

PUBLIC HEARING
BEFORE THE
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
CENTRAL COAST REGIONAL WATER QUALITY CONTROL BOARD

In the Matter of:)
)
Administrative Civil Liability)
Complaint No. R3-2005-0137)
)
Re: Los Osos Community Services)
District, Los Osos Wastewater)
Project)
San Luis Obispo County)
_____)

CENTRAL COAST WATER BOARD
CONFERENCE ROOM, SUITE 101
895 AEROVISTA PLACE
SAN LUIS OBISPO, CALIFORNIA 93401

CLOSING ARGUMENTS - DECISION

THURSDAY, JANUARY 5, 2006

10:03 A.M.

Reported by:
Peter Petty

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

BOARD MEMBERS PRESENT

Jeffrey S. Young, Chairperson

Russell M. Jeffries, Vice Chairperson

Gary C. Shallcross

Daniel M. Press

John H. Hayashi

Leslie S. Bowker (Recused)

Monica S. Hunter (Recused)

BOARD ADVISORS and ASSISTANTS

Michael Thomas, Assistant Executive Director

Sheryl Schaffner, Attorney

Carol Hewitt, Executive Assistant

Burton Chadwick, UST

WATER BOARD PROSECUTION STAFF

Roger Briggs, Executive Officer

Lori Okun, Senior Staff Counsel

Matt Thompson, Project Manager

Sorrel Marks, Project Manager

Harvey Packard, Division Chief

LOS OSOS COMMUNITY SERVICES DISTRICT

John McClendon, Attorney

VanBlarcom, Leibold, McClendon and Mann

Jon Seitz, Attorney/Consultant

Shipsey & Seitz

LOS OSOS COMMUNITY SERVICES DISTRICT

Stephen R. Onstot, Attorney
Burke, Williams and Sorensen, LLP

Daniel M. Bleskey, Interim General Manager
Willdan

Lisa Schicker, President, Director

Bruce Buel, General Manager on administrative
leave

Robert Miller, Chief Engineer

Chuck Cesena, Director

John Fouche, Director

ALSO PRESENT

Darrin Polhemus (via teleconference)
State Regional Water Quality Control Board

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P R O C E E D I N G S

10:03 a.m.

CHAIRPERSON YOUNG: Welcome to today's continuation of our hearing from December 1st and 2nd. Ms. Hewitt, would you like to take roll call, please.

MS. HEWITT: Thank you. Daniel Press.

BOARD MEMBER PRESS: Present.

MS. HEWITT: Russell Jeffries.

VICE CHAIRPERSON JEFFRIES: Present.

MS. HEWITT: Jeffrey Young.

CHAIRPERSON YOUNG: Present.

MS. HEWITT: Gary Shallcross.

BOARD MEMBER SHALLCROSS: Here.

MS. HEWITT: John Hayashi.

BOARD MEMBER HAYASHI: Present.

MS. HEWITT: Les Bowker.

BOARD MEMBER BOWKER: Present.

MS. HEWITT: Monica Hunter.

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

MR. THOMAS: Good morning; my name is Michael Thomas. I'm the Assistant Executive Officer.

To the left of Mr. Young we have Sheryl

1 Schaffner, the Board's Counsel on this case.

2 At the prosecution table, on my left, is
3 Harvey Packard, our Division Chief; Sorrel Marks,
4 Project Manager; Lori Okun, Prosecution Staff
5 Attorney; Roger Briggs, Executive Officer; Matt
6 Thompson, also Project Manager with the Board.

7 And on my right we have Carol Hewitt,
8 who is the Assistant --Executive Assistant. And
9 in the back of the room we Burton Chadwick, who
10 has the cards, I believe -- well, there won't be
11 any speaking on this item, will there. So he does
12 not have cards.

13 And at the prosecution table we have Mr.
14 McClendon, Mr. Seitz, and I'm sorry, I don't
15 remember your name.

16 MR. ONSTOT: Stephen Onstot; I'm Special
17 Counsel. I was retained November 17th to
18 represent the District.

19 MR. THOMAS: Okay, thank you.

20 CHAIRPERSON YOUNG: Okay. And perhaps
21 we need a microphone for you, Mr. Onstot. Or are
22 you going to be sharing that with Mr. Seitz --
23 maybe you can put that in between the two of you.
24 Great. Okay.

25 And we have a court reporter here today,

1 the gentleman down at the end of the table next to
2 Carol Hewitt.

3 MS. SCHAFFNER: Did that appearance make
4 the record? You didn't have a microphone. Did
5 the court reporter catch that?

6 COURT REPORTER: I did, but he can
7 reiterate just to be safe.

8 CHAIRPERSON YOUNG: Go ahead.

9 MR. ONSTOT: Stephen Onstot; I'm with
10 Burke, Williams and Sorensen. Special Counsel to
11 the Los Osos Community Services District.

12 CHAIRPERSON YOUNG: Thank you. Is Mr.
13 Grimm going to be here today?

14 MR. SEITZ: Unfortunately the answer to
15 that is no. He will not be here.

16 CHAIRPERSON YOUNG: Okay. Why don't we
17 then have Dr. Bowker, you're up here with us but
18 why don't you go ahead and tell the audience why
19 you are going to --

20 BOARD MEMBER BOWKER: I've been advised
21 by legal counsel, as in the past, to recuse myself
22 of this issue. Thank you.

23 CHAIRPERSON YOUNG: Okay. And Monica
24 Hunter is here. And, Dr. Hunter, do you want to
25 put on the record again why you are not

1 participating in this?

2 BOARD MEMBER HUNTER: Yes, good morning.
3 I am a resident of Los Osos; I'm also going to
4 recuse myself from this proceedings.

5 CHAIRPERSON YOUNG: Okay, thank you.
6 Well, we're going to continue with where we left
7 off on December 2nd. I'm just briefly looking at
8 some notes for me to read that Sheryl Schaffner
9 put together. This is the first chance I've had
10 to really take a look at them, introductory
11 comments by the Chair.

12 I'll proceed. Okay, folks, this is the
13 time and place for the continuation of a hearing
14 by the Central Coast Regional Water Quality
15 Control Board for consideration of a proposed
16 Administrative Civil Liability for the Los Osos
17 Community Services District.

18 This matter was originally noticed for,
19 and the first two days of hearing were held, on
20 December 1st and 2nd, 2005. As announced at that
21 hearing, and as subsequently noticed, this is the
22 date and place for the continuation and conclusion
23 of that hearing.

24 This matter has been duly noticed and
25 two parties have been designated for this

1 proceeding, the Los Osos Community Services
2 District and the Regional Water Quality Control
3 Board Prosecution Staff.

4 As noted previously, since this is a
5 prosecutorial matter, staff functions have been
6 separated into two teams, the prosecution team and
7 the Board advisory team. This is done to insure
8 that the Board has neutral advisors who have not
9 been personally involved in the prosecution of the
10 proposed enforcement action.

11 The prosecution team, consisting of
12 Roger Briggs, Harvey Packard, Gerhardt Hubner,
13 Sorrel Marks, Matt Thompson and counsel Lori Okun,
14 have been treated like any other party before the
15 Water Board throughout this proceeding, and have
16 not had ex parte contacts with the Board or
17 advisory team.

18 The advisory team consists of Michael
19 Thompson (sic), to my immediate right, and legal
20 counsel Sheryl Schaffner, to my immediate left,
21 who came down from her Santa Rosa Office today to
22 serve in this capacity.

23 BOARD MEMBER PRESS: That's Michael
24 Thomas, Mr. Chair.

25 CHAIRPERSON YOUNG: Yes. Right. Not

1 Matt Thompson. That's like me getting Bruce
2 Daniels and Daniel Press confused all the time.

3 Okay, I would like to remind everyone
4 that everyone that is going to testify at the last
5 stage of this hearing, that they are still under
6 oath, and sworn under penalty of perjury to tell
7 the truth in this matter.

8 Are there any witnesses present to give
9 testimony today that were not at the December 1st
10 or 2nd hearing, or did not take the oath at that
11 time? Okay, seeing no hands, I'm going to assume
12 that everyone who is going to testify today has
13 taken the oath.

14 Okay, initially we need to deal with
15 some -- Mr. Onstot, you were here, I think, for
16 day one, right? December 1st?

17 MR. ONSTOT: Correct, I was in the
18 audience.

19 CHAIRPERSON YOUNG: Right, and you took
20 the oath at that time?

21 MR. ONSTOT: Correct.

22 CHAIRPERSON YOUNG: Okay. That's what I
23 thought.

24 We have a few procedural issues
25 concerning a variety of motions, objections, and

1 document issues. And this is probably going to
2 take us a little bit of time to get through,
3 before we can get into any of the new evidence
4 that I had ordered be produced prior to this
5 hearing.

6 There's an outstanding subpoena issued
7 to the Community Services District; and the
8 Community Services District has a motion to quash
9 before this Panel, which is first on the list to
10 address.

11 Ms. Schaffner, do you want to describe
12 what this item is about?

13 MS. SCHAFFNER: Certainly. Let me pull
14 up a copy of the subpoena. At the -- is that
15 better --

16 CHAIRPERSON YOUNG: Folks, if you can't
17 hear us, please let us know so that we can speak
18 louder, --

19 MS. SCHAFFNER: Yeah.

20 CHAIRPERSON YOUNG: -- that's all right.

21 MS. SCHAFFNER: Can you hear me okay
22 now? Okay, very good. Just got to use the
23 microphone.

24 This subject arises from the conclusion
25 of the last day of hearing on December 2nd, at

1 which the Chair ruled that no further new evidence
2 would be taken. Any evidence that had not been
3 submitted by the prior deadline or introduced at
4 the hearing and accepted was not going to be
5 admitted.

6 The Chair later modified that ruling, as
7 is at his discretion, to ask for any new evidence
8 that concerns, addresses, relates to the CSD's
9 ongoing activities as they may affect compliance
10 with the time schedule order, or unlawful
11 discharges in violation of the prohibition.

12 Those would include actions that would
13 help or hinder or delay or accelerate any ongoing
14 compliance.

15 This is a matter of routine
16 consideration in enforcement actions. The Board
17 frequently considers ongoing compliance
18 activities, whether it be a renewed effort to come
19 into compliance by a discharger who has an
20 enforcement action pending, or whether it is
21 ongoing violations. Either of which is fairly
22 considered by the Board as an equitable
23 consideration in determining how much of an
24 enforcement action is necessary and appropriate to
25 motivate compliance. And to give credit where

1 extra effort is being made to come into
2 compliance.

3 So, it's not unique to the situation.
4 And the Chair asked that the parties, through, I
5 believe, three different communications, December
6 4th, 6th and 16th, I believe, that asked the
7 parties to submit any available information that
8 would affect this subject concerning ongoing
9 compliance.

10 CHAIRPERSON YOUNG: Let me just a
11 brief -- I want to just address that specifically.
12 I didn't realize you had something laid out here,
13 Sheryl, for me to describe this issue.

14 After the conclusion of the December 2nd
15 hearing, and on my drive back home, of course my
16 mind was filled with what had happened December
17 1st and 2nd, as I'm sure everyone's was, who was
18 involved with this. And I began to realize that
19 anything that might happen after December 2nd,
20 that either brought the District into compliance
21 or took them further away from compliance, I felt,
22 was relevant and probative and important for this
23 proceeding.

24 And based on that conclusion that I drew
25 I then proceeded to talk with Sheryl and Michael

1 and we decided to issue a series of emails that
2 turned out to be three of them. But the purpose
3 was to allow for a very narrow category of
4 additional evidence to come in, solely dealing
5 with compliance issues.

6 And so, although I had ruled at the
7 conclusion of December 2nd that there would be no
8 further testimony in evidence, I did make that
9 ruling. As the Hearing Officer I do have the
10 ability and the authority to modify any orders
11 that I do issue. That order was issued by myself
12 and it's my own modification of that for a very
13 narrow category of documents to come in.

14 And so that's why you have the series of
15 emails that went out. And the request for those
16 documents.

17 So, I think, Mr. Onstot, after I
18 received and reviewed your December, I think, 16th
19 letter, and I realized that the District really
20 was not, was not at least willing to provide any
21 additional information, additional testimony, it
22 was very clear to me that you were basing that, in
23 part, on my December 2nd ruling. And apparently
24 were overlooking the fact that I was modifying my
25 own order, but were still not going to provide any

1 additional information, that I felt it important
2 to issue a subpoena to have these documents
3 brought forth.

4 I believe in one of those emails that we
5 had requested at least some of those documents,
6 maybe the Board resolutions or Board minutes, I'm
7 not quite sure. But I felt that we had provided
8 the District with at least some early-on heads-up
9 that we were looking for some of these documents.

10 And part of the reason for that, and I
11 want you to understand this, is that the
12 District's theory so far to the Board has been you
13 can't do anything to the District unless it takes
14 some official action. And Mr. Seitz was very
15 clear, and Mr. McClendon, in going through what
16 those were. You know, resolutions and things of
17 that nature, official acts.

18 And so I began to also contemplate the
19 significance of that and realized that, you know,
20 the District can also express its policy through
21 its administrative officers, and to give them
22 direction, like Mr. Bleskey.

23 And I wanted to make sure that the Board
24 and their record had all documents that might help
25 us even look at what administrative functions the

1 Board was giving to staff to carry out its
2 policies. And that was really the purpose and the
3 intent behind that, is to flesh that out.

4 Anyway, I asked Mr. Thomas and Ms.
5 Schaffner to prepare the subpoena and to get it
6 served. I did look at your motion to quash. I
7 read through it. I did look at the code sections
8 that you cited. I do want to go over them with
9 you and take each of the objections that you
10 raised one by one so we can flesh this out, maybe
11 get this behind us.

12 Why don't we start, Mr. Onstot, with the
13 argument that you put forth on page 3 of your
14 motion, the subpoena is not timely. And my
15 question to you is it's my understanding that the
16 two sections that you cite in the Code of Civil
17 Procedure, 1987, and section 2020.410, do not deal
18 with a party who has been served a subpoena.

19 MR. ONSTOT: That is correct. The
20 normal course of events in litigation is that
21 subpoenas are served on nonparties, not parties to
22 the action, themselves. Usually that's given by
23 notice. The notice provisions for documents are
24 20 days. That's why -- and there's another notice
25 provision for 15 days -- that's why we think that

1 three business days is unreasonable.

2 It's our view that somebody recognized
3 that they missed the notice period of 15 or 20
4 days, and the only way that they can request
5 documents three business days before production
6 today would be to issue a subpoena, which, in our
7 view, is improper on a party.

8 MS. SCHAFFNER: Actually, if I could --

9 MR. ONSTOT: You are correct that the --

10 CHAIRPERSON YOUNG: Okay.

11 MR. ONSTOT: -- the statute pertaining
12 to subpoenas to produce documents does say a
13 reasonable period of time.

14 CHAIRPERSON YOUNG: All right.

15 MR. ONSTOT: That it's not a set amount
16 of days.

17 CHAIRPERSON YOUNG: Okay.

18 MR. ONSTOT: But given the holidays and
19 three business days when other places in the
20 statutes mention 15 or 20 days, we think that
21 three is unreasonable. In fact, so unreasonable
22 those documents are not here today. There's just
23 not time to pull them out.

24 CHAIRPERSON YOUNG: Okay, well, 1987
25 does not apply to the subpoena, is that -- that's

1 your understanding, correct?

2 MR. ONSTOT: Yes.

3 CHAIRPERSON YOUNG: Okay. And 2020.410
4 does not apply to a subpoena served on a party?

5 MR. ONSTOT: Correct.

6 CHAIRPERSON YOUNG: Okay.

7 MS. SCHAFFNER: Actually I think
8 probably the finer point to put on 1987 is it is
9 not required to use a subpoena to obtain this
10 information; that a notice would be sufficient.

11 However, the choice of use of 1987 is
12 not inappropriate in this setting. The Chair and
13 Board Counsel chose the more formal path to insure
14 that the District was given all the process it
15 could receive at this time. And that the
16 reasonable time standard does come out of 1987, as
17 well.

18 And the question of whether the time
19 provided is a reasonable period of time is a
20 factual one for the Board to determine whether the
21 Chair exercised his discretion appropriately in
22 this setting.

23 And the service was made on the 29th.
24 And the question is was the period of time between
25 the 29th and today sufficient time to produce

1 resolutions adopted by the Board, minutes adopted
2 by the Board, draft resolutions and draft minutes
3 held by the Board under consideration; and the
4 minutes and notes taken by the Board's Secretary
5 and the Board's General Manager at Board meetings,
6 between the specific period set out in the
7 subpoena, which was the end of September through
8 this date, or through the date of service of the
9 subpoena, as I recall.

10 Let's see, 9/27 through 12/29/2005. So
11 we're talking about three months of very specific
12 documents in the custody of the CSD, which
13 shouldn't be that difficult to locate in their
14 files.

15 The question is -- and the other
16 relevant fact would be as Mr. Young has noted, the
17 CSD was notified on December 4th, December 6th and
18 December 16th that the Chairman was wanting all
19 documents relating to ongoing actions of the CSD.
20 So there was a general notice that these files
21 could be specifically of interest to the Board.

22 They're not extensive. They're very
23 specific. And they should be right at the
24 fingertips of the Board of the CSD.

25 The question for the Board to consider

1 is, is that a reasonable period of time -- on this
2 particular objection was that a reasonable period
3 of time for the CSD to locate and provide those
4 documents.

5 CHAIRPERSON YOUNG: Well, let me ask a
6 few questions. You would agree that assuming we
7 even look at 1987 as a corollary and for guidance
8 on what might be a reasonable timeframe, do you
9 agree that traveling to the place of attendance
10 for the production we can disregard that. You
11 were going to be coming here anyway --

12 MR. ONSTOT: Correct.

13 CHAIRPERSON YOUNG: -- and that's out?

14 MR. ONSTOT: Correct.

15 CHAIRPERSON YOUNG: Okay. So really the
16 only question for us to resolve is what would have
17 been a reasonable time for your staff to prepare
18 the documents. And let me ask you that. How many
19 resolutions were passed during that three-month
20 time period?

21 MR. ONSTOT: Well, --

22 CHAIRPERSON YOUNG: How many pages are
23 we talking about?

24 MR. ONSTOT: Well, I don't know that.

25 But it goes beyond resolutions, which, I believe,

1 are also posted; it goes for drafts and it goes
2 for notes. Notes that go back three months. Some
3 people don't keep notes; some people don't keep
4 drafts of resolutions that they put together. And
5 to dig on either computer files or call up deleted
6 items or render that search over a holiday period
7 in the course of three business days we think is
8 unreasonable.

9 With regard to resolutions there's
10 probably a couple of them. I don't know off the
11 top of my head. But, the scope of the subpoena is
12 broader than that.

13 CHAIRPERSON YOUNG: Okay, let's address
14 this. Are you the attorney that has been present
15 during the CSD Board deliberations?

16 MR. ONSTOT: Some of them.

17 CHAIRPERSON YOUNG: During this time
18 period?

19 MR. ONSTOT: Yes.

20 CHAIRPERSON YOUNG: Okay. Who else?
21 Has Mr. McClendon? Okay. Mr. McClendon, have you
22 been at all of the CSD closed sessions?

23 MR. McCLENDON: No, not all of them.

24 CHAIRPERSON YOUNG: Okay. Has there
25 always been a lawyer present during the closed

1 sessions?

2 MR. McCLENDON: Well, I'm a little
3 confused here. Are we talking about closed --
4 open sessions or closed sessions?

5 CHAIRPERSON YOUNG: Well, closed
6 sessions during which time any documents would
7 have been produced that are responsive to the
8 subpoena. In other words, closed sessions where
9 resolutions and minutes were discussed. Either
10 proposed --

11 MR. McCLENDON: Those aren't items we're
12 discussing in closed session.

13 CHAIRPERSON YOUNG: Okay, were they done
14 in open session?

15 MR. McCLENDON: Yes.

16 CHAIRPERSON YOUNG: Okay. Do you know
17 how many pages of documents the District has that
18 would be responsive to the subpoena?

