the premise of my presentation is that the short TSO, the push and the shove, because of your absolute frustration over time of not getting a project has, in fact, made things possibly worse because of that.

Now we have a design that doesn't reflect the technical data that was produced after
the design. And this list right here, this is a quote from you about how "We strongly believe it is in the best interest of the community you represent to open-mindedly evaluate alternatives based on technically correct information."

Yet all these reports that you see here on the right happened after design. Therefore, we maintain the design of the plant is so problematic, and it was pushed by the TSO. And our Board's absolute commitment to trying to meet it, even though they asked you over and over again, would you please talk to us about renegotiating it. Would you please --

We put a petition in, you know. There were reasons we didn't think the time order was realistic. So now we've got a project that's the highest per capita in the country. We have huge division in the community. We have you coming after us for fines. We have the state pulling our money. And we're trying to solve the water issue, and we're very committed to that.

But now we're in this situation that's actually even possibly, for your consideration, maybe even made worse by this time schedule order crunch, squish, push.
And so that's what I wanted to say. And I'm going to keep going in the presentation. But I just wanted to explain this. This was in 2000, February.

CHAIRPERSON YOUNG: Ms. Schicker, I'll stop the clock and I just wanted to ask you a little bit about that. What is it about the design of the plant, based on this data that is incorrect --

MS. SCHICKER: It's coming up in my presentation.

CHAIRPERSON YOUNG: Okay.

MS. SCHICKER: I have a few slides about it, but --

CHAIRPERSON YOUNG: Okay, because --

MS. SCHICKER: Yeah, I know, I'll go over it --

CHAIRPERSON YOUNG: -- doesn't the Tri-W plant clean up, it's going to collect the septic tank effluent; it's going to process it; it's going to put it through a membrane filter system; it's going to produce tertiary treated water which is going to be recycled and put into the Broderson site at 800,000 gallons a day.

Are you saying that design would be
different based on the data that you say came to light afterward?

MS. SCHICKER: Yes, I believe so. And I will demonstrate a few of those high points for you. We have great concerns about the design of this project. The task force was formed mainly to protest the design. We have great concerns that I will not meet the water quality goals that were established for this project.

CHAIRPERSON YOUNG: Well, if it produces tertiary treated water, how does that not meet a water quality goal?

MS. SCHICKER: I will demonstrate that in a moment, --

CHAIRPERSON YOUNG: Okay.

MS. SCHICKER: -- but just keep in mind if we're putting 7 mg/L of nitrates back into the mix, and it's going to take 30 years to fix it, and we're stabilized right now, is that a good solution. And if we don't have anywhere to put the water because the Broderson leach fields possibly are completely under-sized and will fail, and the water pops out in Morro Bay and Questa-by-the-Sea, and we don't have anywhere to put it, or we're pumping it to the Bay which we promised we
wouldn't, which is also part of the design, we've got some serious problems with this design.

That's all we've ever been about is exposing these problems.

CHAIRPERSON YOUNG: Well, wasn't the 800,000-gallon-per-day estimate for the Broderson field based on engineers' estimates?

MS. SCHICKER: That's the --

CHAIRPERSON YOUNG: I mean you're going to be producing about a million gallons a day, right?

MS. SCHICKER: That's correct.

CHAIRPERSON YOUNG: So there's like, someone has already made a determination that the field could accept about 800,000 gallons.

MS. SCHICKER: Yeah, and we have --

CHAIRPERSON YOUNG: And the 200,000 has to be dealt with in some other way.

MS. SCHICKER: I'm talking about the 800,000 gallons. We have serious concerns of clogging in the field due to the salts. And then the liquefaction risk. And also the way the clay is designed, I could go on and on. It's going to end up in Questa-by-the-Sea; it's going to flood homes. We're going to have to pump it or dump it
into the Bay. We're going to recycle, recycle, recycle. Energy costs go up. It's a bad design. And it's conceptual. It has never been shown, it's never been proven yet.

We're very concerned about that. That's what we've been trying to reach you for a couple years now.

CHAIRPERSON YOUNG: Do you mean conceptual in that it has never been demonstrated at this site, or anywhere in the state?

MS. SCHICKER: That these big leach fields are going to work and not clog. And the liquefaction risk based on the neighborhood, on the Fugro reports. Some of those reports that I showed you afterwards, you know, and the nitrate modeling.

CHAIRPERSON YOUNG: All right, I'm going to -- go ahead.

MS. SCHICKER: Okay, to continue on, this is a letter sent from the SRF program in 2000. They were concerned about our project even at that time, that we hadn't analyzed the cost effectiveness completely and an evaluation of project alternatives. They didn't like our project report.
They have to be consistent with water
management plans. We didn't have one yet. See,
this is what I'm saying. All the reports were
done later. And adequate cost effectiveness
evaluation may lead to a different project all
together. These are State Water Board engineers.
We agree with these statements. It just didn't
happen because of the push.

Another one. Yeah, quickly.
(The following video was played:)
MS. SPEAKER: We have two
representatives from the Regional Water
Quality Control Board here tonight,
Gerhardt Hubner and Sorrel Marks. Would
either one of you care to speak to the
probability of our getting an extension
on our timeline?
MR. HUBNER: Madam Chair, Members of the
Board and the community, my name is
Gerhard Hubner. I'm a Senior
Engineering Geologist and Chief of the
southern watershed unit. And I'd be
happy to answer questions that you might
have. But I believe the question was --
MS. SPEAKER: The specific question is
we went to ask your Board for support to
go to the State Water Resources Board
and ask for an extension of our
timeline. And can you tell the
community the message that we were
given?