19 MR. McCLENDON: To my best knowledge
20 parsing out what Mr. Onstot has talked about with
21 drafts and preliminaries and notes, and talking
22 about just the resolutions, themselves, it's my
23 understanding that we have two resolutions. One
24 of which has an attachment to it with a deal point
25 memo going back to the negotiated deal with Mr. --

1 or Assemblyman Blakesley. And I believe those are
2 a part of this record; you already have those.

3 CHAIRPERSON YOUNG: Okay. How many
4 times has the Board met in closed session since
5 October 1st or 2nd, whenever the beginning of the
6 timeframe?

7 MR. McCLENDON: I've lost count.

8 CHAIRPERSON YOUNG: Okay, --

9 MR. McCLENDON: Probably, I'm going to
10 guess it's over 20.

11 CHAIRPERSON YOUNG: Okay. Is someone
12 taking notes during closed session?

13 MR. McCLENDON: There may be some notes
14 that are taken, but those would be attorney/client
15 confidence.

16 CHAIRPERSON YOUNG: Is any member of
17 staff taking notes other than attorneys?

18 MR. McCLENDON: No, not to my knowledge.

19 CHAIRPERSON YOUNG: So the attorney is
20 the only -- is essentially the scribe for whatever
21 goes on in closed session?

22 MR. McCLENDON: Correct.

23 CHAIRPERSON YOUNG: Are there any draft
24 resolutions that have been produced during the
25 time period mentioned in the subpoena that exist?

1 MR. McCLENDON: There are drafts that I
2 have --

3 CHAIRPERSON YOUNG: And I don't mean
4 drafts to the two resolutions, --

5 MR. McCLENDON: Oh, okay, then --

6 CHAIRPERSON YOUNG: -- I mean other
7 resolutions that are in draft mode, but have not
8 been finalized.

9 MR. McCLENDON: Not that I am aware of.
10 But in terms of draft resolutions, it's usually
11 myself, I'll take the first cut at it, and I'm
12 typically overriding those as comments and changes
13 come in. So I don't know that I would actually be
14 able to tell you I've got draft version one, draft
15 version two, draft version three. I've got a
16 final, which is the one ultimately adopted.

17 Now, on the second resolution there were
18 some interlineations actually at the open session
19 of that resolution. That's my recollection. I
20 suppose that would require going to the outfit
21 that does the taping of that, and you could
22 probably pull off of the recording of that what
23 those specific edits were right there in open
24 session.

25 CHAIRPERSON YOUNG: All right, how about

1 the minutes. Do you have minutes of all of your
2 meetings?

3 MR. McCLENDON: Minutes, I would not be
4 able to talk on those. I believe we're --

5 CHAIRPERSON YOUNG: Who's responsible
6 for generating minutes.

7 MR. McCLENDON: It's staff.

8 CHAIRPERSON YOUNG: Who specifically?

9 Mr. Bleskey?

10 MR. McCLENDON: Karen Vega.

11 CHAIRPERSON YOUNG: Okay. All right.

12 Does she attend the closed sessions also?

13 MR. McCLENDON: No.

14 CHAIRPERSON YOUNG: Okay. Who takes
15 minutes of closed sessions?

16 MR. McCLENDON: There aren't -- we don't
17 have closed session minutes.

18 CHAIRPERSON YOUNG: Does Mr. Bleskey --
19 he participates in closed sessions, doesn't he?

20 MR. McCLENDON: Yes, we generally have
21 the General Manager.

22 CHAIRPERSON YOUNG: Okay. Mr. Bleskey,
23 do you take notes during closed session?

24 MR. BLESKEY: I take some notes.

25 CHAIRPERSON YOUNG: Okay.

1 MR. BLESKEY: They're more diary
2 entries.

3 (Pause.)

4 CHAIRPERSON YOUNG: Mr. McClendon, I'm
5 not sure that we have the two resolutions.

6 MS. SCHAFFNER: Are you talking about
7 the resolutions adopted since September 27th?

8 MR. McCLENDON: Yes.

9 MS. SCHAFFNER: And you say we have
10 those resolutions in the record?

11 MR. McCLENDON: I believe we -- it's my
12 understanding --

13 MS. SCHAFFNER: Are those the ones
14 concerning your negotiations with the State Board?

15 MR. McCLENDON: Correct.

16 MS. SCHAFFNER: There have been no other
17 resolutions adopted since that date in this three-
18 month period?

19 MR. McCLENDON: Have there been?

20 MS. SCHAFFNER: Yeah? Yeah. Okay.

21 MR. SEITZ: Mr. Chair, --

22 CHAIRPERSON YOUNG: Yes.

23 MR. SEITZ: Mr. Chair, I would just --
24 in order to preserve the record I would suggest
25 that if people from the audience are going to be

1 testifying to responses to your questions that
2 they do so in a microphone so that we --

3 MS. SCHAFFNER: Yes, thank you. Please,
4 could you repeat that into the microphone, what
5 you just said?

6 UNIDENTIFIED SPEAKER: Could you come to
7 the podium; it would be easier for us.

8 MS. SCHAFFNER: Very good.

9 MR. BLESKEY: We have some resolutions.
10 One resolution in particular that had to do with
11 the project, itself, was a commitment to the
12 project.

13 We also have other -- I believe we have
14 some other resolutions related to other dealings
15 with our other CSD functions.

16 MS. SCHAFFNER: And have you adopted
17 minutes in that three-month period?

18 MR. BLESKEY: Yes, we have. We do not
19 have complete minutes adopted right now due to
20 some of the administrative changes we would like
21 to see in our format of minutes.

22 CHAIRPERSON YOUNG: And how are these
23 documents kept in the regular course of business?

24 MR. BLESKEY: With the resolutions we
25 have a resolution file. With the minutes we have

1 a minutes file. Fairly straightforward.

2 CHAIRPERSON YOUNG: So they're just a
3 file to be picked up?

4 MR. BLESKEY: Yes.

5 CHAIRPERSON YOUNG: Okay.

6 MS. SCHAFFNER: And who is your
7 custodian of records?

8 MR. BLESKEY: That is a little unclear.
9 I'd have to refer to counsel on that because of
10 the relationship I have as Interim General
11 Manager, as a consultant, and also we still have
12 our General Manager still on the payroll.

13 MS. SCHAFFNER: But at this time any
14 official act by the CSD that is taken at a meeting
15 is going to be presented to the Board of Directors
16 by you, as the chief executive officer, correct?

17 MR. BLESKEY: Yes.

18 MS. SCHAFFNER: Okay. Well, I guess --
19 (Pause.)

20 CHAIRPERSON YOUNG: How much time would
21 it take, Mr. Bleskey, to retrieve those two files
22 and your notes?

23 MS. SCHAFFNER: Not from closed session,
24 but from open session. Notes that you would have
25 taken at the open session.

1 MR. BLESKEY: My notes?

2 MS. SCHAFFNER: Um-hum.

3 MR. BLESKEY: I take -- those are my
4 diary entries; those are never ever in the project
5 files or the official files. Those are my
6 personal records.

7 MS. SCHAFFNER: Okay. Which you take
8 down as part of your duties in performing your
9 duties for the District, correct? They're not
10 like about doctor's appointments or whatever,
11 they're notes of the meeting? That's what we're
12 talking about?

13 MR. BLESKEY: I just restate, they're
14 personal diaries, not a part of the official
15 record.

16 MS. SCHAFFNER: They're about the
17 meeting?

18 MR. BLESKEY: They're my personal
19 diaries. I mean I'm going to leave it at that
20 because they do contain personal notes, they
21 contain addresses. This is the stuff that I do
22 to, my personal reminders. If I make notes that
23 are project-specific, they go in the project file.

24 CHAIRPERSON YOUNG: Would you put in
25 these notes any directives that you were given by

1 the Board? Anything for you to follow up on and
2 carry out in terms of Board policy?

3 MR. BLESKEY: I would make notations
4 that are to refresh my memory.

5 MS. SCHAFFNER: Okay, and what about
6 draft minutes and resolutions that are pending but
7 not yet adopted. Those are prepared for the Board
8 meeting, but say the Board hasn't gotten to them,
9 they're not agendized, they either didn't adopt
10 them, discuss them, and sent them back for some
11 amendments, whatever. They're not adopted, but
12 they're draft. Would those be -- I would assume
13 they would go through you and therefore they would
14 be presented by your staff to you to present to
15 the Board?

16 MR. BLESKEY: When we're routing what we
17 would consider our latest version, yes.

18 MS. SCHAFFNER: Okay. So do you have
19 currently any draft resolutions or minutes that
20 the Board has not adopted yet?

21 MR. BLESKEY: The only thing that I have
22 right now on my desk, actually I'll have them
23 Friday, will be for stuff after December 29th for
24 our January 12th meeting.

25 MS. SCHAFFNER: Okay.

1 MR. BLESKEY: All other -- version
2 control being a real issue, usually what I do is I
3 fold the draft after I've made the annotations,
4 confirm that the annotations were made to the
5 final version or the current draft. And then I
6 destroy all drafts.

7 MS. SCHAFFNER: So are you -- you're
8 saying that your diary, as you call it, of the
9 meeting, your notes about the meeting, I'd like to
10 just get real clear. Are you saying those are
11 privileged in some way?

12 MR. BLESKEY: That would take --

13 MS. SCHAFFNER: And if so --

14 MR. BLESKEY: That would take a legal
15 opinion.

16 MS. SCHAFFNER: It would. Thank you.

17 MR. ONSTOT: As was mentioned earlier
18 Mr. McClendon either took the first cut or
19 reviewed those drafts. That's attorney work
20 product. Or to the other extent, and I think more
21 importantly, draft resolutions are completely
22 irrelevant because they do not reflect what the
23 CSD has done, what action they did or did not take
24 as a body. Even resolutions that are proposed and
25 not adopted are irrelevant.

1 So, if, in part, if the Chair is going
2 to deny the motion to quash I want to make it very
3 clear that the Chair is holding that unofficial
4 actions, or actions that do not represent the CSD,
5 are relevant in an enforcement proceeding against
6 the CSD. I'd like that explicitly held, Mr.
7 Chair, if that is your ruling.

8 MS. SCHAFFNER: I'm sorry, Mr.
9 Onstot, --

10 CHAIRPERSON YOUNG: We haven't finished
11 going through your motion --

12 MS. SCHAFFNER: Right.

13 CHAIRPERSON YOUNG: -- at this point.
14 But, Mr. Onstot, it appears to me, and we were
15 given a recent San Luis Obispo Tribune article
16 that had comments made by CSD Staff that the
17 District was going to sell or trade the Tri-W site
18 and the Andre site, or pardon me, and the
19 Broderson site for another site.

20 And my concern is if things are going on
21 with the District where there's direction being
22 given, policy being formulated that are not going
23 to appear in resolutions or drafts and minutes,
24 and I think that that is very relevant information
25 to compliance or noncompliance.

1 And it's to that in body of information
2 that I'm trying to get a handle on.

3 MR. ONSTOT: If I may, Mr. Chairman, in
4 response to that, two things, and I'll address it
5 more in closing.

6 With regards to the Chair's prior
7 direction that newspaper articles are hearsay and
8 will not be admitted, I'll get to that more, like
9 I said, later in closing.

10 Secondly, real property negotiations by
11 public entities are privileged. So we would again
12 assert the real property exception. Those could
13 be discussed in closed sessions. If it relates to
14 litigation those were properly agendized and can
15 also be subject to privilege and discussed in
16 closed session.

17 The same thing holds true with any
18 communications regarding counsel between either
19 the District Staff or its Board Members regarding
20 that, as well.

21 CHAIRPERSON YOUNG: What privilege are
22 you citing for discussions about real property
23 being protected? I don't know what you're talking
24 about.

25 MR. ONSTOT: Real property negotiations

1 can be held in closed session and not subject to
2 discovery in enforcement proceedings.

3 (Pause.)

4 CHAIRPERSON YOUNG: I mean it's most
5 likely that that privilege was waived anyway once
6 the CSD Directors discussed it publicly with the
7 newspaper. I mean I can get into eliciting that
8 testimony by examination and get that out. But I
9 would say that that privilege, if it exists, was
10 waived.

11 MR. ONSTOT: Well, we would take the
12 position, number one, it assumes facts not in
13 evidence that there was a sale considered; and
14 number two, we would take exception to the fact
15 that one director or one staff member can waive a
16 privilege held by an entire agency.

17 MS. SCHAFFNER: And that is something
18 that I'm sure we can all have some lengthy debate
19 about. And I'm not sure that it truly bears on
20 the outcome of this motion to quash at the moment.

21 But I would also like to circle back
22 around to your comment, Mr. Onstot, about hearsay
23 evidence. And just to refresh the memory of all
24 those present, the Government Code provides, under
25 section 11513 that the hearing need not be

1 conducted according to technical rules relating to
2 evidence witnesses. And any evidence, relevant
3 evidence, shall be admitted if it is the sort of
4 evidence on which reasonable persons are
5 accustomed to rely.

6 If there's hearsay evidence introduced
7 it can be admitted over objection if it fits any
8 of the exceptions, or it can be used to supplement
9 or explain other evidence.

10 And the Chair has indicated a desire to
11 stay away from newspaper articles just because
12 they tend to be a lot of cobbled-together
13 information that's difficult to validate and
14 verify. However, it can be used as a basis for
15 questioning, and it can be used to corroborate
16 other evidence.

17 And it can be used if it meets other
18 hearsay exception rules such as statements of a
19 party against interest, such as evidence that is
20 otherwise supported by corroborating evidence.
21 And under that rubric the Chair, I believe, has a
22 reasonable basis for inquiring into the director's
23 statement to the newspaper, considering the
24 importance of the concept of selling the property,
25 which is the only path to compliance at this

1 point.

2 But let's go back to what you do have,
3 what you have stated you actually have in the
4 possession of the CSD that you know of, that you
5 could go lay your hands on right now. And that
6 are all minutes and resolutions that the General
7 Manager just noted are in two files. All those
8 documents that have been adopted -- approved by
9 CSD vote for the period of 9/27 through 12/29.
10 Those sound clean and easy to go lay your hands
11 on; they are two files.

12 The question of draft minutes and
13 resolutions that are pending, but not yet adopted,
14 they, you have argued, are privileged because your
15 counsel has made notes on them. However, the
16 counsel notes could be redacted, if need be, to
17 protect the privilege, I'm sure. It sounds like
18 some of those exist and could be located.

19 The notes taken by Mr. Bleskey at the
20 CSD Board meetings that were not in closed
21 session, I don't see a privilege that would apply.
22 And that was my original question to you, Mr.
23 Onstot. Do you believe a privilege applies to any
24 of the notes taken by Mr. Bleskey at the open
25 sessions?

1 MR. ONSTOT: No, other than a relevance
2 objection.

3 MS. SCHAFFNER: Okay, thank you.

4 MR. ONSTOT: If there's an offer of
5 proof, if you know specifically that there are
6 notes there that are germane to this, and can
7 either quote them or give us a date and time in
8 his calendar, then, yes.

9 CHAIRPERSON YOUNG: Well, we're not
10 going to know that. And, of course, the purpose
11 for the subpoena, because we don't have possession
12 of the documents we don't know what's in them, is
13 to use it as a discovery tool. And I think you
14 know the standard in discovery is to get your
15 hands on any evidence that may become admissible
16 at trial or hearing. So there may be things that
17 are outside that scope, but may lead to admissible
18 evidence. And that is the purpose for the
19 subpoena, the very quest for those categories.

20 So, I don't know, there may be, 80
21 percent of it may be really irrelevant to what
22 we're doing; and there may be some nuggets of
23 information that may be probative one way or the
24 other. Till we see it, we don't know.

25 MR. McCLENDON: Mr. Chairman, --

1 CHAIRPERSON YOUNG: Yes.

2 MR. McCLENDON: I'm sorry to interrupt
3 you, but let me just take a throw at this. What I
4 understand -- as I see it you're trying to get
5 probative information on what the District is
6 doing, or not doing, in order to help you make
7 your decision here.

8 And it seems to me that what's happened
9 here is perhaps we've gotten a little turned
10 around a bit, spun around with this idea of draft
11 documents and things of that sort, not
12 understanding.

13 I was handed a list here of Board
14 accomplishments that were actually done, and not
15 necessarily in every case by a resolution or an
16 ordinance, but simply by simple motion. They also
17 gave me a couple of notes here on resolutions that
18 I forgot about one, regarding the District
19 Attorney, one regarding the U.S. Inspector
20 General.

21 What, it seems to me, would be the
22 probative evidence you're looking for would be,
23 and I'll just throw this out, is all of the
24 agendas for all of our meetings with the agenda
25 staff packets on those, which would have the staff

1 reports on each agenda item. And that would show
2 you what this District has done since October 1,
3 with all of these meetings, with all of the
4 actions that they've considered.

5 It would also show you actions where,
6 for example, maybe they've been on the agenda,
7 they've been pushed aside, but they're in the
8 pipeline so to speak, so you can have that over-
9 the-horizon look at where we're going.

10 Perhaps that was the confusion that we
11 had here. And what would perhaps be the most
12 probative evidence would be, and I'm sure it's a
13 lot of information, but it would be all of the
14 agendas and all of the agenda packets.

15 CHAIRPERSON YOUNG: Mr. Shallcross.

16 BOARD MEMBER SHALLCROSS: Would those
17 agendas and packets include what action the Board
18 took?

19 MR. McCLENDON: That would be the
20 minutes.

21 BOARD MEMBER SHALLCROSS: Okay. That's
22 why --

23 MR. McCLENDON: So that would close the
24 loop. In other words, minutes without all of that
25 backup are really kind of meaningless. You could

1 look at the minutes and say, well, they hired so-
2 and-so to do such-and-such study. But without the
3 agenda packet, without the staff report, what's
4 that study about. You really don't have any
5 information there other than what was the final
6 action. But you'd have no context on that.

7 CHAIRPERSON YOUNG: Well, I think that
8 would be helpful. I also, though, want to see Mr.
9 Bleskey's notes. And the purpose for that is I
10 want to see what direction has been given to Mr.
11 Bleskey during this period of time where he is, in
12 fact, carrying out administrative functions and
13 Board policy which may not be reflected in the
14 minutes, themselves, or the resolutions.

15 MS. SCHAFFNER: I guess one final
16 factual point before you draw --

17 CHAIRPERSON YOUNG: Okay.

18 MS. SCHAFFNER: -- this to closure on
19 this issue of what documents we're asking for,
20 where are they, what's reasonable to produce.

21 I would like to refresh the memory of
22 the Chair, because he alluded to it earlier, and
23 for the benefit of the rest of the Board, on
24 December 6th, almost a month ago, on behalf of the
25 Chair, Michael Thomas sent a note to all the

1 parties saying that the Chairman wanted all
2 available evidence, new information and not
3 previously submitted materials, including CSD
4 Board minutes and resolutions regarding the time
5 period in question that could affect the ability
6 of CSD to comply with the TSO.

7 So it's been almost a month, not three
8 days, that the CSD has had to locate these
9 documents.

10 And the response to that request came --
11 there were two responses, actually, that didn't
12 seem to be aware of one another. One of them was
13 from Mr. Onstot. And in that response Mr. Onstot
14 affirmatively refused, said the CSD will not
15 produce the documents requested.

16 And that led to another request on the
17 16th and led to -- ultimately led to the subpoena.
18 Just to make this all tidy on the record for
19 clarity's sake.

20 To wrap up this first segment of --

21 CHAIRPERSON YOUNG: Well, just wrap up
22 the categories, at least, based on our
23 examination, we know that we can at least specify
24 in -- I wanted to finish going through his points
25 here.

1 MS. SCHAFFNER: Okay, will do. The
2 three categories of documents requested were the
3 draft minutes and resolutions pending but not yet
4 approved. Those have been discussed as being
5 available but perhaps containing edits by counsel
6 that may be privileged. So those sound like
7 they're identifiable and locatable.

8 The second category was all minutes and
9 resolutions approved by the CSD Board for the
10 period specified. The General Manager has
11 testified those are clearly identifiable, easily
12 locatable, in two files.

13 And the third category, notes taken of
14 the meetings by Mr. Bleskey. And Mr. Onstot has
15 admitted that those are not privileged. He
16 questions their relevance. The Chairman believes
17 that they contain relevant, potentially admissible
18 evidence. And that is the universe of documents.

19 CHAIRPERSON YOUNG: Well, relevancy is
20 not a standard for discovery anyway.

21 MS. SCHAFFNER: No. And --

22 CHAIRPERSON YOUNG: Okay. It is upon --

23 MS. SCHAFFNER: They are likely to --

24 CHAIRPERSON YOUNG: -- submission for
25 documents and testimony at trial, but not as a

1 discovery bar.

2 MS. SCHAFFNER: However, the subject of
3 the universe of documents, notes taken at Board
4 meetings for this specified period are likely to
5 lead to admissible evidence. I don't think that
6 that is questionable.

7 CHAIRPERSON YOUNG: Okay, let's go
8 through the rest of the argument here. The
9 subpoena violates the Chair's order declaring
10 evidence closed as of December 2nd, '05. I think
11 I've already commented on that, that it is myself
12 who amended my own order of December 2nd. And so
13 the subpoena does not violate my modified order.

14 The subpoena was improperly served.
15 Michael Thomas has been segregated from the
16 prosecution staff team. Now, yes, he is a staff
17 member of the Regional Water Quality Control
18 Board. But he, for this proceeding, is not an
19 employee or a party of the prosecution staff team.
20 I think he's a perfectly legitimate person to
21 serve a subpoena.

22 MS. SCHAFFNER: Yeah, this is, I
23 think, --

24 (Audience participation.)

25 CHAIRPERSON YOUNG: Excuse me. I don't

1 want to hear any comments from the public at this
2 point in time. Okay? I just don't like that. I
3 want to be able to listen to what is said by the
4 people up here at the podium.

5 From either people that are in favor of
6 what you may hear, or not in favor of what you
7 hear, if you cannot keep your comments to yourself
8 I will ask you to leave this proceeding. And I'm
9 not going to repeat this.

10 MS. SCHAFFNER: On the point that the
11 Chairman just made about Mr. Thomas not being a
12 party. I think that really is a critical aspect
13 of this proceeding. In order to provide a fair
14 hearing to the CSD the functions of staff have
15 been separated.

16 And Mr. Thomas is very specifically not
17 a party to this action. Parties have been
18 officially designated by the Chairman. Those
19 parties are the prosecution team staff, as named
20 and participating, and the CSD.

21 This is a formal process that is created
22 to protect the due fair hearing rights of the CSD.
23 And it has been honored. Mr. Thomas has not
24 participated as a party. Therefore, we believe it
25 was appropriate for him to deliver, serve the

1 subpoena.

2 CHAIRPERSON YOUNG: But as part of that
3 component there's an argument that the manner in
4 which Mr. Thomas served the subpoena violated
5 something, and I'm not quite sure what. I'd like
6 to give the District an opportunity to tell me. I
7 did read Mr. Bleskey's letter that was sent to Mr.
8 Briggs complaining about the manner in which the
9 subpoena was served.

10 But I guess the core question is, Mr.
11 Onstot, what is it about that that makes the
12 service of the subpoena defective?

13 MR. ONSTOT: Nothing.

14 CHAIRPERSON YOUNG: Okay, thank you.

15 MR. ONSTOT: It was just an
16 informational item. But what the process server
17 did, what Mr. Thomas did, does not have any
18 bearing on the validity of the subpoena.

19 CHAIRPERSON YOUNG: Okay. And then the
20 last component is the affidavit of Sheryl
21 Schaffner is insufficient. Section 1985 states
22 that an affidavit in support of a subpoena duces
23 tecum specify the exact matters or things desired
24 to be produced, setting forth in full detail the
25 materiality thereof to the issues involved in the

1 case. Here Ms. Schaffner testifies that the
2 request of documents, quote, "pertain to ongoing
3 actions of the CSD affecting compliance as
4 equitable matters in considering the proposed
5 ACLA." Close quote.

6 Such vague reason is nothing more than a
7 fishing expedition and is far from the full detail
8 required by the statute.

9 In addition, Ms. Schaffner requests
10 draft minutes and resolutions of the District
11 Board. However, because the District only acts by
12 a vote of its Board, draft minutes and
13 resolutions, by definition, have no probative
14 value, thus they cannot be deemed to pertain to
15 actions of the CSD affecting compliance.

16 Similarly, personal notes taken by Ms.
17 Vega or Mr. Bleskey have no probative value on
18 District compliance. The subpoena was directed to
19 the custodian of records for the District, which
20 means that the scope of the subpoena is for
21 District records, not personal notes.

22 Well, I think the categories are -- I
23 don't agree with your conclusion. If you read the
24 categories I think they're fairly specific. We've
25 already gone through the three categories that we

1 have requested. They have time constraints.
2 They're not open-ended. It's about a three-month
3 period. And the types of documents are identified
4 as closely as one can without actually having them
5 in their possession and having not seen them.

6 There's an issue with the reason or
7 cause put into the subpoena underlying the
8 request. And Ms. Schaffner put in here, these
9 documents pertain to the Regional Water Quality
10 Control Board's consideration of actions taken or
11 directions given by the CSD Board or Staff that
12 could help, hinder, accelerate or delay the CSD's
13 compliance with order of the Regional Board, as
14 provided by Water Code section 13327.

15 I think that that states a reasonable
16 justification and rationale for why those
17 categories have been demanded. They pertain to
18 ongoing actions of the CSD affecting compliance
19 as equitable matters in considering the proposed
20 ACL.

21 I think there's enough justification; I
22 think there's enough specificity. I do want the
23 documents produced. I want the two files produced
24 that Mr. Bleskey spoke about. I'd like Mr.
25 Bleskey's notes. And I would like to have this

1 material to this Board before we go into closed
2 session for deliberation.

3 Now, we have, within the regulations we
4 have the, first of all, the authority to issue
5 subpoenas, ourselves, as Hearing Officers. We
6 have simply availed ourselves of that opportunity.
7 We're trying to get to all of the facts that we
8 may feel is important in this matter.

9 Ms. Okun and Mr. Briggs may feel that
10 they have sufficient evidence to put on their
11 case, and to make recommendations to the Board.
12 But the statutes and the regulations allow the
13 Board, acting on its own, to issue subpoenas, and
14 I have availed ourselves of that opportunity.

15 I did not have the subpoena issued if I
16 was not going to seek compliance with it, or would
17 not follow through with enforcement of it. We do
18 have powers of contempt, and I don't want to be
19 put into a situation where we have to go down that
20 path. I would prefer that we just have the
21 documents produced let's say by 2:00 today.

22 If we don't get them produced then the
23 Board will just have to decide, collectively,
24 whether it wants to go to the next step, which
25 would be deciding to issue a citation for

1 contempt.

2 MR. ONSTOT: Mr. Chair, we don't
3 disagree with the subpoena power that you have.
4 The basis of most of our objections have been the
5 fact that this is basically a moving target of
6 evidence. And things have been requested after
7 final determination of close of discovery, if you
8 will. And then there's more, and then there's
9 more and then there's more.

10 Now we're at a point where evidence is
11 being requested that will not be subject to being
12 confronted by both parties. The Chair has
13 indicated his intent to terminate these
14 proceedings today. But we're obviously not going
15 to be in violation of the subpoena. I will note
16 for the Chair that Mr. Bleskey just gave me a note
17 that the office person is not there today and the
18 copy machine is broken.

19 (Laughter.)

20 MR. ONSTOT: But we will do what we can
21 to produce the documents that the Chair requested
22 by 2:00.

23 CHAIRPERSON YOUNG: Okay, thank you.

24 MR. ONSTOT: And I'll have Mr. Bleskey
25 testify under oath of his best efforts to do that

1 by 2:00. If it happens, it happens. If it
2 doesn't, there's --

3 CHAIRPERSON YOUNG: Well, if it doesn't
4 we'll deal with it at that point in time.

5 MR. ONSTOT: Okay, fair.

6 MS. SCHAFFNER: Mr. Chairman, if I might
7 make offers on behalf of Water Board Staff. Would
8 it be possible if Mr. Bleskey brought his
9 originals to avail them of the copier in our --

10 CHAIRPERSON YOUNG: Well, of course.

11 MS. SCHAFFNER: Yes.

12 CHAIRPERSON YOUNG: If your copier is
13 broken, the documents can be brought here and you
14 can make use of our facility to make photocopies.

15 MR. ONSTOT: That's fine. And I also
16 make to make it clear that in doing this
17 production it is in compliance with the Chair's
18 order, and we are not in any way, shape or form
19 waiving our objections by producing them.

20 CHAIRPERSON YOUNG: That's fine. Okay.
21 So obviously the conclusion for that first item
22 was that the motion to quash is denied.

23 The next item is a request for another
24 continuance from the CSD.

25 MS. SCHAFFNER: Since the subpoena was

1 an act of the Chairman, and I think it would be
2 appropriate, given the fact that we've just had
3 this extensive hearing presentation and dialogue
4 of evidence in front of the entire Board, to seek
5 the Board, as a whole's, agreement or disagreement
6 by voice vote as to the decision whether to quash
7 the motion -- to deny the motion to quash, if
8 anybody is interested in making such a motion.

9 CHAIRPERSON YOUNG: Mr. Hayashi.

10 BOARD MEMBER HAYASHI: I'll make the
11 motion that we quash.

12 VICE CHAIRPERSON JEFFRIES: Second.

13 MS. SCHAFFNER: I'm sorry, to be clear,
14 you mean make the motion to deny -- move that you
15 deny the motion to quash, is that what you mean?

16 BOARD MEMBER HAYASHI: That's correct.

17 MS. SCHAFFNER: Okay, thank you.

18 CHAIRPERSON YOUNG: You don't want to
19 quash the subpoena, right?

20 BOARD MEMBER HAYASHI: No, no.

21 CHAIRPERSON YOUNG: Okay, we want to
22 make that clear. All right, is there a second?

23 VICE CHAIRPERSON JEFFRIES: I did that,
24 Mr. Chair.

25 CHAIRPERSON YOUNG: Okay. All those in

1 favor?

2 (Ayes.)

3 CHAIRPERSON YOUNG: Anyone opposed?

4 Okay. And I abstain from that vote.

5 Okay, next item is a request for another
6 continuance from the CSD. And let's see here,
7 there's three bases for that. One, to wait until
8 the CSD's petition to the State Board is resolved.
9 And that petition is the one that Mr. Grimm put
10 forth --

11 MR. McCLENDON: That's correct.

12 CHAIRPERSON YOUNG: -- challenging the
13 time schedule order.

14 MR. McCLENDON: That's correct.

15 CHAIRPERSON YOUNG: Okay. Two, because
16 of my request for documents relating to ongoing
17 CSD actions affecting compliance, and my allowing
18 both parties the opportunity to submit further
19 briefing on CSD objections between December 2nd
20 and December 28th.

21 And the third component of this request
22 was because the holidays fell in the midst of that
23 period.

24 Let me just address the first one. And
25 that is the petition to the State Board, I

1 believe, and I've read it, does not deal with the
2 basin plan prohibition discharge alleged
3 violations, correct. So, the petition doesn't
4 completely even overlap the components of the ACL.

5 MR. SEITZ: That's correct, Mr. Chair.
6 I would just point out, however, I think we have
7 some testimony, and I can locate it here in a
8 minute, from the prosecution team that basically
9 says that what you are seeking though is,
10 regardless if it be the basin plan prohibition or
11 the 00-131 order, that you are seeking penalties
12 under the 00-131, \$10,000 per day. I believe
13 that's in the record. If you can give me a
14 moment, I can locate it.

15 We believe that it would be better for
16 this Board and for the District to have an
17 understanding of what the State Water Resources
18 Control Board is going to do with that petition.
19 As a substantive matter it would certainly add
20 some guidance to your Board and to the District on
21 how to proceed with this enforcement hearing.

22 MS. SCHAFFNER: Can I clarify one
23 thing, --

24 CHAIRPERSON YOUNG: Sure.

25 MS. SCHAFFNER: -- Mr. Chairman. The

1 ACLC alleges violations of both the time schedule
2 order, as well as the prohibitions.

3 MR. SEITZ: Okay.

4 MS. SCHAFFNER: However, the penalties,
5 as justified in the staff's worksheet, recommend
6 that the penalties only be calculated based on the
7 time schedule order violations.

8 The Board may choose to accept or reject
9 that recommendation. The Board may choose to
10 grant and assess penalties based on the
11 prohibition violations to the degree the evidence
12 supports that. Or choose to assess penalties
13 under the time schedule order.

14 So both are at issue in the ACLC; it's
15 just the staff's suggestion that not to calculate
16 on the prohibitions.

17 MR. SEITZ: All right, just --

18 MS. OKUN: And if I could just clarify
19 one thing about the complaint. There were
20 findings in the worksheet under both theories.
21 The conclusion was that the analysis of the
22 factors was the same under either 13350 or 13308.
23 The recommendation was to assess penalties under
24 13308, but the full allegations were set forth for
25 both theories.

1 MR. SEITZ: May I just offer a brief
2 response?

3 CHAIRPERSON YOUNG: Sure.

4 MR. SEITZ: Thank you. I'm looking at
5 page 35 of the transcript, commencing at line 22.
6 This is from the prosecution team, and I quote:
7 "The third thing is the basis for assessing
8 penalties on 00-131 versus assessing penalties on
9 the basin plan prohibition. No matter what we
10 base the penalty on, it is based on the
11 District's..." -- this is the wrong quote. Sorry,
12 I got that one -- I think it's --

13 Well, that's not the point I was trying
14 to make. I apologize for not being able to find
15 the exact quote. Maybe I have it here. Yes.
16 Page 74, I apologize, Mr. Chair, for going on to
17 the wrong --

18 MR. THOMAS: 74 of which volume?

19 MR. SEITZ: I believe it's volume I.

20 MR. THOMAS: Okay.

21 MR. SEITZ: I think it's on page 74,
22 Mike, if you see it there. It starts off with, on
23 line 6, "We will talk about the basin plan
24 prohibition...".

25 MR. THOMAS: Hold on.

1 MR. SEITZ: Sure.

2 CHAIRPERSON YOUNG: Do you want to read
3 it for us, --

4 MR. SEITZ: Sure.

5 CHAIRPERSON YOUNG: Go ahead, Mr. Seitz.

6 MR. SEITZ: Thank you.

7 CHAIRPERSON YOUNG: Do you have it, Ms.
8 Okun?

9 MS. OKUN: Yes.

10 CHAIRPERSON YOUNG: Okay.

11 MR. SEITZ: Okay. It says, "We will
12 talk about the basin plan prohibition because it's
13 relevant to the violations of the time schedule
14 order. But our recommendation is that penalties
15 be assessed based on the daily violation of the
16 time schedule order."

17 That's page 74, lines 6 through 11.

18 So what we're trying to point out here
19 is that because 00-131 in the time schedule order
20 is now before the State Water Resources Control
21 Board, it just seems that that matter should be
22 resolved prior to moving forward with this hearing
23 before the State Water Resources Control Board.

24 It just seems to me we're all going to
25 be on much better footing with that decision

1 having been made and resolved.

2 CHAIRPERSON YOUNG: Well, here's my
3 concern about that. I don't know when the State
4 Board is going to take up the issue. What they're
5 going to do with it is kind of speculative.
6 Sometimes they just deny these things outright.

7 And so because any order that we adopt
8 would be put in abeyance anyway pending an appeal
9 by your District, I think you're protected that
10 anything we might do today would be put on the
11 side burner while that issue gets resolved.

12 So I'm strongly in favor of getting this
13 hearing behind us and I think that there is also a
14 benefit, Mr. Seitz, to the CSD and to the public
15 to know what the Regional Board's position is with
16 respect to what's going on currently in Los Osos.
17 I think that's important information that goes
18 beyond just what's in the order, itself; simply
19 for planning purposes.

20 So I'm in favor of moving forward for
21 those two reasons. One is the petition really
22 doesn't deal with the basin plan prohibition
23 alleged violations. And so they don't really even
24 overlap completely. It overlaps somewhat.

25 And then the other reason is for not

1 really knowing what the State Board is going to do
2 and what it's not going to do with this and what
3 timeframe it's going to operate under.

4 So, I want to move forward so that we
5 can get this behind us. Let's deal with the other
6 two components, though, that we've identified as
7 the basis for the request for continuance.

8 And I guess the second one then is the
9 documents relating to the CSD's actions affecting
10 compliance. Do we now, Michael, have all the
11 documents that we need or have requested affecting
12 compliance?

13 MR. THOMAS: Well, we have the
14 documents, the original document list that the CSD
15 submitted included documents that were not
16 actually submitted to the Board. So there was a
17 list of documents, some of them were submitted,
18 some of them weren't.

19 As a follow up the CSD submitted
20 additional documents that they had not mailed to
21 us or sent to us originally. But not all of the
22 documents that are on their original list have
23 been submitted. And the latest document list that
24 I passed around to the parties reflects that.

25 So there's some documents that CSD has

1 on their list, but have not been submitted to us,
2 and they're marked as such, and they're marked
3 rejected.

4 CHAIRPERSON YOUNG: Okay. But part of
5 their request for a continuance is that they were
6 grappling with producing additional documents.

7 Mr. Seitz, have you had the opportunity
8 to produce the documents that you wanted to
9 produce? Whether they've been categorized as
10 rejected or not, have you at least been able to
11 produce them?

12 MS. SCHAFFNER: Before he answers that
13 question I just want to clarify that we're
14 accurately portraying the nature of the request
15 for the continuance.

16 My understanding of the request for the
17 continuance was not that the CSD's three or four
18 opportunities to produce documents that it wished
19 to introduce were insufficient. It was that the
20 Chairman was asking for additional documents
21 concerning ongoing compliance issues that it did
22 not believe it had the time to deal with and
23 didn't want to produce.

24 So, it's not -- the documents you and
25 Michael are talking about are documents that were

1 due in November, that the Chair gave them extra
2 time through December to produce. And then extra
3 time within that period to produce the specific
4 ones that we're talking about now, which are the
5 ongoing compliance issues.

6 That was the basis of the CSD's -- one
7 of the three bases of the CSD's request for a
8 continuance, because it felt that the Chairman's
9 requests on December 4th, 6th and 16th for any
10 information concerning ongoing compliance were
11 burdensome and they needed more time.

12 Although at the same time they refused
13 to produce them, so -- is that correct, or am I
14 misreading your argument?

15 MR. SEITZ: No, I think it's fairly
16 accurate. On December 2nd the Chair issued orders
17 at the conclusion of the meeting. Those orders
18 were basically confirmed in a subsequent email
19 from your staff. I think it was Ms. Schaffner
20 sent an email out on Sunday. I was surprised to
21 see it came out on -- it was a workday, but it
22 came out basically confirming no new evidence.
23 And a brief outline of what this hearing was going
24 to be composed of.

25 I guess my point in making this is this:

1 As you recall, the Board debated several
2 timeframes in which to conduct this continued
3 hearing. This was, as far as I can remember, I
4 think there was some talk about a December
5 hearing, but most of the hearing dates were out in
6 February. And I felt with my own vacation
7 schedule, I don't mean to interpose my vacation as
8 a material element into this proceedings, that I
9 would have ample time, the District would have
10 ample time to review the testimony, prepare for
11 its substantive motions.