MR. HUBNER: The Board, at this time, is
not inclined to give an extension. At
least that was the direction that they
gave. They have asked us at the October
27th meeting to come back to them with
various enforcement options. We, as
staff, are working with your District
Staff and the consultants, looking to
see that we had a good faith effort, so
that we can come to the Board in October
and recommend a lesser type action.
Presently there's a cease and desist
order. We're looking potentially to
revise that with some dates. However,
we do need to see that the Board is
moving forward so that we can make that
recommendation."

MS. SCHICKER: Again, just another
example of what we are possibly suggesting to your
Board might have been part of the problem with coming to a solution that was agreeable to all.

This push -- we asked for assistance, we asked for help and we were told no. No, you don't get any more time, you can't do this. Yet, we find ourselves in this situation today. And maybe we're all involved with that result. I'm asking you to consider that.

Again, high costs of MBR at Tri-W, really high costs. MBR is a good technology; there's no disagreement there. They replace the tertiary filters. We're unclear on the sizing. The capital costs are outrageous. The costs for electricity is out of this world, it's 50 to 80 percent more. And then if you add on that pump-and-dump thing I was talking about with the water recycling, you've got electrical costs.

No sustainability. That was a big goal for our community. You just held a workshop on it last month. We believe in that goal. We agree with you. We aren't getting it with this project.

The MBR technology and these filters need to be replaced, possibly every seven years. Forty percent of the capital costs every seven years. The O&M goes way up on a plant like this
for a community of our size and the amount of
people that are using it. We question that cost
factor, again.

Here's a summary of some of the flaws.

Mr. Young, you were asking me why we think this is
such a poor project for our town. Again, the
technical reports came after the design, so the
plant was not designed appropriately to meet
things.

The biggest ones, which you folks should
be very concerned about, are salt water intrusion
and groundwater recharge. We don't accomplish
either of those goals with this project. For the
cost that's not a good thing.

Salt water intrusion isn't addressed at
all. Groundwater recharge, again technical
studies came out later, maybe 10 percent of the
water will get back in because of the clay layers.
It's not a -- you know, the way we have it
designed does not work. We're ending up pumping
and dumping the water.

So that was the next line about either
dumps water to the Bay or we've got to pump it in,
figure out what to do with it, you know. We're
not recharging and recycling like we wanted to.
It doesn't treat the nitrate problem for
at least 30 years. And, again, we're putting
plenty back in to mix with the existing. So is
that really a good thing? We question that.

We've got a grass-lined sewer overflow
pit right uphill from the National Estuary.
Everybody's saying don't pollute the Bay. We
don't want to pollute the Bay. How many sewer
plants spilled last year? We've got this plant
located -- I'm a site planner; I have a landscape
architecture, that's my advanced degree,
environmental planning and landscape architecture.
We're putting a sewer in a ditch, in a drainage
ditch right upstream from the back side of the
Morro Bay Estuary. And we're saying that's a good
siting. I'm sorry, I disagree.

Where is it going to spill to? Which
way is the spill going to go? This time it's raw
sewage, it's not effluent going through a sand
filter, it's raw sewage going down the hill to the
back Bay that doesn't flush. We think it's a bad
idea.

The project doesn't meet sustainability
goals. I've already mentioned that. Highest per
capita sewer in the country. Disposal at
Broderson is conceptual; dangerous to homes;
liquefaction risk has not been assessed. I can
show you that in the EIR. I've been saying it for
a couple years now.

And the Broderson leach field is
dangerously under-sized. There's engineering
disagreement about that, I realize. But we've
done enough studies to believe that the field will
clog based on the soil type and the effluent
quality. And we will have problems with Broderson
that we will be sorry about.

CHAIRPERSON YOUNG: Then when --

MS. SCHICKER: And you will be coming
back and fining us.

CHAIRPERSON YOUNG: -- when were those
studies done, Ms. Schicker?

MS. SCHICKER: The Fugro report on the
soil type and the groundwater management plan were
done in 2004 and '5.

This is an example that came out of the
2001 project report; another one of our big
contentions, cost, you know, for the money,
project for the money.

This is table 4.4. It shows the Tri-W
site has overall life cycle costs that are higher.
The community was completely misled. If you wonder why the community is in such division about this project, the environmentally superior project was out of town, identified in the EIR, and it was cheaper. And that was never disclosed to this community. We ask you why. We've asked why for about three years now. It should be of concern to you, as well.

That's the difference in cost --

CHAIRPERSON YOUNG: Are you suggesting it wasn't discussed in the EIR?

MS. SCHICKER: No, it wasn't, actually.

The lifecycle costs and the --

CHAIRPERSON YOUNG: No, I mean are saying the Andre site --

MS. SCHICKER: Oh, no, the Andre --

CHAIRPERSON YOUNG: -- was not discussed in the report, in the EIR?

MS. SCHICKER: No. The Andre site was discussed --

CHAIRPERSON YOUNG: Okay.

MS. SCHICKER: -- and it was disclosed as the environmentally preferred site in the EIR.

CHAIRPERSON YOUNG: Well, let me tell you how I view environmentally superior, things of
that nature. I think that's somewhat subjective. I think if you ask the people that live out there in that part of the community, they would have a different take on that.

I think that --

MS. SCHICKER: I know, sir, but with due respect, the EIR, which is the environmental document that you're supposed to follow, identified it as the one, as the place to go. So, why did the community not pick it? That's the real question, isn't it? Why did the community not pick this site?

CHAIRPERSON YOUNG: Well, there's another issue, Ms. Schicker, that involves feasibility, not just what might be environmentally superior based on certain factors. Feasibility.

So, --

MS. SCHICKER: And your --

CHAIRPERSON YOUNG: -- there are pluses and minuses --

MS. SCHICKER: Absolutely.

CHAIRPERSON YOUNG: -- to the site at Tri-W. It's closer to the collection system; it's more centrally located. And getting out to Andre
would have other, you know, pumping costs and
things of that --

MS. SCHICKER: That's correct, but --

CHAIRPERSON YOUNG: -- associated with

it, so it --

MS. SCHICKER: -- but Andre --

CHAIRPERSON YOUNG: -- it's a series of

balancing of values that take place.

MS. SCHICKER: Another one of the goals

I forgot to mention was ag exchange. That was

another reason we thought it would be better out

of town.

But back to the ditch and the esha and

the Bay and the homes and the cost, all of those

factors -- you say it's a balancing act. I would

just ask you to please consider those, as well.

All of those things weren't in the EIR. That's

why you noticed a great upsurge of people coming

out at the Coastal Commission stage because the

project had changed. It had morphed.

Now it's 40 feet tall; now it's the most

expensive ever. Now we got a drainage, overflow

pit coming out there. We didn't have any of that

in the EIR. Those were new facts, never disclosed

to the community. That's why you have this
dissension. That's why you have this division.
It didn't come out of nowhere. It didn't come out
of people not wanting to clean the water. I think
there's a misconception about that.

CHAIRPERSON YOUNG: Well, I'll tell you,
I recall at some of the Coastal Commission
hearings I was at in '98 when there were people
that said, stop the sewer, there isn't a problem,
we don't need a sewer.

So, you know, maybe there's been a
progression and a maturation in appreciation for
what's going on with the groundwater, but, you
know, the community, itself, has had many
different roles in this.

I mean we are here today because of what
this community has done, not because of what the
regulatory agencies have done to the community.
These are discharges from the community. You
elected a board before, the community did. That
board went through a process; it made choices. It
developed the EIR, did certain things. The
community then voted new members of the board in.
And so these are all -- you know, we're here today
because of what the community has done.

And so we're not really here to start
looking back in time at what was or wasn't in the EIR. It's not really part of a defense, I don't think, to what's in the ACL complaint.

MS. SCHICKER: With respect, Chairman Young, what I'm asking you is possibly, and other Directors, possibly a philosophical question, that's what I brought up about the TSO. Please accept a partial role in this scenario that's played out.

When you have an agency that's regulatory butting heads with the community, and putting the thumb on the neck of the people and saying, no, we will not revise this time schedule order. And you've got people who are trying to solve their problems. Would you at least be willing to accept that maybe there is a dual role here. And that maybe we could both benefit from some negotiations or mediation or workshops. Why don't you want to work with us and why do you want to punish us?

BOARD MEMBER SHALLCROSS: I'd like to say something.

CHAIRPERSON YOUNG: Sure, go ahead.

BOARD MEMBER SHALLCROSS: You know, if this had just happened, if we had just found out
the Los Osos was polluting the waters of the state, and, you know, you guys went through this process, and oops, this isn't where we want it, you know, I'm sure we would have been more than happy to work with you.

This didn't just happen. This has been over 20 years this community, for different reasons, has not come up to the plate and stopped polluting the waters of the State of California.

And every time there's a project that's almost ready to get built you guys change your mind. Oh, we want to do it ourselves. Or, we don't like where it is. And you continue polluting the waters of the State of California.

So, don't give me this, you know, change the TSO stuff, because we, you know, held back in enforcing for over 20 years. You guys have had plenty of time. And to come to us at this late date and say work with us. We've been saying work with us for over 20 years. And you people said, oh, yeah, yeah, yeah, and you never have.

And I'm wondering if you ever will.

With Measure B, I'm not sure you're ever going to get to a plant because I can see this very divided community voting over and over and over again to
turn down site after site after site, because they
don't want to pay for a plant.

So this is very disingenuous of you.

(Audience participation.)

MS. SCHICKER: Oh, Mr. Shallcross, --

(Audience participation.)

MS. SCHICKER: -- Mr. Shallcross --

CHAIRPERSON YOUNG: Please keep it down

or I'll ask everybody to leave. Okay? Go ahead,

Ms. Schicker.

MS. SCHICKER: Mr. Shallcross, I

appreciate your frustration, but with all due

respect, we had a conversation about a year ago in

Watsonville. You asked me, I don't know why you

want a plant downtown. You told me that,
yourself.

BOARD MEMBER SHALLCROSS: I absolutely

agree. I probably wouldn't, either. But that's

not why we're here.

MS. SCHICKER: But, I'm not that 20-year

person that you're describing, as kind of a
generic person, you should have. It wasn't me.

It's a progression.

You are wanting to blame me for the

past, and I'm telling you I'm here to solve the
problem. I'm volunteering as an elected representative. I took the ultimate sacrifice. I ran. You told us to change the Board if we wanted to change the project. We did. We ran for office; we got elected. We're trying to work with you. We don't want to work against you.

BOARD MEMBER SHALLCROSS: Let me say this, you know, I agree. If you wanted to change the site, your argument was with the Board, your Board, not with us.

You and Ms. -- thank you -- Ms. Tacker came in here time after time. First of all, generally when you came in you would start insulting us or bad-mouthing us and saying help us move the site.

We got really tired of it because we have absolutely no ability to move the site. We have absolutely no jurisdiction to move the site.