12 And I agree with Ms. Schaffner's later
13 observations that I had told the Chair I had no
14 intentions of sandbagging, even though it wasn't
15 in his final order, I didn't mind giving notice of
16 that so that everybody would be prepared to
17 address them.

18 But quite frankly I wasn't prepared to
19 spend time away from this case on issues that
20 were, to me, clearly resolved on December 2nd.
21 And that being testimony is closed; evidence is
22 closed; and what happens to us, from my
23 perspective, I know the Chair has a different
24 perspective, and I honor that, I'm not trying to
25 be disrespectful of the Chair's concerns.

1 But from my position, now I'm sitting
2 here in my office dealing with these two fine
3 gentlemen and other people, attempting to comply
4 with the situation of reopening evidence,
5 reopening this new briefing schedule, new briefs.

6 And it's just been my observation, but
7 generally when these types of issues come up,
8 which they do and I don't deny, that there's a
9 phone call, there's a joint conference between the
10 prosecution team, the chair and your team. And we
11 iron this out.

12 We say well, how much time in order for
13 you to do this new workload, in order to get this
14 to the Board. How much time do you need
15 considering this is the Christmas vacation time.
16 And the Chair's prior orders.

17 And there is a discussion between the
18 three parties as to the appropriate timing of when
19 do we get this information out. Should the
20 hearing be continued. I know it's much more
21 difficult for the Board to continue hearings
22 because there's a multiplicity of directors that
23 are up here. It's not like a court where the
24 court can say, okay, we'll put this over for two
25 or three weeks.

1 But still, the idea of us reaching an
2 agreement as to what your specifically looking for
3 where we can talk about it, what documents are you
4 specifically looking for, what types of briefs and
5 things.

6 So not that maybe I can sit back and say
7 no, but at least everybody can have a firm
8 understanding, and whether or not a continuance
9 would be appropriate.

10 You know, we've gotten these orders from
11 the Chair through the Chair's Staff, three or four
12 of these emails and they're very perplexing only
13 because I would hope, had hoped to spend this time
14 reviewing transcripts and closing, and not re-
15 addressing opening testimony and so forth.

16 So that was the basis for that request
17 for a continuance, was that I thought that it
18 would be much more productive and much more
19 efficient to have those discussions to try and
20 address the Chair's concerns, and the prosecution
21 staff's concerns, and, of course, the District's
22 concerns in responding to these three or four
23 emails that were clearly outside of what my
24 understanding was on December 2nd, as to how this
25 hearing was going to be conducted.

1 MS. SCHAFFNER: Mr. Chairman, I would
2 like to clarify one factual point.

3 CHAIRPERSON YOUNG: Yes.

4 MS. SCHAFFNER: Mr. Seitz didn't
5 accurately portray the first direction given by
6 the Chair through me on December the 4th, which
7 was the first direction after the hearing. That
8 did not say no new further evidence absolute. It
9 said the only -- it said no new evidence, but that
10 the Chairman can foresee, an exception to that,
11 there are new facts or information available
12 concerning the CSD's efforts to come into
13 compliance, or steps that will further inhibit or
14 delay compliance with the TSO. If any new
15 information arises on that front the Chair and the
16 Board will want to be apprised of that.

17 That was the first statement that the
18 Chairman was modifying his ruling of no new
19 evidence. And that was two days after the last
20 hearing.

21 That was followed up on December 6th
22 with a specific request for minutes and
23 resolutions. That was followed up on December
24 16th with another reiteration of that request.
25 That was followed up with a subpoena, which we

1 have in this hearing this morning, figured reduced
2 to a determination that these are locatable in a
3 handful of files and can be produced in a couple
4 of hours.

5 And as for the additional burdens that
6 keep being cited to and the responses to these
7 interim communications between the last day of
8 hearing and this one, the briefs that were invited
9 were opportunities given by the Chair to the CSD
10 to further articulate its due process concerns or
11 objections on the record. Those were not new
12 burdens; they were opportunities given to better
13 articulate the legal bases and factual bases for
14 the objections that have been posed, so that the
15 Chairman could give them fair consideration before
16 today's hearing.

17 The CSD, in some ways chose to avail
18 itself of those briefing opportunities; in some
19 ways, it didn't. But I just want to make clear
20 those are not new mandates, they were supplemental
21 briefing opportunities to clarify positions.

22 CHAIRPERSON YOUNG: And let me add to
23 that, Mr. Seitz, because I want you to know that I
24 listened to the tapes of December 1st and 2nd.
25 And I wanted to make sure that we had covered all

1 of the objections that you had raised through the
2 proceeding. And so that we were taking extra
3 measures to not let anything slip through the
4 cracks.

5 So that's why you began to see requests,
6 really from me, to give you the opportunity to
7 flesh out and to make sure that we understood
8 exactly what these objections were, so that we
9 would know what kind of remedy to engage to
10 address them.

11 So, that was the basis for it. I know
12 things could have been done in a different fashion
13 with respect to my request for additional
14 information, but I deemed it to be most efficient
15 and expedient to lay out some very detailed emails
16 and send them in that fashion. Because that would
17 just both tell the prosecution team and your team,
18 this is what I'm looking for, we don't need to
19 debate it. If there was an issue that needed to
20 be addressed you guys could call on the phone, try
21 to set up a conference call and say, you know
22 what, this is going to be a sheer impossibility.

23 And I don't really see the need for the
24 continuance based on that because there was the
25 better part of a month from December 2nd to today.

1 Even given the holidays. You know, with
2 litigation things go very quickly, and you guys
3 have multiple attorneys and staff to work on
4 things like this.

5 MR. SEITZ: Can I just make one --

6 CHAIRPERSON YOUNG: Go ahead.

7 MR. SEITZ: I understand, I think, what
8 the Chair's ruling is to deny the motion for a
9 continuance. But I just want to make sure how I
10 perceive this, just so that there's -- and how the
11 District, through myself, perceived this.

12 I viewed these emails as requests for
13 additional information. We're going to get to
14 some substantive due process motions that I've
15 made here.

16 But I want the Chair and the Board to
17 understand, because I raised new issues here, and
18 I say this in my preamble, I'm not waiving the
19 objections that I made at the prior evidentiary
20 hearing. I'll be happy to restate them on the
21 record here, but my take on this is to put in what
22 procedural and substantive due process issues I
23 intended to raise that I haven't raised in the
24 past, and that's what is in my December 22, 2005
25 email.

1 CHAIRPERSON YOUNG: Okay, so unless
2 there's an objection by my colleagues, I'm going
3 to overrule the motion to continue the hearing so
4 that we can proceed.

5 All right. The next item, there was an
6 issue raised as to an ex parte contact that was
7 made.

8 MR. SEITZ: I'm not raising -- I mean
9 maybe my co-counsel is raising that, I'm not
10 raising it.

11 CHAIRPERSON YOUNG: Well, it was in Mr.
12 Onstot's communication. Are you renewing an
13 objection --

14 MR. ONSTOT: No. So that we can move on
15 we'll withdraw that.

16 CHAIRPERSON YOUNG: Okay. All right,
17 now we can get to the due process objections that
18 were raised. Okay. Ms. Schaffner, do you want to
19 summarize for us what we have kind of gleaned from
20 the record, from the correspondence from the CSD
21 as to what their outstanding due process issues
22 are?

23 MS. SCHAFFNER: Yeah, and I apologize if
24 I'm being dense or not understanding or not fairly
25 characterizing, I will certainly expect that you

1 will correct me if I get any of this wrong, Mr.
2 Seitz.

3 But my understanding from your latest
4 briefing submitted on the 22nd, and this when it
5 finally started to gel for me, what the nature of
6 what I think your objection, procedural and
7 substantive due process objections are.

8 Is that you believe that there is an --
9 that the ACLC is somehow holding the CSD, itself,
10 liable for the discharges of individual
11 dischargers that the CSD does not control the
12 waste of within the District.

13 That parts of the CSD are not in the
14 prohibition zone, parts of it are, I'm not sure if
15 I got that right. But your basic argument is that
16 you think the ACL holds the CSD liable for
17 dischargers over which it has no control.

18 MR. SEITZ: That's correct. As you may
19 recall, and I've had many fine discussion with
20 your Board regarding this very issue, as I flipped
21 up the prohibition zone and kept trying to advise
22 the Board, that it is inappropriate to hold the
23 Community Services District responsible for the
24 violation of the prohibition -- and I still
25 believe the 00-131 is based on the general

1 prohibition -- of the time schedule order to sewer
2 the prohibition zone. I don't want to mix apples
3 and oranges here.

4 But, I kept getting --

5 MS. SCHAFFNER: Okay.

6 MR. SEITZ: -- the idea that what the
7 ACL complaint was aimed at, and I can quote Mr.
8 Briggs' letter to the District transmitting the
9 ACL complaint, was the concept that because the
10 District didn't build the wastewater treatment
11 project for the entire prohibition zone, that
12 somehow the amount of penalties, when you take a
13 look at the original, and maybe the ongoing
14 because I don't know how many versions of the
15 worksheet are out there any more, but the whole
16 concept was based on these horrendous discharges
17 from the entire prohibition zone.

18 And my concern was that the prosecution
19 staff was attempting to say because the District
20 didn't build the wastewater treatment project to
21 sewer the whole prohibition zone, that this \$11
22 million that we were -- was before your Board, was
23 aimed at that issue, the failure to build the
24 wastewater treatment project. Therefore, you're
25 going to be held responsible for all these

1 individual discharges -- and you'll see a
2 PowerPoint on this -- within the prohibition zone.

3 I kept trying to say, there's no nexus,
4 without a plant, without having a wastewater
5 treatment plant in process, you know, up and
6 serving the community, there was no way that the
7 District a) could be responsible, because they're
8 only an individual discharger; and b) they could
9 not pass on the fines within the prohibition zone
10 because there was -- the prohibition zone, itself,
11 was an empty shell.

12 Now, I have, since I raised this we've
13 had two correspondence back from the prosecution
14 team, I believe clarifying this. One is their
15 rebuttal brief. And I'm going to read to you.

16 It says that the District argues that
17 the complaint should be stricken because Water
18 Code section 13301 applies to persons who
19 discharge waste, and therefore the District cannot
20 be held accountable for discharges of waste from
21 individual dischargers within the prohibition zone
22 as alleged in the ACL complaint and the proposed
23 worksheet for assessment.

24 The prosecution team's response:
25 Neither the complaint nor the worksheet -- and I

1 disagree with this completely -- alleges any such
2 thing. The basis for the four cease and desist
3 orders, which I believe are not at issue here, the
4 time schedule order and the ACL complaint are the
5 District's own discharges. Which is basically the
6 Bay Ridge Subdivision, Vista del Oro and the fire
7 station.

8 I think this is further clarified --

9 CHAIRPERSON YOUNG: Well, does that then
10 satisfy your concern?

11 MR. SEITZ: Well, as long as the Chair -
12 - this is resolved this way. I hate to be sitting
13 up here saying, putting out our position and if
14 the Chair says you're right, you're only going to
15 be held responsible for those three discharges,
16 then I'll be satisfied.

17 The third -- now I'm reading from page
18 35, I think, of the first transcript, the first --
19 the December 1st transcript. The third thing is
20 the basis for assessing a penalty under 00-131
21 versus assessing a penalty on the basin plan
22 prohibition, no matter what we base the penalty on
23 it is based on the District's discharges at Bay
24 Ridge Estates, Vista del Oro and the fire
25 department. It is not based on the basin-wide

1 prohibition or discharges of other residents,
2 other than the residents in these two
3 subdivisions.

4 Now, if that is the Chair and this
5 Board's position, then I believe my substantive
6 due process argument is resolved.

7 CHAIRPERSON YOUNG: Okay, well, let me
8 say this. The Board doesn't have a position with
9 that. This is staff's recommendation. I will
10 tell you that that was always my understanding in
11 reading the ACL, that they were recommending under
12 one of their two theories that you would be held
13 responsible for only the discharges from your own
14 facilities and not from the community at large.

15 So, that's always been my understanding,
16 and not everyone else in the community.

17 MS. SCHAFFNER: Perhaps we could let Ms.
18 Okun clarify this for the prosecution team, but my
19 understanding was the same as the Chairman's in
20 that the citation to the factual threat of water
21 quality and health and safety risks posed by
22 ongoing unsewered discharges from the rest of the
23 community within the District were a factual
24 context and implication that is a water quality
25 context for the failure to get the sewer built.

1 Not a basis for assessing a violation.

2 The enforcement policy adopted by the
3 State Board, as well as the statutes require that
4 the Board consider water quality implications as
5 well as any other things. So it was my
6 understanding was that was given as context for
7 that discussion. Is that correct, Ms. Okun?

8 MS. OKUN: That's correct. And, in
9 fact, the next two and a half paragraphs after the
10 rebuttal citation that Mr. Seitz just read says
11 exactly that. That those are factors for the
12 Board to consider in determining the amount.

13 MR. SEITZ: Just so I have this clear,
14 because this has a major impact on what I've been
15 trying to achieve here. Maybe it's just my own
16 misunderstanding in my discussion with the Board,
17 is that the District is only being held
18 responsible here today for three discharges, Bay
19 Ridge, Vista del Oro and the fire department.

20 CHAIRPERSON YOUNG: Under one of two
21 theories in the ACL.

22 MR. SEITZ: Right. But we're not being
23 held responsible for the general discharge within
24 the prohibition zone for the failure -- in
25 violation of 8313.

1 CHAIRPERSON YOUNG: Well, in violation
2 of the basin plan prohibition.

3 MR. SEITZ: That's -- okay, that's what
4 I --

5 CHAIRPERSON YOUNG: Okay, so --

6 MR. SEITZ: Okay. So if that's the
7 ruling, then I'm --

8 CHAIRPERSON YOUNG: Well, you know what,
9 it's not a ruling, because I don't know what we're
10 going to end up doing. But let me say this. Due
11 process is notice and an opportunity to be heard.

12 You're getting an opportunity to be
13 heard on all of these issues. This goes more to
14 the notice issue, I believe, in your argument.

15 And so if the Board comes up with
16 something later that maybe doesn't jibe with what
17 your notion is of what notice should have been,
18 then you've got an issue at that point. It may
19 not be with this Board, it would be with some
20 appellate review.

21 MR. SEITZ: I feel like if I say
22 anything I'm going to be interpreted as concurring
23 with you. And I don't want to sound -- as I said
24 the other day, I don't believe in arguing with the
25 Judge, because I don't --

1 CHAIRPERSON YOUNG: Mr. Seitz, I won't
2 take it personally if you want to concur with me.

3 MR. SEITZ: Okay, I --

4 (Laughter.)

5 MR. SEITZ: I appreciate your humor. I
6 don't concur with that statement. I think notice
7 is a key due process, and it's certainly a key to
8 the District's position to know precisely what
9 discharges that we are being held accountable for.
10 And I've continually made the argument that we
11 can't be held accountable for the discharges of
12 other residents.

13 The prosecution team's rebuttal seems to
14 confirm that, and their direct testimony before
15 this Board seems to confirm that.

16 CHAIRPERSON YOUNG: Okay. All right,
17 let's go on to the second, then, --

18 MS. SCHAFFNER: Does that dispose of all
19 of your due process objections, Mr. Seitz?

20 MR. SEITZ: No, there's one more that I
21 listed in my --

22 CHAIRPERSON YOUNG: Okay.

23 MS. SCHAFFNER: Okay, and let me see if
24 I -- I'm afraid I may have collapsed them or
25 teased them out when they should have been

1 collapsed.

2 Do I understand correctly that your
3 second objection to due process -- motion to
4 strike based on due process obligations, and here
5 I'm a little less clear. Is it because the
6 penalties might affect the budgets of the
7 subdivisions within the CSD? Or is it based on an
8 allegation that your equal protection rights are
9 violated by not assessing penalties against those
10 subdivisions within the CSD? I'm not real clear
11 on that.

12 MR. SEITZ: Thank you for the
13 opportunity. First of all I want to make sure
14 that there's a clear understanding. We haven't
15 waived our other procedural due process issues
16 that we raised during the December 1st and
17 December 2nd hearing. These are the ones that I
18 intended to raise prior to closing. And doesn't
19 necessarily reflect back.

20 This isn't an accumulative restating all
21 my due process objections that I had during the
22 evidentiary hearing.

23 First, --

24 MS. SCHAFFNER: To be clear, Mr.

25 Seitz, --

1 MR. SEITZ: Yes.

2 MS. SCHAFFNER: -- that is not our
3 understanding, at least as the Chairman and I
4 discussed this since that hearing. There has been
5 no citations to law or fact or argument, to flesh
6 out any of the general prior objections you just
7 tried to preserve.

8 We can't address them. The Board cannot
9 give you a remedy when no cause of action has been
10 stated. So, if you want to abandon those
11 objections, you can do so. If you want to support
12 those objections, you've had, by my count, at
13 least three written opportunities and two days of
14 hearing to do that. This is the third day.

15 So, if you really want it to be
16 considered, I would suggest that you just lay it
17 out there now.

18 MR. SEITZ: Okay, thank you. First of
19 all, what my concern was is now that when you're
20 enforcing the second part of this, which is the
21 basin plan prohibition, which is the violation of
22 8313, the Vista del Oro Subdivision, the Bay Ridge
23 Subdivision and the fire department, that as a
24 matter of process that you need to follow the
25 processes of either a cease and desist order or a

1 clean-up and abatement order in order to give
2 those subdivisions and those wastewater
3 treatment -- sorry, septic tank systems the
4 ability to provide a remedy.

5 In other words, you turn around and you
6 say to yourself, okay, we have these, and you'll
7 see these on the PowerPoint. You're going to see
8 these three operations that are run by the
9 District, pursuant to zones of benefit, that have
10 their own separate budgets, that are managed as
11 independent little zones to operate. That what's
12 going on here is that you're fining them directly
13 for violations -- through the District, I want to
14 make sure that there's a distinction there -- for
15 direct violations of 8313.

16 And the point that I wanted to make and
17 clear is that a) it's been the history of this
18 Board, it's articulated in the State Water
19 Resources Control Board enforcement policies that,
20 and the prior actions of this Board, that you've
21 always thought enforcement against individual
22 dischargers, which are these three organizations,
23 through cease and desist orders or clean-up and
24 abatement orders because they come with a specific
25 timeline.

1 If the Regional Board is concerned about
2 those discharges, I'm not saying you shouldn't be,
3 that the way to go about doing that is not
4 alleging a direct violation of 8313, but in the
5 alternative is to issue cease and desist orders
6 that gives this Board, your staff, and the LOCS
7 Staff the opportunity to come up with a fix.

8 You're sitting here under one theory
9 saying we're going to fine you folks those zones
10 of benefit \$11 million, and maybe now it's \$32
11 million, looking at what got emailed to us late
12 last night, for these discharges when the very fix
13 is less than \$11 million.

14 And it just seems to me that the correct
15 way and the historical method that this Board has
16 used, and what's recommended in the policies is to
17 issue individual cease and desist orders or clean
18 up and abatement orders to give the discharger,
19 being the District, the ability to address those
20 individual discharges and not lump them with a
21 direct violation of 8313.

22 MS. OKUN: Mr. Chair, this board did
23 that six years ago. Six years ago in 1999 the
24 Board issues cease and desist orders for those
25 four discharges. And those cease and desist

1 orders had time schedules in them. They were
2 based on the solution that the District proposed
3 to resolve those discharges, which was to build a
4 treatment plant.

5 A year later the Board adopted the time
6 schedule order in part because the District said
7 that it needed to extend the schedules and the
8 cease and desist order. And the Board included an
9 extended schedule in the time schedule order.

10 The four discharges aren't separate
11 entities. The cease and desist orders, I agree,
12 were not alleging violations of the cease and
13 desist orders, but those were the orders that were
14 the basis for the time schedule order.

15 The discharger named in the time
16 schedule order is the District, because it owns
17 and operates the four facilities.