So I told you if you have a problem with the site, that's within the jurisdiction of the CSD. You have to go and change those folks if you can. You did.

Now, does that mean that all of a sudden you get to do whatever you wanted? Does that mean you get to violate the Porter-Cologne Act? Does
that mean you get to violate the Clean Water Act?
No.

I think you could have had a good chance
at moving the site and gotten some of the stuff
you wanted if you had gone about it right. I
think the thing that's really tying you folks up
is Measure B. I think that's the killer in this.
And I know it's not the Board's fault because
you're sort of bound by it. The Measure B is
what's going to keep this community from ever
building anything. And that's what I think.

(Audience participation.)

BOARD MEMBER SHALLCROSS: Yes, that's
what we're here to do.

(Audience participation.)

CHAIRPERSON YOUNG: Okay, excuse me.

(Audience participation.)

CHAIRPERSON YOUNG: Excuse me. You'll
have a chance to testify at public comment. All
right, Ms. Schicker, the clock was stopped during
that. So, keep on going.

MS. SCHICKER: Thank you very much, sir.

CHAIRPERSON YOUNG: Okay, go ahead.

MS. SCHICKER: We've heard several times
that the group of us who really felt we could
change this -- wanted to change this project that
you didn't have a plan. Well, yes, we do have a
plan; we've been studying for at least a year and
a half about which way to go.

And this is the top of our list. It's
not the only one, but we do have a plan. We've
researched it. We've had speakers come into town
and workshops.

At the multi-stage pond treatment, a
high rate modular pond that can treat the nitrates
and it can do tertiary treatment. And this
summarizes what the components of this project
would be. Aerobic ponds, anoxic ponds, et cetera,
I mean you can read them.

But the main thing is the timeline for
construction was do-able; the cost, the lifecycle
cost was lower. We thought we could get more buy-
in from the community.

And then you know about these state
negotiations we had with the State Water Board
Staff. They bought it; they thought it was great.
They thought it was do-able. I don't want to say
they thought it was great. They saw the same
issues we saw, complications of site planning.

This is how we entered the negotiations
with Mr. Blakesley's office. This was Mr. Polhemus. Here's a summary of results of some of our work. State Water Board Staff did agree with our negotiating team, which was Vice President Fouche and I, Mr. Miller and Mr. Bleskey, along with Assemblyman Blakesley and the State Water Board Staff. They agreed with us. We had something that looked do-able and less expensive. Less O&M.

So this is what we went for. And this is why we wanted to get the state revolving fund loan changed. So this is just a summary of that. The pond east of town would have had the 21, and the MBR Tri-W was 46. So we convinced Mr. Polhemus that we had a do-able proposal. He took it back to his Board, and they kiboshed the loan. He came here in full -- with full willingness, and he told us, I have full authority to negotiate with you. I can, on behalf of my agency, I'm coming here in good faith. We spent a week. We came up with something.

So, anyhow, this is just a summary from some of those negotiations I thought you might be interested in that.

Going on to the planned O&M costs, it
was a question that I think, Mr. Young, you asked about, could you break out the cost of O&M for the plant versus the ponds. And this data comes from Montgomery Watson Harza's work, 2003. It hasn't been escalated completely to 2005, but it's close enough that you could see and we could show the state that our O&M, which is really the big cost over time, is much less with the ponding system. It's about half.

So this is some of the data we presented in our negotiations; just some that I thought you would also find interesting.

CHAIRPERSON YOUNG: Ms. Schicker, how do those numbers on the right differ from the numbers we heard earlier --

MS. SCHICKER: Yes, Mr. Buel gave you the overall project, disposal and collection and included.

CHAIRPERSON YOUNG: Okay.

MS. SCHICKER: And this is just the plant.

CHAIRPERSON YOUNG: Just the facility.

MS. SCHICKER: And that was the question you had asked, --

CHAIRPERSON YOUNG: Okay.
MS. SCHICKER: -- I think. This was some summary of the benefits noted in the compromise that we worked out with the state staff before it went to the Board. We thought we could get the collection going right away. We could address more of those deferred costs that I listed for you, the groundwater intrusion, the salt -- the ag exchange, the groundwater recharge and the salt water intrusion. We thought we could get more bang for the buck, more water quality goals.

We thought about -- we offered to consider sewerage outside the prohibition zone. I've talked to many people, as an elected, who said that more people want to hook up, not less, but more. They can't do that with this downtown plant.

So we were getting initial feedback that maybe we could sewer the whole town. So, we thought that was a good idea. And, again, the out-of-town would provide for future modifications for treatment when necessary to improve water quality.

BOARD MEMBER SHALLCROSS: I'd like to ask you a quick question about the negotiations. Procedurally you guys came to some sort of an
agreement at some point, and you went back to your
Board for a vote and you agreed to it.

And then I'm assuming Mr. -- what's his
name?

CHAIRPERSON YOUNG: Polhemus.

BOARD MEMBER SHALLCROSS: -- Polhemus
went back to his Board, and at that point did they
also vote to agree to it?

MS. SCHICKER: It actually went back to
their staff first, and the staff put the kibosh on
it before it ever went to the Board. They never
went back to -- his staff above him went. And I
understand there were also some Board Members that
were negotiating with Mr. Polhemus during that
week and Mr. Blakesley --

BOARD MEMBER SHALLCROSS: Okay.

MS. SCHICKER: -- were a part of that
negotiation.

BOARD MEMBER SHALLCROSS: So it never
went back to the Board for a vote.