18 I don't know how to make that any more
19 clearer.

20 CHAIRPERSON YOUNG: Mr. Seitz, I don't
21 see this as really a due process issue, anyway. I
22 think that you'll have opportunity to argue this
23 further. If you feel that some other remedy is
24 appropriate, you can argue that to the Board.

25 But I think what's in the ACL is going

1 to stand at this point and not get amended. And
2 you can take issue with what staff is
3 recommending, you know, as a remedy for what's
4 going on, and what you think the Board should or
5 should not do.

6 But I don't see it as germane to
7 something that the Board, itself, can fix at this
8 point with the pleading or the process.

9 MS. SCHAFFNER: Mr. Chairman, if I can
10 just point out one other point for the record.

11 CHAIRPERSON YOUNG: Go ahead.

12 MS. SCHAFFNER: Of the four lawfirms
13 that the CSD has engaged to advise or participate
14 in this matter, it's gotten a little confusing.
15 Because now I have before me a petition filed,
16 actually a reactivation of a petition filed five
17 years ago on the TSO by the CSD.

18 Mr. Grimm filed on behalf of the CSD,
19 and I believe Mr. Seitz submitted that as an
20 attachment to one of his recent submittals to the
21 Chair.

22 The points and authorities by Mr. Grimm
23 specifically says that the District consequently
24 can only be held accountable for those four
25 service areas of which it has control, and from

1 which it discharges wastewater.

2 There seems to be some tension between
3 what you're saying. You're saying that the CSD
4 should no be held accountable for the discharges
5 from these facilities. And Mr. Grimm is saying
6 that it can.

7 MR. SEITZ: No. I'm sorry, maybe I
8 misstated. I think that the District, under my
9 interpretation of the rules, is a discharger for
10 the purposes of the 8313 for the three septic tank
11 systems that it operates for Vista del Oro, Bay
12 Ridge, thank you, and the fire station. I'm in
13 complete agreement.

14 I just -- but those are the only
15 discharges that we can be held responsible for.
16 And the way that the Board has traditionally and
17 consistent with the State Water Quality Control
18 Board enforcement policies are that you issue
19 against individual discharges, either cease and
20 desist orders or clean up and abatement orders.

21 CHAIRPERSON YOUNG: Okay, I don't think
22 we have a due process violation here. I think it
23 goes more towards your argument as to what might
24 be an appropriate remedy for what's going on. And
25 you'll have opportunity to, you know, restate that

1 again during closing.

2 MR. SEITZ: Okay. Then, --

3 CHAIRPERSON YOUNG: Okay?

4 MR. SEITZ: Then picking up on Ms.
5 Schaffner's other issues, we have always raised
6 the objection as to the timing of these hearings,
7 if I have to restate them now, so everybody's
8 clear on them, on the basis of notice and
9 opportunity to be heard, and I quoted a section,
10 there's an old case law that says the amount of
11 due process that an agency is entitled to, or
12 anybody's entitled to, is directly related to the
13 penalties.

14 And we've continually been handling this
15 hearing on an expedited basis, and with the threat
16 of an \$11 million fine. And I've raised that in
17 the past. I want to make sure if I'm supposed to
18 renew it now that it be renewed now. And so that
19 is being renewed.

20 I've also raised issues on the Chair's
21 ruling that our cross-examination of opposing
22 witnesses was going to be deducted from our case-
23 in-chief time. I've raised that on numerous
24 occasions. I've always been cited back to an
25 email that Mr. McClendon sent to Ms. Schaffner in

1 response to some questions which basically stated,
2 when they asked these questions, that we somehow
3 stipulated to two hours.

4 I have reviewed that email, and I can
5 find it in my binder here. Two things: One is we
6 gave no time for cross-examination. We only gave
7 time, when we estimated two hours, for at least
8 two hours for our case-in-chief.

9 And as far as authority goes, I want to
10 cite to you Government Code section 11513(b):
11 Each party shall have these rights: To call and
12 examine witnesses; to introduce exhibits; to
13 cross-examine opposing witnesses on any matter
14 relevant to the issues, even though that matter
15 was not covered."

16 And it just seems to me the continual
17 indication that when we were cross-examining or
18 giving our ability to cross-examine the
19 prosecution team's witnesses, we always had the
20 clock running on our case-in-chief.

21 And if I have to continue to raise these
22 objections, I'm raising them again right now. And
23 I'm citing you the California Government Code that
24 addresses that section.

25 CHAIRPERSON YOUNG: Okay, Mr. Seitz, was

1 there anybody, any witnesses that you were not
2 able to cross-examine on the December 1st and 2nd
3 hearings?

4 MR. SEITZ: Absolutely. And the reason
5 why I say that is this. Is that you put
6 tremendous strain on myself and the other
7 attorneys up here to cross-examine witnesses, to
8 figure out what questions you can ask them and
9 what questions you shouldn't because the time is
10 ticking against your case-in-chief.

11 I believe, you know, that we -- I know I
12 would have had additional questions back then. If
13 I'm required now to re-raise these issues, I need
14 to make sure they're clear on the record, that by
15 me just doing substantive and procedural due
16 process motions that we've already went through,
17 that I haven't somehow waived those objections,
18 because --

19 CHAIRPERSON YOUNG: Well, you --

20 MR. SEITZ: -- I want it clear I
21 haven't.

22 CHAIRPERSON YOUNG: Okay, you haven't
23 waived those. My concern was that I had given you
24 all the time that you requested through December
25 1st and 2nd. I didn't hear anything from you

1 that, gee, I really need some more time because I
2 had some more questions for Mr. Thompson or Mr.
3 Briggs.

4 So, I'm asking you now, do you have any
5 specific questions or areas of examination that
6 you felt you were not able to cover December 1st
7 or 2nd that you would like to revisit during this
8 hearing today?

9 MR. SEITZ: I think the answer to that
10 is yes.

11 CHAIRPERSON YOUNG: Okay. And can you,
12 with some specificity, tell me who you need to
13 examine and how much time you need for each of
14 those witnesses?

15 MR. SEITZ: First of all, there's
16 prosecution team witnesses that we would want to
17 call. I can't give you a timeline. I would much
18 prefer to have my notes from my meetings for the
19 evidentiary portion of this. But I'm sure I can
20 go back to my office and resurrect them.

21 Do you know how this works, and I'm
22 sorry, being flippant here, from a lawyer's
23 perspective a question begs another question.
24 Every lawyer knows that. To sit back and say how
25 much time are you going to need to cross-examine

1 witnesses, in itself, places a limitation on our
2 ability to cross-examine.

3 I have no intentions of filibustering
4 this hearing, so on and so forth. And I don't
5 know, so I think that we'd also, just as a side
6 note, we did want to have Mr. Miller come back up
7 and make a presentation on nitrates because --
8 this isn't quite exactly what the Chair had in
9 mind, I think, in the other emails to us, but we
10 have come into subsequent information regarding
11 nitrates in the groundwater basin due to the most
12 recent studies.

13 It's a very short presentation, but we
14 would also want the opportunity to put that on as
15 an informational item.

16 CHAIRPERSON YOUNG: That's not cross-
17 examination. that's your own witness --

18 MR. SEITZ: Right, I agree.

19 CHAIRPERSON YOUNG: -- and he was
20 here --

21 MR. SEITZ: -- I agree.

22 CHAIRPERSON YOUNG: -- on the 1st and
23 2nd. Michael? Daniel.

24 BOARD MEMBER PRESS: Mr. Chair, I have
25 to register an objection to going into more cross-

1 examination to entertaining this idea that due
2 process has been violated here. I think the
3 record will show that the Chair provided extra
4 time to the District. That when the Chair asked
5 if the District had any more questions for
6 witnesses, the District did not.

7 That part of the hearing was closed, and
8 I think it should stay closed.

9 MS. SCHAFFNER: As a refresher, Mr.
10 Chairman, --

11 CHAIRPERSON YOUNG: Is that the sense of
12 the Board? Mr. Hayashi? Mr. Shallcross?

13 MS. SCHAFFNER: Could Mr. Thomas --

14 CHAIRPERSON YOUNG: Mr. Jeffries.

15 MS. SCHAFFNER: Could Mr. Thomas maybe
16 refresh our memory on how much time you actually
17 gave last time, just so we're all current?

18 MR. THOMAS: Extra time?

19 MS. SCHAFFNER: Yeah, initially the
20 Chairman said two hours for the total case.

21 MR. THOMAS: Two hours for both parties.

22 MS. SCHAFFNER: But there were numerous
23 additional times presented as Dr. Press just --

24 MR. THOMAS: Approximately 30 minutes
25 was added.

1 MS. SCHAFFNER: Okay.

2 MR. SEITZ: Mr. Chair, I don't argue
3 with the generosity of the Chair to extend time.
4 I want everybody to understand that. But the fact
5 of the matter is these generosities were welcome,
6 but they came after the witnesses were sent down,
7 and they had more to do with our case-in-chief.

8 You may recall that the limitations on
9 cross-examining Mr. Polhemus directly, based on
10 the extended timelines.

11 I guess the bottomline is I don't argue
12 with the notion that the Chair extended my time to
13 put the case-in-chief on. I don't -- want to make
14 sure that everybody's clear on that.

15 CHAIRPERSON YOUNG: Okay. And I know
16 that there was an argument, Mr. Seitz, that you
17 had wanted Mr. Grimm to be available to
18 participate in this. And I guess you're waiving
19 that specific objection because I don't see him
20 here?

21 MR. SEITZ: Right, --

22 CHAIRPERSON YOUNG: And he was your
23 expert lawyer on --

24 MR. SEITZ: Right, and I appreciate, and
25 that was part of the time, as you may recall, for

1 extending this out. And I appreciate that from
2 the Chair.

3 We've had extensive time to review the
4 pleadings and our response and our closing
5 argument with Mr. Grimm, and I appreciate the
6 opportunity that the Chair gave in extending the
7 meeting for that purposes.

8 CHAIRPERSON YOUNG: Let me say this.
9 I'm sensitive to what my colleagues want me to do,
10 and want done with this issue. I'm also sensitive
11 to your concerns about having sufficient time to
12 examine, you know, witnesses or cross-examine
13 witnesses.

14 I'm also very aware that judges and
15 hearing officers can and do limit the amount of
16 time that a party has to put on a case and to go
17 through witnesses.

18 I would like to know if you can be
19 specific with a timeframe and specific witnesses
20 that you feel you really needed to cover, and this
21 is really an important part of your case that you
22 felt was really set aside because of the time
23 constraint. I would like to hear what the request
24 is if there was some specific witnesses, and I
25 don't just mean the prosecution team, but specific

1 witnesses and a specific amount of time as
2 possible.

3 Because, I can't give you an unlimited
4 amount of time for cross-examination. That I'm
5 not going to do.

6 MR. SEITZ: Mr. Chair, could I suggest
7 maybe a five-minute break so I can consult with
8 the other two attorneys on my side so I can come
9 back and give you that information?

10 CHAIRPERSON YOUNG: Okay. We can do
11 that. Let me finish with this category we're
12 calling due process right here, so we can cover
13 that.

14 Ms. Schaffner, is there anything else
15 left.

16 Well, there was another issue, I think,
17 about the budgeting and funding sources and you
18 felt that I think there was a due process issue
19 that you might be assessed a penalty that would
20 create a problem because it would be pulling on
21 subdistricts or something of that nature.

22 MR. SEITZ: I don't know if that was
23 more argument or substantive or procedural due
24 process. The issue that I wanted to make, and I'm
25 going to continue to make, is that the District

1 operates zones of benefit.

2 You can't sit back and hold these zones
3 of benefit responsible or fine them to the tune
4 that -- or do otherwise than through a cease and
5 desist order, or a clean up and abatement order,
6 hold these subdivisions responsible for the entire
7 violation of the prohibition zone, or the entire
8 alleged violation of 00-131.

9 BOARD MEMBER PRESS: Mr. Chair, why is
10 that a due process issue?

11 CHAIRPERSON YOUNG: Well, I would agree
12 with that. And I think Mr. Seitz has kind of
13 tendered that as more maybe of an argument than a
14 true due process issue. And that's the way I'll
15 receive it. So you'll have opportunity to address
16 the Board on that during closing.

17 Okay. I think that kind of covers those
18 due process issues.

19 MS. SCHAFFNER: I didn't have any others
20 in my notes unless the CSD had something. Okay.

21 CHAIRPERSON YOUNG: Okay, why don't we
22 take a quick break, and you said five minutes is
23 enough?

24 MR. SEITZ: No, I think I just need to
25 step out in the hallway and --

1 CHAIRPERSON YOUNG: Okay, so I'm going
2 to try to get us back here right at ten after the
3 hour, so we can move forward.

4 (Brief recess.)

5 CHAIRPERSON YOUNG: Would everyone
6 please take their seats.

7 MS. OKUN: Mr. Chair.

8 CHAIRPERSON YOUNG: Yes.

9 MS. OKUN: Mr. Seitz indicated to us
10 during the break that the reason they want to put
11 Rob Miller back on is to present the most recent
12 sampling data which shows that nitrate levels have
13 actually gone up. And that that testimony will
14 only take about five to ten minutes.

15 And if that's the case and that's all
16 he's going to testify about, then the prosecution
17 staff joins his request to present that evidence.

18 CHAIRPERSON YOUNG: Okay. If there's no
19 objection, then --

20 MR. SEITZ: No objections.

21 CHAIRPERSON YOUNG: -- that's fine.

22 MR. SEITZ: Thank you.

23 CHAIRPERSON YOUNG: Okay. Before we get
24 to the issue that you guys just deliberated about
25 and over, let me just mention this to the public.

1 There's going to be no public comment period
2 today. This was a continued hearing. Public
3 comment was had, I believe, on December 2nd. And
4 we had sufficient public comment at that point in
5 time.

6 There's only a little bit of additional
7 new testimony today dealing with the issue of
8 compliance/noncompliance subsequent to December
9 2nd. And so in order that we keep things moving
10 along and not open this up to another couple of
11 hours of public comment, we will have no public
12 comment today.

13 VICE CHAIRPERSON JEFFRIES: Mr. Chair.

14 CHAIRPERSON YOUNG: Yes.

15 VICE CHAIRPERSON JEFFRIES: Maybe you
16 better clarify between public comment and public
17 forums, because public forum is on the agenda.

18 CHAIRPERSON YOUNG: Thank you, Mr.
19 Jeffries. I do have a copy of the agenda. And we
20 have public forum, which would be that any member
21 of the public can address the Board on anything
22 other than this agenda item.

23 (Laughter.)

24 CHAIRPERSON YOUNG: And that will be
25 some time after 2:00 p.m. today. All right, that

1 is public forum, not public comment on this item.

2 Okay, so, Mr. Seitz and Mr. Onstot,
3 would you like to --

4 MR. SEITZ: Yes.

5 CHAIRPERSON YOUNG: -- tell us what you
6 came up with?

7 MR. SEITZ: Yes, first of all we were
8 both very hungry. But secondly of all --

9 (Laughter.)

10 MR. SEITZ: -- I'm sorry for the humor,
11 but it's just part of me.

12 CHAIRPERSON YOUNG: Do you notice how it
13 really keeps you focused?

14 (Laughter.)

15 MR. SEITZ: It does.

16 CHAIRPERSON YOUNG: I mean it's true,
17 you really only need a little bit of water and
18 some crackers, and you'll be able --

19 (Laughter.)

20 CHAIRPERSON YOUNG: -- to go the whole
21 day.

22 MR. SEITZ: Your constitution is much
23 different than mine then, Mr. Chair.

24 We would like to call back Darrin
25 Polhemus, both Mr. Onstot and Mr. McClendon

1 believe that that would be somewhere between 15 to
2 20 minutes.

3 I would like to call back Mr. Briggs.
4 Myself and Mr. Onstot would like to call back Mr.
5 Briggs. And we estimate that to be 20 minutes.

6 Additionally, if we're going to break
7 for lunch I do think that Mr. Miller's testimony
8 is going to be very short, but I think somewhat
9 relevant. And basically, as Ms. Okun pointed out,
10 it's the latest nitrate samplings.

11 I think it's what, two charts? Three
12 slides that are going to be very quick. But they
13 do, to some extent, contradict his testimony that
14 he presented to the -- I can represent to you,
15 I've seen the slides, they somewhat contradict his
16 testimony that he gave.

17 The District is in no position, nor do
18 they want to be in any position where they would
19 lead this Board or your staff to conclude that we
20 had new information and we withheld it from the
21 Board without giving an opportunity to present it.

22 CHAIRPERSON YOUNG: Okay, let's look at
23 the request for essentially 20 minutes for these
24 two categories. Normally the examination of a
25 witness is done by one lawyer. Was your

1 suggestion that you were going to split that up
2 between lawyers?

3 MR. SEITZ: It would be 20 minutes
4 combined. My issues are somewhat different than
5 Mr. Onstot's and Mr. McClendon's. And so I have
6 no interest in -- for myself, that's why Mr.
7 McClendon and Mr. Onstot would be in charge of Mr.
8 Polhemus. And myself and Mr. Onstot would be the
9 cross-examination -- obviously, each of us have a
10 little different expertise and a little bit
11 greater knowledge of the precise areas that we
12 want to cross-examine.

13 I don't want to find myself cross-
14 examining into an area that I know very little
15 about.

16 CHAIRPERSON YOUNG: Okay, let's look at
17 this, then. Starting with how much time do we
18 have coming into today, Michael?

19 MR. THOMAS: Forty minutes.

20 CHAIRPERSON YOUNG: Okay, it's --

21 MR. THOMAS: Forty minutes for the CSD.

22 CHAIRPERSON YOUNG: Okay, so the CSD has
23 already 40 minutes, and the prosecution team has,
24 I think, an abundance of time. And it just keeps
25 on growing.

1 So, what you're asking for essentially
2 is an additional about 40 minutes to add on top of
3 the 40 minutes that you have.

4 MR. SEITZ: That's correct.

5 CHAIRPERSON YOUNG: Okay, and then some
6 time for the three slides like ten minutes?

7 MR. SEITZ: We're hoping. I'll let
8 Rob -- Rob, how much time do you think you'll need
9 for those three slides? Ten would be great.

10 CHAIRPERSON YOUNG: Okay.

11 MS. OKUN: Mr. Chair, could we have
12 an --

13 MR. ONSTOT: Mr. Chairman, --

14 MS. OKUN: -- could we have an offer of
15 proof on the cross-examination of Mr. Briggs and
16 Mr. Polhemus?

17 CHAIRPERSON YOUNG: Okay. Mr. Seitz,
18 Mr. Onstot, do you want to --

19 MR. ONSTOT: Well, why there is an offer
20 of proof requested, I don't know. By definition
21 the offer of proof is that the scope of cross-
22 examination is the same scope as that on direct.

23 So, if what they're asking for is do we
24 want to lay the questions out so the prosecution
25 can prepare the witness, we decline to do that.

1 We will commit, however, to keeping our cross-
2 examination questions within the scope. For
3 example, Mr. Polhemus, in his position with the
4 State Board, in administering the SRF, and Mr.
5 Briggs' function as the XO of the Board.

6 CHAIRPERSON YOUNG: Well, but is the
7 scope going to be solely with areas that you did
8 not cover before? Okay. If that is so, then I
9 think that would be okay if there's areas that you
10 didn't get to cover. I just don't want you to be
11 going over prior testimony and rehashing that.

12 MR. ONSTOT: I agree, Mr. Chair. One
13 other point of clarification. You mentioned that
14 we had 40 minutes. That is exclusive of closing,
15 correct?

16 CHAIRPERSON YOUNG: No, that was the
17 closing that was given to you before.

18 MR. ONSTOT: So it is still the Chair's
19 view that each side will be given a total of 40
20 minutes closing?

21 CHAIRPERSON YOUNG: No. What we have
22 coming into this is 40 minutes is what the CSD had
23 coming into this. And how much time --

24 MR. THOMAS: About two hours and 15
25 minutes, I think.

1 CHAIRPERSON YOUNG: Two hours and 15
2 minutes is what they had accumulated based on
3 additional time being given to both parties. So
4 prosecution team has two and a half -- was it two
5 and a half?