MS. SCHICKER: Not that --

BOARD MEMBER SHALLCROSS: Is it your
understanding that it needed to go back to the
Board for a vote for them to accept it?

MS. SCHICKER: What they told us at the
staff level was that it was too risky and they weren't even going to agendize it. We had thought that --

BOARD MEMBER SHALLCROSS: No, I'm sorry, what I meant was would the Board have had to have voted to accept it in order for it to take effect.

MS. SCHICKER: Yeah. We had thought we were going to be agendized. And we were quite surprised, actually, that we weren't even on the agenda.

And so we had thought for sure that we were going to be going before a Board to finalize it just like we had done with our Board hearings, et cetera.

BOARD MEMBER SHALLCROSS: So the Board never voted on it. Okay. Thank you.

MS. SCHICKER: This is just a few of the benefits in the compromise. This is something that I spoke with Mr. Polhemus with, and maybe you guys can ask him that tomorrow.

We have a clip. So this comes from the January meeting when we were going back to get the loan. This has to do with what would happen if there was a recall and we wanted to change the project. This is from staff, State Water Board.
Staff, in January 2005.

(The following video was played:)

MR. SPEAKER: -- come back. If you approve this $93 million loan for the project before us, and if the community decides to change their mind at some point in the future, they could come back and ask you to change the project. But you would basically then need to recommit and consider that. And that's at this Board's discretion on how they want to treat that."

MS. SCHICKER: I know one of you asked me, what gave you the impression that you could do this. And I have to tell you, this was part of the -- this is definitely --

CHAIRPERSON YOUNG: Okay, but what I clearly take from that image is that it's within the State Board's discretion. I certainly would not go to the bank on a statement like that from, you know, staff that the Board has to do it. And I think I'd certainly want to be very clear in my mind before relying upon that that he said.

MS. SCHICKER: Absolutely, Mr. Young.

CHAIRPERSON YOUNG: Yeah.
MS. SCHICKER: And just so you know, we
did actually meet with Mr. Polhemus for about five
hours outside of the Board hearing to discuss
details about this. Because we wanted to make
sure that this was a possibility.

And, of course, he said it's a Board
action. We understand that, we're a Board, we
understand how that works.

But because this summer, because they
knew about Measure B and the recall and all that
before they let the money, we didn't really
believe that after the election that there would
be a change. If they knew about it before and
they let the money out, less than one month before
an election, why would it matter afterwards?

We were totally committed to a project.
He knew that. We'd been talking to him for a
couple years now. And he was totally, he knew
that we wanted a project. And he knew about
Measure B beforehand, the Board knew, the staff
knew, everybody knew.

So if they were so concerned about it
before, that's the question that we asked, why did
they let the money out. Because now we're in a
bigger mess and we didn't have to be. We were
ready to go. We had our -- we were ready to get
to work right away. We didn't want any delays.
We don't believe in the delays. We want to get it
fixed completely.
Chuck, do you want to do your part now?

MR. CESENA: Do we have time?

MS. SCHICKER: Yeah, really quick. We
have a little more time. Mr. Cesena. Really
quick.

CHAIRPERSON YOUNG: Mr. McClendon,
you're down to 21 minutes of that additional 30.

MR. CESENA: Okay, I'm going to make
this quick then. The community's been living
under the threat of fines for a long time. This
has always been a tactic --

MS. SCHAFFNER: I'm sorry to interrupt,
sir, but could you please introduce yourself.

MR. CESENA: Chuck Cesena; I'm one of
the Directors of the CSD Board.

MS. SCHAFFNER: Thank you.

MR. CESENA: I've been in the
environmental planning field for 25 years, and
deal with permitting and all of the factors
involved with developing public works projects.

It's always been a tactic of the
previous Board to come to the community and say, if you don't go along with what we're telling you you're going to get fined. And the most blatant example would be in July of 2005 when Director Legros, I believe came to your meeting, talking about $11 million in fines, pretty much asked you to levy a fine.

Came back to the community and told us that if we voted to move the sewer there would be $11 million in fines even though he did not get your Board to say that that definitely would happen. He came back and presented that to us as a definite done deal.

Following Chairman Young's advice, I think this was given at the Monarch Grove ACL hearing. There was a reference made that staffs should get together and try and work these things out before they have to come to the Board, and we agree with that.

CHAIRPERSON YOUNG: And I've said that many times.

MR. CESENA: Oh, absolutely.

CHAIRPERSON YOUNG: I don't want these things coming to this Board like this.

MR. CESENA: I don't think anyone wants
to be here today, that's for sure.

To that effect, immediately after the
election we formed a compliance team to meet with
Regional Board Staff. I believe October 6th was
the day that that meeting took place.

Unfortunately, it wasn't really very productive.

We wanted to start discussions regarding
the septic tank maintenance district, something
that was ordered by this Board back in what, 1983,
but never implemented. Why has that been
overlooked? We could have been pumping the upper
aquifer to provide a greater separation between
leach fields and the groundwater all this time.

It was never ever -- all these things we wanted to
come talk about getting going.

Maybe it was just too late because of
the history and acrimony between community and
staff. And that's exemplified by this next slide.
You probably remember seeing this in the past.
Not only was this a slam at our community, it
managed to rip the Coastal Commission, even took a
swing at law enforcement. And all of this was
prepared by a staff member who worked for Mr.
Briggs. So maybe there was just too much poison
for us to work together now.
MS. OKUN: I object to this slide and move that it be stricken from the record.

(Audience participation.)

MR. CESENA: It's a fact it was prepared by --

MS. OKUN: It's irrelevant, it's inflammatory. It was done by a staff person on his own time. It's already been investigated.