6 MR. THOMAS: Two hours and 15 minutes, I
7 believe.

8 CHAIRPERSON YOUNG: Okay, two hours, 15
9 minutes, --

10 MS. OKUN: I think it was -- was it 153
11 minutes? Two hours and 33 minutes.

12 CHAIRPERSON YOUNG: Okay. However, I
13 believe Ms. Okun had told us that she didn't think
14 she was going to use half that.

15 MR. ONSTOT: Right. No, that I
16 understand.

17 CHAIRPERSON YOUNG: Yeah.

18 MR. ONSTOT: I just want to be clear how
19 much time, because the agendas that each side had
20 had 40 minutes for closing. I just want to be
21 sure that in the tally that you're doing, Mr.
22 Chair, if that's inclusive, that number that you
23 just gave is inclusive or exclusive of closing.

24 CHAIRPERSON YOUNG: Here's what I will
25 do with this. And we'll see whether my colleagues

1 want to go along with this at this point. But I
2 would give you the -- essentially you're looking
3 for 50 additional minutes, plus the 40 you had
4 before; that would be 90 minutes, an hour and a
5 half.

6 I'll let you divide it up any way you
7 want, okay? If you decide you want to shift that
8 around, take from your closing, to the
9 examination, I'll leave that up to you. I won't
10 interfere with that.

11 But I'm going to be pretty hard and fast
12 this time that that number is going to stick. And
13 I'm not going to be adding any time to it unless
14 there is something absolutely extraordinary that
15 develops that nobody could anticipate.

16 Now, is Mr. Polhemus available? Is he
17 on the --

18 MS. OKUN: After I got the request from
19 Ms. Schaffner to insure that the witnesses would
20 be available, I did confirm that he'd be in his
21 office today. And he asked that I follow up with
22 him when we had more information about what time
23 or whether he'd actually be needed. And I didn't
24 have any further information, so we had
25 overlapping vacations, I think. He said he would

1 be in all day. He's maybe at lunch right now.

2 CHAIRPERSON YOUNG: Well, it sounds like
3 we need to get -- let me first deal with this.
4 How does the Board feel about allowing the
5 District the additional time it's requested?

6 BOARD MEMBER PRESS: Well, another 50
7 minutes, I don't really see the need for that.
8 But I'll defer to you, Mr. Chair, if you want to
9 call it 90 minutes total. But be firm about that,
10 because I think we do need to get to the point
11 where we do deliberate and we do need to close
12 this hearing. So if that's your recommendation
13 I'll go along with it, but as long as it's really
14 firm.

15 CHAIRPERSON YOUNG: All right. Mr.
16 Jeffries?

17 VICE CHAIRPERSON JEFFRIES: Well, Mr.
18 Chair, I agree with Dr. Press, but I have a
19 different caveat to this. The attorneys say
20 they're not trying to filibuster, but they
21 continue to ask for more and more time.

22 You've been extremely liberal on the
23 time that you have given them to extend them the
24 extra time that they have asked for. And I think
25 there has to be a time and a place that we say

1 enough is enough.

2 It's the Chair's prerogative if you want
3 to allow the additional time. I'll go along with
4 the Chair's prerogative. But I will say I'm not
5 interested in going beyond that time. I think
6 that's more than sufficient.

7 They basically used a lot of their time
8 just reiterating points of their presentation
9 several times, and they could have curtailed some
10 of that information and been more direct in what
11 they were really trying to point to us.

12 CHAIRPERSON YOUNG: Mr. Shallcross.

13 BOARD MEMBER SHALLCROSS: Yeah, I agree
14 with Dr. Press and Mr. Jeffries.

15 CHAIRPERSON YOUNG: And Mr. Hayashi?

16 BOARD MEMBER HAYASHI: I will agree,
17 also.

18 CHAIRPERSON YOUNG: Okay.

19 BOARD MEMBER HAYASHI: Let's just hold
20 it at the 90.

21 CHAIRPERSON YOUNG: Okay. All right.
22 So, you've got a total of 90 minutes. Use it any
23 way you wish. And somehow we should let Mr.
24 Polhemus know that he's going to be needed. And
25 is there someone that can -- can you send him an

1 email?

2 MS. OKUN: Actually I can.

3 CHAIRPERSON YOUNG: Okay.

4 MS. OKUN: Do we have a time estimate
5 for him?

6 MR. SEITZ: We'll put Rob on now, or do
7 you want to --

8 CHAIRPERSON YOUNG: Well, let's -- we
9 have some other issues --

10 MR. SEITZ: Okay.

11 CHAIRPERSON YOUNG: -- that
12 unfortunately, we haven't completed yet that are
13 preliminary in matter.

14 MR. SEITZ: Okay.

15 CHAIRPERSON YOUNG: And, you know what,
16 I think we can go right into that extra time that
17 you've been granted if you want to then put him
18 on, and we'll get Mr. Polhemus on. And that might
19 be a half hour from now. Oh, he's right here,
20 okay, wonderful.

21 All right.

22 MS. SCHAFFNER: And just because there's
23 been some confusion in the past I want to make
24 sure we're clear that the 90 minutes, when you say
25 use as you see fit, that means allocate as they

1 see fit between the additional cross-examination,
2 the additional direct testimony by Mr. Miller, and
3 rebuttal and closing, correct?

4 CHAIRPERSON YOUNG: It's everything.

5 MS. SCHAFFNER: Okay, just --

6 CHAIRPERSON YOUNG: It's everything.

7 MS. SCHAFFNER: -- wanted to --

8 CHAIRPERSON YOUNG: Rebuttal.

9 MR. SEITZ: And we understand that, but
10 we would -- the testimony that Mr. Miller puts on
11 right now, I've just said two minutes. But I
12 would hope that if the -- if you have questions of
13 Mr. Miller that we're not sitting here having
14 these things deducted from our time.

15 CHAIRPERSON YOUNG: No, I have not done
16 that; I have stopped the clock. And he's got up
17 to ten minutes. You can give him the time. If he
18 does it faster, you've made out, okay?

19 MR. SEITZ: Thank you.

20 CHAIRPERSON YOUNG: All right.

21 MS. OKUN: Excuse me, before we move on,
22 I'm --

23 CHAIRPERSON YOUNG: Yes.

24 MS. OKUN: -- sending an email to Mr.
25 Polhemus. What time do you want me to tell him?

1 CHAIRPERSON YOUNG: Well, I would --

2 MS. OKUN: Will it be after lunch or --

3 CHAIRPERSON YOUNG: -- say in maybe 45
4 minutes he should be available, if possible.

5 Okay, this next category to --

6 VICE CHAIRPERSON JEFFRIES: Mr. Chair.

7 CHAIRPERSON YOUNG: Yes.

8 VICE CHAIRPERSON JEFFRIES: Can you give
9 us and the audience some time when you plan on
10 breaking for lunch?

11 CHAIRPERSON YOUNG: Well, I don't know
12 right now. My sense is that I was hoping to
13 utilize the lunch period so the Board could go
14 into closed session and deliberate, so that we're
15 doing two things at once.

16 In order to do that we have to have our
17 closing arguments completed. So, --

18 VICE CHAIRPERSON JEFFRIES: Well, Mr.
19 Chair, then give me some approximate time when
20 that's going to be.

21 BOARD MEMBER PRESS: Yeah, that would
22 put us out at 4:00.

23 VICE CHAIRPERSON JEFFRIES: Yeah,
24 that's, if you're allowing 90 minutes --

25 CHAIRPERSON YOUNG: Well, obviously

1 we're not going to be able to do what I wanted to
2 do, which was to go into closed session during
3 lunch. So, you know, I would like to --

4 VICE CHAIRPERSON JEFFRIES: What brought
5 that --

6 CHAIRPERSON YOUNG: Let's look at this
7 again, Mr. Jeffries, when we've gone through the
8 rest of these objections --

9 VICE CHAIRPERSON JEFFRIES: Okay.

10 CHAIRPERSON YOUNG: -- that we've got,
11 and issues, and see how far we can get into their
12 additional time with some of the witnesses. That
13 might be when we break at that point, and I don't
14 know when that is. But, before 1:30. In other
15 words, by 1:30 we'll have lunch, we'll break for
16 lunch.

17 VICE CHAIRPERSON JEFFRIES: Well, what
18 brought that question to mind is because if you're
19 asking Mr. Polhemus to be available at 1:15, I was
20 wondering at what period of time thereafter is
21 this going to happen.

22 MS. OKUN: I got an email from Mr.
23 Polhemus. He's actually listening to this, and he
24 says he's standing by.

25 CHAIRPERSON YOUNG: Okay, good. Good

1 for him.

2 MS. OKUN: So, Darrin, send me another
3 email if you need to.

4 CHAIRPERSON YOUNG: Okay, good. All
5 right. Let's continue. Ms. Schaffner, let's see.
6 Page 5 of -- all right.

7 MS. SCHAFFNER: And I'm sorry to belabor
8 the time point, but there's been much testimony on
9 the due process point and how much time is
10 appropriate. But I want to make clear for the
11 record, triggering off of Mr. Seitz' just recent
12 statement about not deducting Board questions from
13 the CSD's time.

14 In addition to the two hours and 40
15 minutes granted to the CSD and to staff at the
16 last meeting for their direct examination and
17 cross-examination time, there were hours of
18 questions by the Board which were not deducted
19 from anybody's time.

20 And in response -- and there were hours
21 of testimony elicited from both sides, mostly the
22 CSD, giving them the opportunity to address
23 substantive issues in response to Board questions.

24 So I don't want the record to make it
25 look like there were only, you know, a limited

1 number, that the specified minutes were the only
2 testimony allowed. There was something like 13
3 hours of hearing.

4 CHAIRPERSON YOUNG: I think we've
5 allowed a lot of time for a lot of argument, you
6 know, to come in, even at this point, through the
7 proceedings so far. So I feel comfortable with
8 where we're headed.

9 Okay. I'd like to get to the document
10 issues now. Let's see, updated exhibit summary
11 and ruling document. Ms. Schaffner, do you want
12 to describe for us the updated document prepared
13 by Michael Thomas for us?

14 MS. SCHAFFNER: Yes. I believe
15 everybody had a copy of the updated exhibit list.
16 It's entitled master document list 1 and master
17 document list 2, I believe. As well as the
18 prosecution team's index.

19 What that document does is an updated
20 version of what was handed out at the December 1st
21 and 2nd hearing, which it has been updated to
22 reflect the documents that were subsequently
23 provided by the CSD that they inadvertently didn't
24 provide on their first proffer in November.

25 And the documents that were -- the Chair

1 gave the CSD an additional period of time to
2 provide the documents they thought they had.
3 Those documents that were provided by the
4 additional extended deadline have been admitted.

5 There are also some documents that the
6 Chair is recommending not be admitted, including
7 approximately 33 hours of DVD videos of hearings,
8 which were presented to the Board on December the
9 12th, I believe.

10 The Chair felt that that was submitted
11 too late for any reasonable period of time to
12 review those, and asked for a summary of what was
13 on those videos in order to admit them. No
14 summary was forthcoming.

15 And based on the fact that any probative
16 value of those DVDs, not having any summary to
17 know what they might be, is outweighed by the risk
18 of an undue consumption of time. The Chair is
19 exercising his authority under Government Code
20 section 11513(f) to exclude the DVDs.

21 There are also a number of documents in
22 that list that were listed but -- or not listed,
23 which were added, which were documents produced in
24 a Public Records Act request from The Tribune.
25 And I believe those were not in the index, but

1 they were provided on the extended deadline.

2 And the Chair has been considering
3 whether to admit those. And the question for CSD
4 is whether they -- the documents, were they
5 intended to be submitted in November, or these new
6 documents within the scope of ongoing compliance
7 efforts? Because if it doesn't fit into one of
8 those categories there's so far no basis for
9 admitting them.

10 And that also ties into the outstanding
11 allegation by the CSD that the Board has failed to
12 comply with Public Records Act requests. So maybe
13 we could deal with both those issues now.

14 First, I guess, I would ask has the
15 Public Records Act issue been resolved? Do you
16 feel that you have received the documents that
17 were requested by the CSD?

18 MS. OKUN: I'm not sure what Public
19 Records Act request you're talking about.

20 MS. SCHAFFNER: That was in, let me find
21 the --

22 CHAIRPERSON YOUNG: Was that the one
23 from Ms. Tacker?

24 MS. SCHAFFNER: Yeah, I believe --

25 CHAIRPERSON YOUNG: It came in as really

1 a CSD Board --

2 MS. SCHAFFNER: It was --

3 CHAIRPERSON YOUNG: -- Member using a
4 Public Records Act request.

5 MS. SCHAFFNER: That's correct. That's
6 correct. I believe Mr. Onstot's letter cites to
7 this. It's dated December 12th, and Mr. Onstot
8 says that the CSD is awaiting full response from
9 the Regional Board Staff; and asks that these
10 documents be added to the record. And references
11 the Chair to The Tribune's website for these
12 documents.

13 After much research and comparing of
14 documents and comparing of documents provided by
15 the CSD to the previously provided index, Mr.
16 Thomas determined that these were -- that about
17 200 documents were provided on the 12th that
18 weren't on the index appeared to be the ones that
19 were referenced on The Tribune website.

20 And I infer those are the ones that you
21 were talking about for the Public Records Act
22 request. This is your objection, your proffer. I
23 would ask that you clarify.

24 MR. ONSTOT: I think we're mixing up
25 two --

1 MS. OKUN: Actually, I think I -- yeah,
2 I think we are mixing up two things. The first
3 thing is that Julie Tacker, who is a Director of
4 the CSD, made a Public Records Act request and
5 said that she was acting in her capacity as a
6 private citizen, even though the request was made
7 very shortly before this hearing started.

8 Our response was that she is not a
9 member of the public, which is defined to include
10 public representatives, but in the interests of
11 good government we agreed to produce all the
12 documents that she requested as if it were a valid
13 Public Records Act request. And we did that.

14 At one point there was some question
15 about whether we had -- it was a request for
16 emails -- and at one point there was a question
17 about whether we had additional emails that we
18 hadn't already produced on our backup tapes.

19 And Mr. Packard researched that and it
20 was determined that we didn't have any additional
21 emails.

22 In addition to the emails that we had
23 electronically, we advised Ms. Tacker to come in
24 and look at our paper files, which she did, in
25 case there were emails that we no longer had

1 electronically that had been printed and filed.

2 And she did that before the December 1
3 hearing. So there are no further documents.

4 The other issue is --

5 CHAIRPERSON YOUNG: Can I just check in
6 with Mr. Onstot to make sure that that request has
7 been resolved? Do you concur with --

8 MR. ONSTOT: Well, I --

9 CHAIRPERSON YOUNG: -- what Ms. Okun has
10 represented? That he received --

11 MR. ONSTOT: Yes and no. That some
12 documents were produced, but I'm not going to
13 represent that the Public Records Act request was
14 honored by either the State or the Regional Board,
15 because it was denied. And saying that we deny
16 your request because you're working for a public
17 entity, we take issue with. And that issue will
18 be decided in a different forum.

19 So, the validity of the denial, I agree
20 with Ms. Okun, that we're kind of mixing apples
21 and oranges here.

22 I'm not here to say that the Public
23 Records Act requests have been complied with,
24 because our position is that they have not. I
25 will say that some documents have been produced

1 voluntarily by both the State and the Regional
2 Board.

3 CHAIRPERSON YOUNG: Wait a minute. I
4 don't want to mix things up here. Did you get the
5 documents that were requested in the Public
6 Records Act request? Did you get those?

7 MR. ONSTOT: No.

8 CHAIRPERSON YOUNG: Okay. Do you know
9 which ones were withheld?

10 MR. ONSTOT: I have yet to receive one.

11 MS. OKUN: We gave him all the emails we
12 had -- not him, I'm sorry, we gave -- there were
13 two Public Records Act requests.

14 One was to the Regional Board from Ms.
15 Tacker. We provided Ms. Tacker with all the
16 responsive documents in our possession other than
17 documents that were privileged or not otherwise
18 subject to disclosure.

19 There was a second Public Records Act
20 request, and the response to that request was what
21 I think those 200 pages of documents were.

22 Now, I know that the District submitted
23 a Public Records Act request to the State Board,
24 and The Tribune submitted a Public Records Act
25 request to the State Board.

1 I think those documents were in response
2 to The Tribune's Public Records Act request, but I
3 could be wrong about that. The District can
4 clarify that.

5 And as I recall, I submitted a relevance
6 objection to those documents because they included
7 a lot of public comments on the state revolving
8 fund loan.

9 MR. THOMAS: I agree with that. There
10 were two Public Records Act requests that I'm
11 aware of. One was from Ms. Tacker to the
12 prosecution team. One was from The Telegram
13 Tribune to the State Board.

14 The State Board responded; provided
15 documents to The Telegram Tribune. Those
16 documents were put on The Telegram Tribune's
17 website. And those documents were submitted to us
18 by the CSD.

19 And I have listed those documents at the
20 end of master document list 1. So they're
21 included here.

22 CHAIRPERSON YOUNG: So, what documents
23 haven't been produced, Mr. Onstot? I want to make
24 sure I understand --

25 MR. ONSTOT: Well, there were two Public

1 Records Act requests that I made, myself; and got
2 back denial letters. And in that denial letter it
3 says will produce them voluntarily and give you
4 the costs some time around the end of January.

5 MS. OKUN: I can't speak for the State
6 Board. There's two different entities here. If
7 there was a Public Records Act request to the
8 State Board that's at issue, we can't resolve it
9 here.

10 But we didn't charge for --

11 CHAIRPERSON YOUNG: Well, let's see --

12 MS. OKUN: -- providing documents.

13 CHAIRPERSON YOUNG: -- was that a
14 request that came to this Regional Board? Or to
15 the State Board?

16 MR. ONSTOT: Like I said, there were two
17 of them. One came to the Regional Board, one went
18 to the State Board.

19 CHAIRPERSON YOUNG: Okay. Well, the one
20 to the State Board, that's a separate agency.

21 MR. ONSTOT: Okay.

22 CHAIRPERSON YOUNG: Okay? I mean we
23 don't control --

24 MR. ONSTOT: I understand.

25 CHAIRPERSON YOUNG: -- their files of

1 documents.

2 MR. ONSTOT: I understand.

3 CHAIRPERSON YOUNG: Okay. And is the
4 first one Ms. Tacker's request, is that correct?

5 MR. ONSTOT: Correct.

6 CHAIRPERSON YOUNG: Okay. Has Ms.
7 Tacker received the documents that were spelled
8 out in her specific request?

9 MR. ONSTOT: She received some
10 documents, yes. There's no way of telling if all
11 that were responsive were received.

12 CHAIRPERSON YOUNG: Okay. Did the
13 prosecution team make a representation that they
14 had reviewed the records and this is all that they
15 could produce in response to the request?

16 MR. ONSTOT: May have been, but I'm not
17 aware of that. I don't know.

18 CHAIRPERSON YOUNG: Okay.

19 MS. OKUN: We did.

20 CHAIRPERSON YOUNG: Okay. Well, if they
21 made that representation I don't where else we
22 could go with this at this point in time. That's
23 their representation, okay.

24 MS. SCHAFFNER: And for the record
25 question, I think what is being proffered by the

1 CSD for admission to the record are The Tribune
2 documents, not the documents produced by staff in
3 response to Ms. Schicker's request, correct?

4 UNIDENTIFIED SPEAKER: Tacker.

5 MS. SCHAFFNER: Sorry, --

6 CHAIRPERSON YOUNG: Mr. Shallcross.

7 BOARD MEMBER SHALLCROSS: Yeah, I have a
8 question. If the original request was from Ms.
9 Schicker, as a --

10 UNIDENTIFIED SPEAKER: Ms. Tacker.

11 CHAIRPERSON YOUNG: Ms. Tacker.

12 BOARD MEMBER SHALLCROSS: I'm sorry, Ms.
13 Tacker -- as a member of the public, then why is
14 the CSD attorney answering --

15 CHAIRPERSON YOUNG: Because --

16 BOARD MEMBER SHALLCROSS: I'm sort of
17 confused.

18 CHAIRPERSON YOUNG: Well, Ms. Okun has
19 accepted and deemed that request, and is
20 responding to it on the basis of accommodation.

21 BOARD MEMBER SHALLCROSS: Right.

22 CHAIRPERSON YOUNG: So that the
23 documents are produced and not withheld.

24 BOARD MEMBER SHALLCROSS: I understand
25 that, --

1 CHAIRPERSON YOUNG: Based on potentially
2 a valid objection that it's not a proper request.

3 BOARD MEMBER SHALLCROSS: But if the
4 person requesting is a member of the public and
5 not a member of the CSD, why is it even before us
6 in this hearing?

7 CHAIRPERSON YOUNG: Well, that's a good
8 question.

9 MR. ONSTOT: Because the request was
10 taken by Regional Board's counsel that Ms. Tacker
11 was acting in her capacity as a member of the CSD
12 Board Member.

13 MS. SCHAFFNER: And I'm sorry to confuse
14 the issues by getting the two Public Records Act
15 requests confused. What really all that is being
16 proffered for introduction into this hearing
17 record are The Tribune documents. That's my
18 understanding.

19 And those documents were not in the
20 original index. So the question for the CSD is
21 for what purpose are those documents being offered
22 into evidence.

23 MR. McCLENDON: You gave two, the former
24 and the latter. It's the latter. For ongoing
25 issues of compliance.

1 MS. SCHAFFNER: Okay.

2 MR. McCLENDON: They show the whole
3 process which was made relevant in this hearing on
4 what was going on in relation to the SRF loan, the
5 funding with the state, our negotiations with the
6 state. All of that's been a part of this record.
7 And those showed the behind-the-scenes of what was
8 happening the whole time we were negotiating.

9 MS. SCHAFFNER: Very good. And with
10 that as foundation, I believe it was contemplated
11 by the Chair to go ahead and admit those documents
12 as part of the final index.

13 CHAIRPERSON YOUNG: That's right.

14 MS. SCHAFFNER: We just needed to
15 clarify the basis. And since there was no cover,
16 no explaining why, what the relevance was, we
17 wanted to clarify that. Thank you.

18 Does the index reflect that
19 determination, Michael?

20 MR. THOMAS: Yes. Yes.

21 MS. SCHAFFNER: Okay.

22 MR. THOMAS: But I have a comment on
23 this list.

24 CHAIRPERSON YOUNG: Go ahead.

25 MR. THOMAS: The documents that we're

1 talking about now that have been admitted from The
2 Telegram Tribune website submitted by the CSD,
3 we've dealt with that now.

4 There is an outstanding objection from
5 the CSD regarding the Public Records Act request
6 to the prosecution staff. It's separate from The
7 Telegram Tribune documents. That's resolved now.

8 There is an objection, I think it was
9 Mr. Onstot, in one of his emails, that made the
10 objection saying you have not received all of the
11 documents that you asked for from prosecution
12 staff.

13 MR. ONSTOT: Okay, maybe I -- do you
14 have that? I don't have the Public Records Act
15 request that you're referring to in front of me.

16 MS. SCHAFFNER: It sounds like you
17 anticipate resolving -- as you stated just a few
18 minutes ago you're going to resolve any remaining
19 concerns about the Public Records Act response in
20 a forum outside this one, is that correct?

21 MR. ONSTOT: No, no, no, you're putting
22 words in my mouth again. What I'm saying is we
23 made requests. Whether it's myself or through
24 Director Tacker or through Julie Tacker, as an
25 individual, that issue is not relevant.

1 The fact is that requests were made for
2 some documents to be part of these proceedings.
3 And I think that they are and have been.

4 What I'm also saying is that because you
5 can't mix whether they come into these proceedings
6 with the legality or illegality of the denial of
7 those requests, and either the State or the
8 Regional Boards' desire to produce them
9 voluntarily. Those will be dealt with in a
10 different forum.

11 MS. SCHAFFNER: Okay, so all we have
12 before us for the Chair and the Board to resolve
13 today is the admission of the records that have
14 been produced to date, and that was just dealt
15 with, correct?

16 MR. ONSTOT: Correct.

17 MS. SCHAFFNER: Okay, thank you.

18 CHAIRPERSON YOUNG: Okay.

19 MS. SCHAFFNER: And one other thing that
20 was in that same paragraph of the December 12th
21 letter was a request by Mr. Onstot, and I quote,
22 "that the Chair reconsider its exclusion of
23 records showing prosecutorial bias."

24 We need to deal with that, as well.
25 Exactly what records are you referring to, Mr.

1 Onstot?

2 MR. ONSTOT: Well, there were a number
3 of records that the Chair excluded. A couple in
4 particular are emails, and I think on, in fact,
5 was put up on the overhead. The cartoon drawing
6 by a Regional Board Member. Everybody knew it was
7 a Regional Board Member, distributed at CSD
8 proceedings.

9 As our view is that the Regional Board
10 Staff, including the prosecution team, is biased,
11 and that excluding evidence allowing us to show
12 that is an abuse of discretion. We should be
13 allowed to produce evidence that either Members of
14 the Board Staff, itself, and/or the prosecution
15 team had a bias in moving forward toward the CSD
16 and did not act objectively.

17 MS. SCHAFFNER: Mr. Onstot, I wasn't
18 asking about the argument as to why it does or
19 does not meet the standard for a prosecutorial
20 bias argument. That's a legal argument that has
21 not been briefed or had, in any way; there were no
22 citations to law, there were no citations to fact
23 in your objection.

24 All I am asking is specifically what
25 documents are you asking the Chair to reconsider.

1 I have the cartoon. Are there other specific
2 documents that you're asking the Chair to
3 reconsider --

4 MR. ONSTOT: Yes, all the emails
5 regarding the ACL complaint which Mr. Briggs was
6 either the author, the recipient or cc'd on.

7 MS. SCHAFFNER: Were those produced?

8 MS. OKUN: Are those late comments, or
9 other --

10 MS. SCHAFFNER: Yes.

11 MS. OKUN: -- emails back and forth?
12 Because I don't recall that there were any emails
13 back and forth that were offered that were
14 rejected.

15 MS. SCHAFFNER: Yeah, I don't recall
16 seeing any specific emails being offered being
17 rejected, either. I do recall the cartoon --

18 (Parties speaking simultaneously.)

19 MR. ONSTOT: Okay, then that's fine. If
20 they weren't rejected there's no objection;
21 they're in. Thanks.

22 MR. THOMAS: Is there a number --

23 MS. OKUN: Well, I think we need to
24 clarify whether there were documents that were
25 rejected or not. It's not clear to me which

1 documents Mr. Onstot is talking about.

2 MS. SCHAFFNER: It is not clear to me,
3 either. Michael, do you have any idea.

4 MR. THOMAS: I don't know. Is there a
5 number -- can you say what number it is, what
6 exhibit number?

7 MR. ONSTOT: Well, I don't have those in
8 front of me, but those specifically that were
9 prior to the issuance of the ACL complaint. And
10 if my notes are wrong that they weren't excluded,
11 then I will withdraw my objection.

12 MR. THOMAS: I can't say whether they
13 were excluded or not excluded if they're not
14 referenced to a number on this list.

15 CHAIRPERSON YOUNG: Okay, well --

16 MS. SCHAFFNER: Yeah.

17 CHAIRPERSON YOUNG: -- I remember the
18 cartoon I excluded because it's a newspaper
19 article. And when you say Regional Board Member,
20 you don't mean one of us, but you mean an employee
21 of the Regional Water Board. And do you know if
22 that was a prosecution team member who wrote the
23 cartoon? Or is this some other employee of the
24 Board?

25 MR. ONSTOT: Employee of the Board. It

1 was not a Board Member.

2 CHAIRPERSON YOUNG: Okay, well, I had
3 excluded that. And newspaper articles are not
4 coming in. I'm not going to change that ruling.

5 But if there are emails that went back
6 and forth, you know, where Mr. Briggs was involved
7 in emails regarding the ACL, I think those should
8 come in. I mean I don't know why they wouldn't.
9 I remember seeing some in that package of 126
10 letters that I read.

11 So, maybe at the lunch break if you can
12 identify any specific documents, Mr. Onstot, that
13 you think you want to make sure are in and that go
14 to this point, you know, we can deal with that
15 later.

16 MR. ONSTOT: Okay.

17 CHAIRPERSON YOUNG: Okay.

18 MS. SCHAFFNER: And just in order to
19 make clear, to enable the Chair to address the
20 request for reconsidering the admission of the
21 cartoon, I think it would be useful to have some
22 questions directed at the prosecution team staff
23 concerning the circumstances of the cartoon's
24 creation. Who created it, what kind of employee
25 were they, are they part of this prosecution team,

1 did they have anything to do with the ACL?

2 If you don't mind, just a couple?

3 CHAIRPERSON YOUNG: Go ahead.

4 MS. SCHAFFNER: I believe it would
5 probably be appropriate for Mr. Briggs. Mr.
6 Briggs, who was the artist who created that
7 cartoon?

8 MR. BRIGGS: Scott Phillips, a member of
9 the Regional Board Staff, and a resident of Los
10 Osos.

11 MS. SCHAFFNER: And when did that
12 happen?

13 MR. BRIGGS: I should say a former
14 member of the Regional Board Staff, former
15 resident of Los Osos.

16 MS. SCHAFFNER: When was the cartoon
17 created, roughly?

18 MR. BRIGGS: I don't know the date; it
19 might have been a year or so ago.

20 MS. SCHAFFNER: Okay, and does that
21 person work for the Board anymore?

22 MR. BRIGGS: No.

23 MS. SCHAFFNER: How long ago did this
24 person leave the employ of the Board?

25 MR. BRIGGS: Probably six months ago.

1 MS. SCHAFFNER: And did -- I'm sorry,
2 refresh my memory on the name?

3 MR. BRIGGS: Scott Phillips.

4 MS. SCHAFFNER: Did Mr. Phillips have
5 anything to do with preparing the draft ACL or
6 presenting this referral to the Board for
7 enforcement action?

8 MR. BRIGGS: No.

9 MS. SCHAFFNER: Has he participated in
10 the preparation of this enforcement case in any
11 manner?

12 MR. BRIGGS: No.

13 MS. SCHAFFNER: Has he made any
14 recommendations to the Board regarding enforcement
15 in Los Osos outside the context of the ACL?

16 MR. BRIGGS: No, not that I'm aware of.

17 MS. SCHAFFNER: Okay.

18 CHAIRPERSON YOUNG: Did he identify
19 himself as the artist -- as an artist who was a
20 Regional Board staff employee? Did it say Scott
21 Phillips, --

22 MR. BRIGGS: On the cartoon?

23 CHAIRPERSON YOUNG: Yeah.

24 MR. BRIGGS: I don't know.

25 CHAIRPERSON YOUNG: -- Engineer,

1 Regional Water Quality Control Board?

2 MR. BRIGGS: Oh, no.

3 CHAIRPERSON YOUNG: No.

4 MR. BRIGGS: He might have had his name
5 on it.

6 CHAIRPERSON YOUNG: Okay.

7 MR. BRIGGS: I don't recall.

8 CHAIRPERSON YOUNG: All right.

9 MS. SCHAFFNER: That is up to you, Mr.
10 Chairman, whether you want to reconsider admitting
11 that or not.

12 CHAIRPERSON YOUNG: I want to keep to
13 not having newspaper articles come in. I'm not
14 going to change my ruling on that.

15 MR. ONSTOT: Mr. Chair, point of
16 clarification. That cartoon, to my knowledge, was
17 not a newspaper article.

18 CHAIRPERSON YOUNG: Well, not an
19 article, but something printed in -- I mean it's
20 an artist's rendition, it's a cartoon. Okay?
21 You're right, it's not an article in the strict
22 sense of an article.

23 If the CSD wants to argue in closing
24 that the prosecution team staff is biased. If you
25 want to refer to anything else like that, cartoons

1 and things, that's fine. We'll go ahead and
2 listen to that argument.

3 All right, what is next, Ms. Schaffner?

4 MS. SCHAFFNER: I believe those were all
5 of the document objections raised. Oh, I'm sorry,
6 there was one more objection raised, according to
7 my notes, by the CSD, that must be dealt with, and
8 that was the blanket objection to everything
9 submitted by the prosecution staff on December
10 12th.

11 And I believe those were the documents
12 concerning the various settlements of the various
13 lawsuits concerning the funding of the Tri-W site,
14 and the Measure B. And the prosecution team had
15 introduced those into the record in response to
16 the Chair's request for information on current and
17 ongoing activities that may affect compliance.

18 Is that objection still outstanding?

19 MR. SEITZ: It is.

20 MS. SCHAFFNER: And that would be for
21 the Chair --

22 CHAIRPERSON YOUNG: And is it based on
23 the fact that it seeks documents that essentially
24 go beyond the scope of my ruling on December 2nd?

25 MR. SEITZ: In part, but we also object

1 on the basis of relevance.

2 CHAIRPERSON YOUNG: Okay. All right.

3 Well, the objection is noted and I'm going to
4 overrule that request.

5 MS. OKUN: Overrule the request to admit
6 the documents or overrule the objection --

7 CHAIRPERSON YOUNG: Overrule the
8 objection.

9 MS. OKUN: Thank you.

10 CHAIRPERSON YOUNG: In other words, I do
11 feel, and of course it was my intent and desire
12 after December 2nd, that the District be given
13 every opportunity to put into the record anything
14 related to efforts they've made that would bring
15 them into compliance with the Board's orders, or
16 anything on the flip side that would bring them
17 further away from compliance.

18 And I think that those are relevant
19 documents to that issue.

20 MR. SEITZ: Mr. Chair.

21 CHAIRPERSON YOUNG: Yes.

22 MR. SEITZ: If I might, just so I can
23 have a clear record here. First of all, I believe
24 those settlement agreements, and I quite frankly
25 haven't looked at all of them, I believe they are

1 pre-December 2nd.

2 Secondly, our basis for our relevance
3 objection is based on it's a clear attempt by the
4 prosecution team to make a run at the SRF loan
5 monies, to satisfy any fines that the District may
6 be subjected to at the end of this hearing.

7 We believe that there's a letter --
8 first of all, we have the questions and answers
9 from the Board; but secondly, we believe that to
10 the extent that those funds are around anymore,
11 they're subject to the litigation between the
12 District and the State Water Quality Control
13 Board.

14 So, why put them in if the only idea
15 here is to say you have money to pay these guys,
16 therefore you have money to pay us, when the fact
17 of the matter is any money the District has,
18 outside of those budgets that Mr. Buel put up
19 there, is money that is subject to litigation
20 between the District and the State Water Quality
21 Control Board?

22 CHAIRPERSON YOUNG: All right, both
23 sides are going to have their opportunity to argue
24 anything they want from those documents. So
25 you'll have additional time to get into that. And

1 it is argument that you're presenting to us.

2 MS. SCHAFFNER: So, Mr. Chairman, is
3 there a ruling that those documents will be
4 admitted?

5 CHAIRPERSON YOUNG: Yes.

6 MS. SCHAFFNER: Okay.

7 CHAIRPERSON YOUNG: They are admitted.

8 MS. SCHAFFNER: And then the last, more
9 general comment that I have is just to make sure
10 we don't miss any loose ends, the indices that
11 have been prepared by Mr. Thomas, which basically
12 collect together the index of documents submitted
13 by the CSD and the index of documents submitted by
14 the prosecution team, to be clear, are the record;
15 in addition to the documents submitted at this
16 hearing and admitted by the Chair.

17 There is nothing else except what's on
18 the indices, as noted.

19 And I believe we addressed all
20 objections. And if there are -- I just want to
21 make sure there weren't any that were overlooked
22 on relevance, on hearsay, on anything. So now is
23 the time to make sure we've hit them all.

24 MR. SEITZ: Just for the sake of
25 clarity, and I'm not trying to be argumentative

1 here, the CalCities administrative record,
2 consisting of these three boxes right here, from
3 the prosecution team, are in the administrative
4 record?

5 MS. SCHAFFNER: I believe those were
6 included in the prosecution team's index of
7 administrative records that they offered, and
8 therefore they're there.

9 MR. SEITZ: Yes. The answer to that
10 question is yes.

11 MS. SCHAFFNER: Yes.

12 CHAIRPERSON YOUNG: Is that correct, Ms.
13 Okun?

14 MS. OKUN: Yes.

15 CHAIRPERSON YOUNG: The answer is yes.

16 MR. SEITZ: Okay. And then as I
17 understand it, that the Regional Board could have
18 in their files documents in addition to what's in
19 the administrative record, and are those -- sorry,
20 in addition to what's in the CalCities' record
21 that are in addition to the documents that the
22 prosecution team has specially offered, --

23 MS. SCHAFFNER: The answer is no.

24 MR. SEITZ: -- are those documents in
25 the administrative record?

1 MS. SCHAFFNER: No. If they're not on
2 the index, if they're not on either of the indexes
3 or they weren't otherwise admitted specifically by
4 the Chair, they're not in the record.

5 MR. SEITZ: Thank you.

6 MS. OKUN: Actually, the first item of
7 the index refers to all Central Coast Water Board
8 files, exhibits and agenda material pertaining to
9 this matter, including our general files. And at
10 the last hearing it was ruled that those were
11 admitted.

12 MS. SCHAFFNER: Yeah, and since that
13 time we asked that the prosecution staff provide
14 an updated comprehensive list of all documents it
15 wanted to have in the record. And that was
16 intended to expand upon that.

17 Are there documents not in your index
18 that you had otherwise thought would be
19 incorporated by that? Just to be clear.

20 MS. OKUN: Probably.

21 MS. SCHAFFNER: Well, perhaps at the
22 break you could check that and make sure. Because
23 we are going to try and keep this definitive,
24 given the formal nature of this hearing, and not
25 open-ended.

1 Given the many many years of action on
2 this site, that could be problematic in preparing
3 the inevitable Superior Court administrative
4 record. So if you could just narrow that down,
5 that would be great.

6 MR. THOMAS: Mr. Chair.

7 CHAIRPERSON YOUNG: Yes.

8 MR. THOMAS: On the master document list
9 2, which is the list of documents from the
10 prosecution team, items 150 through 182, the final
11 column, will have to be updated now that the Chair
12 has made his decision about whether these are
13 accepted or not. You said they are accepted.
14 I'll have to update that column. So, just so you
15 know there'll be another printing of this.

16 MS. OKUN: There is one other document
17 that we admitted, I know there's been some -- or
18 that we submitted, and there's been some
19 discussion about newspaper articles. But
20 specifically there was a newspaper article that we
21 submitted two days ago as being a -- or including
22 statements against interest that you discussed,
23 regarding the sale of Broderson and the Tri-W
24 site.

25 And so I asked for a ruling on that.

1 And also I asked for the opportunity to cross-
2 examine the District regarding the statements.
3 And that cross-examination might eliminate the
4 need for the documents.

5 CHAIRPERSON YOUNG: Okay, you know what
6 I will do to be consistent, the article doesn't
7 come in, okay? But however, you have time anyway,
8 and you can cross-examine their witnesses or
9 anyone who made those statements, and check into
10 the veracity of the statements. So why don't we
11 deal with it that way.

12 But I want to be consistent with
13 newspaper articles and cartoons not coming in.

14 Okay, --

15 MR. ONSTOT: Mr. Chair, then I have a
16 question. We've identified two witnesses, Mr.
17 Polhemus and Mr. Briggs. How many do the
18 prosecution still intend to call to present new
19 evidence at 1:00 today?