CHAIRPERSON YOUNG: Well, was this something --

MR. CESENA: It does call into question the ability of staff to carry out the duties under the ACL.

CHAIRPERSON YOUNG: Was this something that was marked as an exhibit?

MR. CESENA: Yes.

CHAIRPERSON YOUNG: Okay. You know, it is a newspaper article --

MR. CESENA: No. No, no, no, no, this was a cartoon distributed at a CSD Board meeting.

CHAIRPERSON YOUNG: Okay. What is the relevancy of this?

MR. CESENA: It refers back to the ability for staff to work with us, to be civil.

CHAIRPERSON YOUNG: How is that relevant
to the District's defense to the ACL, and perhaps Mr. McClendon should answer that question.

I see it as irrelevant.

MR. CESENA: I could throw in one comment. We were told today that people normally come in and start working with us toward compliance immediately if there's a new board or when an ACL is issued. And we did that.

My point being maybe it's just too late. Maybe there was no point in trying to come and work things out with staff, even though we've been given that direction.

CHAIRPERSON YOUNG: Okay. I'm not going to allow it to come in for the reason that there's probably been many cartoons like this, different depictions. I don't see what purpose it serves to what's at issue here.

MS. OKUN: Also, for the record, this was drawn by a staff person who was a resident of Los Osos, but never worked on the project, as far as I know, for the Board. And no longer works for the Board.

CHAIRPERSON YOUNG: So this was done by a --

MS. OKUN: A staff person.
CHAIRPERSON YOUNG: -- resident of Los Osos, okay.

MR. CESENA: These are some of the comments that we've heard today that we take objection to: that the current project is the least costly means of resolving water quality problems in Los Osos. We think we demonstrated, along with Mr. Polhemus that that's not true.

Pollution of Morro Bay and the groundwater resources will continue until the community sewer is complete. I guess what this alludes to is that once we build that system the pollution will stop or somehow go away.

It'll take 30 years if we're putting 7 mg/L nitrate water back into the upper aquifer to drop 1 mg to get us down to the drinking water standards.

We feel that an ag exchange program east of town, where we're not putting nitrate-laden water back into the ground would be a quicker way to deal with the pollution.

CHAIRPERSON YOUNG: Are the farmers willing to accept water like that in the winter?

MR. CESENA: I talked to one a year and a half ago who said he'd take 200,000 gallons a
day in the dry season, that's a quarter --

CHAIRPERSON YOUNG: The winter is what I asked about.

MR. CESENA: Okay, --

CHAIRPERSON YOUNG: When it's raining do farmers need to take water?

MR. CESENA: We would probably need Broderson and we would need some wet weather storage. But there's a lot of land out there that would make storage ponds and that sort of thing much more feasible.

The Coastal Commission even required an ag exchange program. It's coming. I mean they fought it in the Pajaro River Basin, the Salinas River Basin. It's -- change is always dealt with with trepidation.

And obviously we share the water basin with the farmers; we're all in this together. So we think we have to work with them, and we hope they want to work with us.

The delays are wasting millions of dollars. We think if we can deliver a cheaper project that obviously would be false.

Thank you.

MS. SCHICKER: Just a few more things
coming out of the negotiation I thought would be
of interest to you.

We also in negotiation, and as part of
our task force and elected roles, we believe in
all these things to help immediately, to help the
water quality problems in Los Osos.

Short-term and interim pollution control
methods include leachate treatment systems for
specific sites. We can relate those to the map
that you just saw.

Pumping for irrigation and ag exchange.
Begin immediate pump down of the upper aquifer to
allow further denitrification to occur in the soil
matrix. We think that's a quick solution that we
could start on right away.

And then finally, additional well
production in the east basin, thereby allowing
reduced pumping in the deep west basin.

We proposed all of these in the
negotiations with Mr. Polhemus, and he was
amenable to these, as well.

We want to immediately implement
emergency water conservation. We want to adopt an
ordinance and a program. As a matter of fact,
we're scheduling another Board meeting tomorrow
night, Friday night, and all of these things are
on the agenda. We're going to go forward with
them, nonetheless. We have all these things on
the agenda. I'd encourage anybody to come and
hear what we have to say.

CSD is signatory to the California Urban
Water Conservation Council implementing BMPs; ID
the high groundwater leachate failures and fix
them; review for possible collection and
treatment.

And then finally, we are committed to
establishing a septic tank management district.
And when I say we, I'm bringing it before the
Board and the public. And to begin by serving
onsite for implementation of AB-885.

Just to assure you and encourage you
that we are on it, as far as the water quality,
water conservation and things, we have great
goals. We're very excited to get going.

This last two months has been pretty
painful for us because we've been waylaid by the
loan and the fine issues that we've had to deal
with. They've taken a great amount of time. But
we're not giving up.

And, again, we understand the
supplemental environmental program and projects. And we would encourage you to consider those for us, as well. And we have lots of ideas about how we could get those going.

And this comes from your staff report, again, in July of '04, about how they work. And we're familiar with them. We know we'd have some great ideas for Los Osos if you'd be willing.

So, that kind of summarizes my presentation. But we need to go back to Mr. Bleskey to finish the timeline.

CHAIRPERSON YOUNG: Fourteen minutes.

MR. BLESKEY: The remainder of my presentation is just going to be to make the point that we've used and exhausted any and every contract remedy to get the work going again. And our commitment to doing that.

You've heard all about the negotiations. That was a do-able deal. That was a bilateral agreement, supplemental to the scope of the original project. It's been my experience personally, as well as professionally, that there's only two contracts that can unilaterally be modified. One is no-fault divorce in California, can't do anything about that one. The
other one is DOD contracts for the federal
government, but remedies are provided under the
Claims Act.

And those remedies for the unilateral
actions of the federal government in the
administration of defense-related contracts,
especially in war time, have severe penalties.

I'm not aware of anything else that
allows an agency to dictate terms that are out of
scope in the form of a supplemental agreement that
are mandated by one party in a bilateral
agreement. That's for the courts to sort out.

Normally that's done through the form of
negotiations.

Negotiations cannot occur unless both
parties can agree an effective negotiation range.

We thought we had that. That was removed. And
now the SRF loan has violated the terms of its
contract.

We have issued -- there's a term that
you're going to hear here, and when does
construction start? Number one, the issuance of a
notice to proceed. That starts the clock.

What constitutes a delay? Delay is only
the impacts on the critical path of the agreed-to
and approved construction schedule. There is no
construction schedule for this project, period.
it doesn't exist. There's no baseline, and the
ability to negotiate what are the actual impacts
of a construction claim will be very very
difficult because of the lack and the failing of
the consultants to actually be consultants in
charge of that to implement that project.

I have never seen a contract of this
complexity that allowed start of construction
without an agreed-to construction schedule.

The schedule was crashed from the
beginning; front-loaded. And the only thing that
you can say about it, when looking at it, is that
it was to get the maximum amount of work in the
dirt in the form of the ability to issue
subcontracts and equipment orders that would bind
the CSD through a form of -- by using, you know,
accelerating the schedule in the beginning, which
is ludicrous. You don't invoke emergency contract
measure when you start a contract. You wait until
you have an emergency. That was not done on this,
and that's a very detailed discussion by
professionals that would be able to discuss in
detail.
I don't want to go over that. But those
are the things that we faced.

It's my professional opinion that when
counsel for this Board went and represented a
private entity without a amicus prior to, and
sitting at the table of a party that they were not
-- this Board was not a party to this suit,
representing them constitutes a form of contract
interference.

CHAIRPERSON YOUNG: Wait, you're
referring to Ms. Okun?

MR. BLESKEY: Yes, I am.

CHAIRPERSON YOUNG: And who are you
saying she was representing?

MR. BLESKEY: She was with -- she tried
to -- she was with Taxpayers Watch Group, and she
was sitting at a table --

CHAIRPERSON YOUNG: You said she was
representing --

MR. BLESKEY: She said that she -- yes,
that's correct.

(Parties speaking simultaneously.)

MR. BLESKEY: She said -- no, she was
representing this Board there to provide
information on a claim in a suit that she was not
It's my contention that from a contractually related matter is that if I were going to pursue this claim, that the claim was purchased at that time back to the point where we used our contractual remedies between the parties to suspend the work to assess the project status. That's a remedy that is granted us. We've been denied that remedy.

Secondly, there was a failure of notification because we had a conversation with Mr. Evoy and their staff that was witnessed by other members on a conference call where Mr. Moore's name was brought up as having talked to them. He is not a party to the contract with the SEF in this District.

The SEF Staff has failed in every way to use the required notification clauses. It failed to grant us a cure, which is instrumental into remedying construction deficiencies, and did not issue a notice to -- basically a show-cause letter why we should be terminated.

They threatened termination at the beginning. Realizing that termination was not an option to them, they withheld funding. The funds
were withheld based upon statements made by
parties outside the contract, and not through the
proper notification clauses of the contract.

This is why we find ourselves in a delay
today. We have acted responsibly, and we are
having a difficult time with the SRF. And they're
kind of tying our hands behind our back, and
basically forcing us into a claim situation where
we can negotiate this. There are tools available
that they failed to realize they're required to.

Especially if they get in the federal
arena, because the money on this project is
colored federal. Once that happens, and if we can
get into that arena, then we're confident that
we're going to be back at the table working this
out.

We have filed a claim. We have notified
the District Attorney about certain actions. And
we have notified the Inspector General of the EPA.
And I've made initial contacts right now with the
Congressional Office of Management and Budget.
Because these types of things really make no sense
to fight when we have tools to fix.

So the delay, in my opinion, and you
know, I've been proved wrong before, but I feel
fairly comfortable that the team on the other side
should take heart because we are willing to
negotiate. We've proved that.

We've had the rug pulled out from
underneath us, and that doesn't matter anymore.
Because it's what we do from here on to mitigate
these damages. And we've been damaged. Our
contractors have shown tremendous faith. But,
still, they can only take so much. It's a tragedy
on their part.

And I'm going to leave it there and go
with questions.

CHAIRPERSON YOUNG: Okay, let's --

MR. BLESKEY: -- thank you.

CHAIRPERSON YOUNG: -- do this. We've
got -- you have seven minutes left. And we are at
a quarter of eight, and I said we would stop, and
we're going to stop.

And let's talk about when we're going to
resume this tomorrow. Mr. McClendon, would your
team be ready to resume at 8:30?

We could also do it at 1:30. We do have
an agenda that we're now going to have to amend --

MR. McCLENDON: Okay, I --

CHAIRPERSON YOUNG: -- to continue with
this. And so I'm going to ask Mr. Briggs --

MR. McCLENDON: Sounds like --

CHAIRPERSON YOUNG: -- what's also do-
able.

MR. McCLENDON: Sounds like everyone's

on board for 8:30.

CHAIRPERSON YOUNG: Well, let me ask Mr.

Briggs. Can we -- I know we have staff reports

that maybe can be deferred to another Board

meeting. We don't meet, you know, every week or

every two weeks. We meet about ten times out of

the year. And so to call a special meeting which

we do with panels, you know, that's how this

operates.

So, I think --

MR. BRIGGS: Mr. Chairman, we have folks

who are planning on attending for other Regional

Board Business at 8:30 in the morning. I think it

would be preferable to take care of as much of

that business as possible say by 11:00. We can

defer the status reports and the nonaction items.

But I think we could take care of the bulk of the

agenda and perhaps continue this item at 11:00 or

sometime after that.

CHAIRPERSON YOUNG: Okay. Mr.
McClendon, would that be do-able? Mr. Seitz?

MR. McCLENDON: Sounds like 11:00 works for our side.

CHAIRPERSON YOUNG: Okay, good. All right, so we will do that. That will give everyone time anyway to review their notes, think about what else they want to say and get into. And I think we will then resume with cross-examination by Regional Board Staff.

MS. OKUN: I have a --

CHAIRPERSON YOUNG: Yes.

MR. BRIGGS: Has the District concluded their remarks? It sounded like they finished up.

CHAIRPERSON YOUNG: Yeah, are you guys finished with your case? I think you probably are, you've got seven minutes left that I think you want to maybe wrap up with your closing arguments.

MR. McCLENDON: Tomorrow --

CHAIRPERSON YOUNG: Yeah, tomorrow with that. I mean, you know, and if there is really something else that you want to get in, Mr. McClendon, other testimony, please discuss it with Ms. Okun and Ms. Schaffner and with me in the morning, and we'll take a look at that.
MR. SEITZ: Okay. Will Ms. Okun be, your staff be involved in your meetings from 8:30 to 11:00? I'm just trying to figure out how we can really address your --

CHAIRPERSON YOUNG: Well, we do have the Monarch Grove --

MR. SEITZ: Oh, do you? Okay.

CHAIRPERSON YOUNG: -- issue which because a panel hearing did that, the full Board now has to adopt or consider adopting the panel's recommendation. So Ms. Schaffner is actually going to be involved in that, not Ms. Okun.

MR. SEITZ: Okay.

MS. OKUN: Well, no, I'm going to be here representing staff.

CHAIRPERSON YOUNG: Representing staff.

MR. SEITZ: Okay, I was just wondering about the availability of us getting together with Lori tomorrow.

MS. OKUN: No.

MR. SEITZ: It seems like it's pretty slim.

CHAIRPERSON YOUNG: Right.

MR. SEITZ: Okay.

CHAIRPERSON YOUNG: Right.
MS. OKUN: I have a couple other housekeeping items.

CHAIRPERSON YOUNG: Okay, go ahead.

MS. OKUN: We have three copies of the CalCities record index, so we can give them all to the District. If you and Ms. Schaffner want copies, we can give those to you now.

CHAIRPERSON YOUNG: Okay, that's fine.

MS. OKUN: I issued subpoenas yesterday for the settlement agreement that involved Measure B. And I haven't seen anything. I don't know if that's here or --

CHAIRPERSON YOUNG: Okay, --

MS. OKUN: -- if there's a copy for us.

CHAIRPERSON YOUNG: -- can we get ahold of that, Mr. McClendon? Was there a settlement agreement entered? With respect to the District dismissing its complaint in Superior Court.

MR. McCLENDON: Well, I did it. Now that you bring that up, I do have a couple of issues with that. One is the timeliness of the request. You know, under title 23 of your reg 648.4 it's the policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits.
So I think it's at least fair to ask what's the probative value of this, what's the relevance?

CHAIRPERSON YOUNG: Okay. Do you --

MS. OKUN: Well, in terms of the timing, if the District had done us the courtesy to tell us that they've dismissed that case, we could have subpoenaed the settlement agreement earlier.

(End Tape 3B.)

MS. OKUN: In terms of the relevance, a large part of the District's defense rests on Measure B; and it's relevant to what actions they've taken to perpetuate or eliminate Measure B.

CHAIRPERSON YOUNG: Why don't we do this. If you can have it with you and then we can maybe continue this discussion as to whether it should be used or not tomorrow.

MR. McCLENDON: I would --

CHAIRPERSON YOUNG: Is it readily available to you.

MR. McCLENDON: I would point out that -- yes, I can make it available. But, too, if it's going to become a topic of discussion that discussion is not a matter of a few minutes. I
think there's a fair amount of elaboration that
needs to be explained and what went into that
settlement.

CHAIRPERSON YOUNG: Okay, well, we'll
take that up tomorrow on our clock, okay, not
yours.

MS. OKUN: And then --

CHAIRPERSON YOUNG: And anything else,

Ms. Okun?

MS. OKUN: -- does the Board want copies
of the letters from Monterey Mechanical to the
District, and from the District to Monterey
Mechanical? They're in the record. I don't know
if you have copies --

CHAIRPERSON YOUNG: Sounds like Mr.
Jeffries does, so I guess the answer is yes.

Anything else?

MS. OKUN: No, that's it, thank you.

CHAIRPERSON YOUNG: Okay, folks, thank
you for being patient. And we will resume this
agenda item at 11:00 tomorrow. Thank you.

(Whereupon, the Regional Water Quality
Control Board Public Hearing was adjourned, to
reconvene at 11:00 a.m., Friday, December 2, 2005,
at this same location.)
CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript from the electronic sound and DVD recordings of the proceedings in the above-entitled matter, to the best of my ability.

Margo D. Hewitt
Official Transcriber Date