20 MS. OKUN: Well, the only topic of our
21 cross-examination, other than any cross-
22 examination that results from their additional
23 examination, would be regarding the issues -- the
24 sole issue of the sale of those two properties.

25 And so at this point I anticipate

1 examining Ms. Schicker and Mr. Bleskey. And
2 depending on what their answers are, there may be
3 additional witnesses if they say they don't know
4 the answer, but the person sitting next to them
5 does.

6 CHAIRPERSON YOUNG: Okay, their cross-
7 examination is more limited than yours. Okay.
8 I'm allowing you to go into areas that you didn't
9 cover before with these witnesses. Their cross-
10 examination is limited to issues that I ruled on
11 would be opened up after December 2nd. So you've
12 got more leeway in your cross-examination than
13 they do.

14 So I don't know how much time they're
15 going to need for that, but Ms. Okun has just told
16 us kind of the substance of what that is going to
17 be.

18 MR. ONSTOT: Okay. I understand the
19 Chair's ruling, and again for the record, we would
20 object on new testimony at this late date. It's
21 not cross-examination, it's direct examination of
22 an adverse witness. Cross-examination, by
23 definition, is limited to the scope of the
24 witness' testimony at the first instance. And we
25 would ask the Chair to reconsider the 90-minute

1 time limit, since we now have at least three more
2 witnesses the prosecution are going to call. And
3 We should have an opportunity to ask them
4 questions, as well.

5 BOARD MEMBER PRESS: Mr. Chair, you
6 can't have it both ways it seems to me. You've
7 already ruled that the District is going to be
8 examining its witnesses on issues that it did not
9 cover before.

10 So, if you're going to apply one
11 standard, you should apply it to both.

12 CHAIRPERSON YOUNG: And I think you're
13 right. And so I will give the prosecution team
14 that leeway with their remaining time. That will
15 make it more even-handed. Thank you, Dr. Press.

16 Okay, are we through the document issue,
17 Mr. Thomas and Ms. Schaffner?

18 MR. THOMAS: Yes.

19 CHAIRPERSON YOUNG: Okay.

20 MS. SCHAFFNER: I have nothing further,
21 thank you.

22 CHAIRPERSON YOUNG: Good. All right.
23 Now we can get to the order of presentation, and
24 it will be as follows. And I think we've already
25 kind of modified this, because yeah, the first

1 thing we're going to do is allow the District
2 time, to use whatever time you wanted to, to
3 examine any additional witnesses with respect to
4 those other items that you felt were not covered
5 before.

6 MR. SEITZ: Yeah, with the Chair's
7 indulgence, and, of course, the Board's, too, Mr.
8 Miller's presentation is short and rather than
9 have him --

10 CHAIRPERSON YOUNG: Put him on first.

11 MR. SEITZ: -- come back and --

12 CHAIRPERSON YOUNG: Put him on.

13 MR. SEITZ: Okay, thank you.

14 CHAIRPERSON YOUNG: Go ahead, put him
15 on, and then if you want to get in to Mr.
16 Polhemus, we can deal with him.

17 MR. SEITZ: I'm way too hungry for that.
18 I just want to get Mr. Miller excused so that he's
19 not coming back. He's a busy person.

20 CHAIRPERSON YOUNG: All right. Mr.
21 Miller, would you come up here? Come up to the
22 podium, and you are still under oath.

23 Okay, hang on one second. Michael, 90
24 minutes. Okay, 90 minutes, and the clock is
25 ticking. Go ahead.

1 Whereupon,

2 ROBERT MILLER
3 was recalled as a witness herein, and having been
4 previously duly sworn, testified further as
5 follows:

6 DIRECT TESTIMONY

7 MR. MILLER: Thank you, Mr. Chairman.
8 As was indicated earlier, there's more recent
9 information that came after the information that
10 was submitted in my last testimony.

11 And what that is is the latest sampling
12 event for nitrates in the groundwater basin. And
13 that information is produced in a report by Cleath
14 and Associates in December. And it's based on
15 sampling that took place in October.

16 So this data was not available at the
17 last hearing. We thought that it would be
18 appropriate to present at this hearing.

19 The slide that you see before you
20 presents the same data as we presented before.
21 However, there has been some increases in nitrate,
22 some decreases, and we'll show that on the next
23 slide.

24 This is a slide representing the nitrate
25 concentrations in the October sampling event,

1 again reflected in a December report. And I will
2 show you first, in green, there are two monitoring
3 well locations that had substantive decreases in
4 nitrate concentrations. That in yellow there are
5 monitoring wells that have substantive increases
6 in nitrate concentrations since the last sampling
7 event.

8 In reviewing the testimony of Mr.
9 Thompson he did note that nitrate concentrations
10 do fluctuate seasonally. Although there are two
11 of these wells, specifically 7L3 near the top,
12 again, has a yellow band around it, and 13H, that
13 had nitrate concentrations that were higher than
14 previous seasonal amounts.

15 So we recalculated some of the average
16 nitrogen concentrations, nitrate concentrations
17 basin-wide, and I've overlaid those on a slide
18 that was presented by the prosecutorial staff at
19 the previous hearing. And those are shown here.

20 Again, this is the slide presented by
21 the prosecution team. It denotes in red the
22 drinking water standard for nitrate, and I've
23 given you the conversion there because the
24 District normally reports their nitrate results as
25 nitrogen as opposed to as nitrate. So those have

1 been converted for purposes of this slide.

2 In blue it will show the average nitrate
3 concentration from the April results. And in
4 green you see the average nitrate concentration
5 from the recent October results.

6 We are re-testing one of those wells
7 which came up with a nitrate concentration of 52
8 as N, which is a very high reading. And so that's
9 in the process of being re-sampled. And we'll, of
10 course, provide that to your staff once we have
11 those results.

12 If you look at an extension of the
13 timeframe there on out to 2005, you can see that
14 we believe that our opinion that those results
15 show a more stable nitrate concentration pattern
16 over time, since the implementation of the
17 prohibition, which is shown by the extension of
18 that line.

19 We do still believe that it does hold
20 true that since the 1988 moratorium took effect,
21 that nitrate levels have been fairly stable over
22 that period of time.

23 We wanted to be clear with this Board
24 that the recent sampling event was higher than the
25 April results. And, of course, we'll be

1 continuing to test those over time. But we wanted
2 to present the latest information.

3 MR. SEITZ: Just real quickly, can you
4 flip back to the prior slide, please. Right
5 there. You got those areas in green, going from
6 the lower right-hand corner moving to your left,
7 what does that lower area depicted in green
8 represent?

9 MR. MILLER: The areas that are cross-
10 hatched in green depict the zones of special
11 benefit, specifically Vista del Oro and Bay Ridge
12 Estates. And also the fire station. The lower
13 left-hand depicts Vista del Oro; the lower right-
14 hand depicts Bay Ridge Estates.

15 So you can see how those service areas
16 overlay on the nitrate concentrations.

17 MR. SEITZ: Thank you.

18 MR. MILLER: I have nothing further. Be
19 happy to answer questions.

20 CHAIRPERSON YOUNG: Okay. I guess,
21 let's see, let me just stop the clock here. How
22 do we want to proceed with this? Do you want to
23 ask any questions of this witness? No questions?

24 MS. OKUN: We have no questions.

25 CHAIRPERSON YOUNG: Okay. Go ahead, Mr.

1 Seitz, Mr. Onstot, you can -- any other witnesses?

2 MR. SEITZ: I would love to break before
3 we -- we don't have any -- Mr. Miller was the only
4 witness I had in mind.

5 CHAIRPERSON YOUNG: Okay. Well, what I
6 was going to allow you to do was to, you know,
7 proceed with any additional examination that you
8 felt you didn't cover, you know, December 1st or
9 2nd.

10 MR. SEITZ: I was hoping that we would
11 get -- since I didn't come prepared to do that, I
12 was hoping we'd get the lunch break to give me a
13 chance to review my notes so that I could
14 conduct --

15 CHAIRPERSON YOUNG: All right. I'd like
16 to not break yet. Ms. Okun, are you prepared to
17 proceed with any presentation of evidence post-
18 December 2nd?

19 MS. OKUN: I'm ready to cross-examine
20 the District.

21 CHAIRPERSON YOUNG: On?

22 MS. OKUN: Regarding the Broderon and
23 Tri-W issues.

24 CHAIRPERSON YOUNG: Okay.

25 MS. OKUN: -- on the other presentation

1 of evidence.

2 CHAIRPERSON YOUNG: Okay. All right,
3 why don't we -- did you want to deal with Mr.
4 Polhemus, or do you want to wait, also until--

5 MS. OKUN: Yeah.

6 CHAIRPERSON YOUNG: -- you've prepared
7 some notes?

8 MR. SEITZ: Please.

9 CHAIRPERSON YOUNG: Okay.

10 MR. SEITZ: I just wanted to make one
11 just quick thing. I assume that those slides that
12 are up there are moved into the record?

13 CHAIRPERSON YOUNG: Sure.

14 MR. SEITZ: Okay.

15 CHAIRPERSON YOUNG: They're in the
16 record.

17 MR. SEITZ: Okay.

18 MS. OKUN: And can we have copies of
19 them?

20 CHAIRPERSON YOUNG: Can you produce
21 copies of them?

22 MR. SEITZ: I think you have the CD
23 right there.

24 MS. OKUN: Okay.

25 MR. SEITZ: Rob, do you have any

1 problems leaving it with them?

2 CHAIRPERSON YOUNG: Okay, thank you.

3 All right, Michael, 85:23 timewise. Where are we
4 with the prosecution? Give them the time, both
5 sides got the same amount of time. Four hours,
6 okay. Let's do this in 60-minute increments. So
7 I'll set this for 60.

8 Okay, Ms. Okun, go ahead.

9 MS. OKUN: I'd like to call Lisa
10 Schicker.

11 CHAIRPERSON YOUNG: Okay. Ms. Schicker,
12 you're still under oath. Please come to the
13 podium.

14 Whereupon,

15 LISA SCHICKER

16 was called as a witness herein, and having been
17 previously duly sworn, was examined and testified
18 as follows:

19 DIRECT EXAMINATION

20 MS. OKUN: Good afternoon, Ms. Schicker.

21 MS. SCHICKER: Good afternoon.

22 MS. OKUN: What was the date that the
23 District purchased the Tri-W property?

24 MS. SCHICKER: I don't know.

25 CHAIRPERSON YOUNG: And could you speak,

1 Ms. Schicker, into the microphone so that
2 everybody could hear you?

3 MS. SCHICKER: Yes.

4 CHAIRPERSON YOUNG: Thank you.

5 MS. SCHICKER: I know negotiations began
6 in September of 1999.

7 MS. OKUN: September of 1999?

8 MS. SCHICKER: 2000, excuse me. A
9 little bit of feedback there. September of 2000.

10 MS. OKUN: Do you have any idea how long
11 the negotiations took place before the purchase
12 was consummated?

13 MS. SCHICKER: No, I do not know.

14 MS. OKUN: Is there anyone who
15 represents the District who would know that?

16 MS. SCHICKER: I think Mr. Buel would
17 know.

18 MS. OKUN: Do you know what the purchase
19 price was?

20 MS. SCHICKER: Approximately 3.3
21 million; 3.3 million, or just 3 million, excuse
22 me.

23 MS. OKUN: Has the District had an
24 appraisal done of the Tri-W site since the
25 purchase?

1 MS. SCHICKER: No.

2 MS. OKUN: Has the District done any
3 investigation at all as to what the current value
4 of the Tri-W property is?

5 MS. SCHICKER: No.

6 MS. OKUN: Have you talked to any
7 brokers about the potential value? You
8 personally, or any of the District's
9 representatives.

10 MS. SCHICKER: No. I can just speak for
11 myself.

12 MS. OKUN: To your knowledge, have any
13 District representatives discussed this issue with
14 brokers?

15 MS. SCHICKER: No.

16 MS. OKUN: Has the District or any
17 District representative entered into any
18 discussions with any person regarding a potential
19 sale of the Tri-W property?

20 MR. ONSTOT: Objection, vague. Object
21 to the extent that it calls for attorney/client
22 privilege communications, or discussions held in
23 closed session.

24 MS. OKUN: Have there been any
25 discussions that were not in closed session

1 between a District representative and any person
2 regarding a potential sale of the Tri-W property?

3 MR. ONSTOT: Objection to the extent it
4 would violate attorney/client privilege.

5 CHAIRPERSON YOUNG: Well, the question
6 was towards anything in open session, so that
7 would then waive any attorney/client privilege.

8 MS. SCHAFFNER: Or outside the meeting
9 at all. I think the objection can be sustained
10 probably to the extent that it would call for
11 conversations specifically with counsel. But with
12 anyone else, the privilege would not apply.

13 CHAIRPERSON YOUNG: Yeah. Ms. Schicker,
14 any conversations you had with your attorneys,
15 okay, where there have not been third parties
16 present, you know, non-party people, those
17 conversations are protected, okay?

18 MS. SCHICKER: Okay.

19 CHAIRPERSON YOUNG: But if there have
20 been discussions regarding the scope of this
21 question, and even if your lawyers were present,
22 if there were other people present like a real
23 estate broker, sales agent, somebody that is not a
24 member of the CSD, that privilege would be waived,
25 in my opinion. And then we would be entitled to

1 know the answer to that question.

2 MS. SCHICKER: Okay, Ms. Okun, could you
3 please repeat?

4 MS. OKUN: Has the District or any of
5 its representatives had any discussions with any
6 person, other than your attorneys, with no one
7 else present, regarding the potential sale of the
8 Tri-W property?

9 MS. SCHICKER: Yes.

10 MS. OKUN: Who were involved in those
11 discussions?

12 MS. SCHICKER: That would be me with the
13 reporter from The Telegram Tribune. And also at
14 public meetings in general discussions with the
15 public.

16 MS. OKUN: What did you tell the
17 reporter from the Tribune?

18 MR. ONSTOT: Objection, calls for a
19 narrative. And vague as to time.

20 MS. OKUN: Well, as to the time
21 objection Ms. Schicker just testified that she had
22 a conversation with The Tribune. And whatever
23 time that conversation occurred is the time I'm
24 referring to.

25 Narrative isn't a proper objection in an

1 administrative proceeding.

2 CHAIRPERSON YOUNG: Well, I'm going to
3 overrule the objection. Go ahead, you can answer
4 the question. If it's the discussion that you've
5 already told us about that you had with that
6 reporter, that's fair game. So you can answer the
7 question as to what you discussed with that
8 reporter.

9 MS. SCHICKER: Okay, as one Director
10 with no authority --

11 CHAIRPERSON YOUNG: We understand that.
12 But you are the President of the CSD, correct?

13 MS. SCHICKER: That's correct.

14 CHAIRPERSON YOUNG: Okay, and I know
15 this issue has come up before and I've been
16 thinking about it repeatedly in the last month.
17 Aren't you authorized to talk on behalf of the
18 Board, at least to articulate what the Board's
19 policy is with many issues?

20 MS. SCHICKER: Only if it's been
21 adopted. I'm not -- I don't have any authority
22 as -- I don't have any authority other than
23 through the three things that have already been
24 discussed, you know. I can speak to the press, I
25 can speak to you, I can speak about what the Board

1 might or might not do. But ordinance, motion --

2 CHAIRPERSON YOUNG: Okay, why don't you
3 answer the question in terms of you as an
4 individual Board Member.

5 MS. SCHICKER: Okay.

6 MS. OKUN: Well, before you answer it as
7 you as an individual Board Member, you just said
8 that you had authority as a Board Member and as
9 the President of the Board to speak to the press,
10 correct?

11 MS. SCHICKER: That's correct.

12 MS. OKUN: And we're talking about a
13 conversation with the press?

14 MS. SCHICKER: Yes.

15 MS. OKUN: Okay.

16 MR. ONSTOT: Objection, lack of
17 foundation. There's been no establishment of the
18 authority of President Schicker to speak on behalf
19 of the CSD regarding any real property issues.
20 Until that foundation is laid, my objection will
21 be continuing.

22 CHAIRPERSON YOUNG: The objection is
23 noted. You can go ahead and answer the question.

24 MS. SCHICKER: I'm sorry, could you
25 repeat, please?

1 MS. OKUN: What did you tell The Tribune
2 reporter regarding the potential sale of the Tri-W
3 property?

4 MS. SCHICKER: I spoke to the reporter
5 about Tri-W in a general sense with many options
6 that the CSD was considering at this time of how
7 to deal with the current situation.

8 MS. OKUN: So your testimony was --
9 strike that.

10 You told the reporter that the CSD was
11 considering the sale of the Tri-W property?

12 MS. SCHICKER: I told the reporter that
13 all options were on the table, and I made a list
14 of options of things that we could possibly do to
15 address water quality quickly, and address our
16 situation.

17 MS. OKUN: Without disclosing the
18 contents of any closed session discussions, has
19 the District had any closed session meetings
20 regarding the sale of the Tri-W property?

21 MS. SCHICKER: Yes.

22 MS. OKUN: Has the District entered into
23 any negotiations regarding the sale?

24 MS. SCHICKER: No.

25 MS. OKUN: Did the District ever enter

1 into an escrow regarding the sale of the Tri-W
2 property?

3 MS. SCHICKER: The sale of. No.

4 MS. OKUN: Has the --

5 CHAIRPERSON YOUNG: Well, excuse me, how
6 about the transfer of?

7 MS. SCHICKER: I was just thinking of
8 the past like in 2000 before I wasn't there, you
9 know, when we bought it. That's why I hesitated.
10 So, no.

11 MS. OKUN: Okay, and you can assume that
12 all my questions have to do with events --

13 MS. SCHICKER: Today.

14 MS. OKUN: -- that occurred after the
15 September 27th election.

16 MS. SCHICKER: Okay.

17 MS. OKUN: So there has not been an
18 escrow opened that would, in any way, involve sale
19 or transfer of the Tri-W property since September
20 27th?

21 MS. SCHICKER: There has been no escrow
22 opened.

23 MS. OKUN: Has the District received any
24 offers to purchase the property?

25 MS. SCHICKER: No.

1 MS. OKUN: Regarding the Broderson
2 property, what was the purchase date of that
3 property?

4 MS. SCHICKER: Mr. Buel would know. I'm
5 not sure.

6 MS. OKUN: Do you know what the purchase
7 price was?

8 MS. SCHICKER: Approximately 4.4 --

9 UNIDENTIFIED SPEAKER: 4.65.

10 MS. SCHICKER: -- 4.65 million.

11 MS. SCHAFFNER: I'm sorry, what was that
12 figure again?

13 MS. SCHICKER: 4.65.

14 MS. SCHAFFNER: 4.65, thank you.

15 MS. OKUN: Is the District considering
16 selling that property?

17 MR. ONSTOT: Objection, lack of
18 foundation. Also objection to the extent it calls
19 for attorney/client privilege or closed session
20 communication. Vague as to the term considering.

21 CHAIRPERSON YOUNG: Overruled.

22 MS. SCHICKER: I'm sorry, again, --

23 MS. OKUN: Is the District considering
24 selling the Broderson property?

25 MS. SCHICKER: That was something I

1 mentioned to the reporter as an option, yes.

2 MS. OKUN: So your answer is yes?

3 MS. SCHICKER: Yes.

4 MS. OKUN: Without disclosing the
5 content of the discussions, has the District
6 discussed this in closed session?

7 MS. SCHICKER: Yes.

8 MS. OKUN: Has the District had an
9 appraisal done of the current value of that
10 property?

11 MS. SCHICKER: No.

12 MS. OKUN: Has the District taken any
13 steps toward investigating the current value of
14 that property?

15 MS. SCHICKER: Yes.

16 MS. OKUN: What were those actions?

17 MS. SCHICKER: I think that's closed
18 session, again. I can't -- I'm not allowed to
19 discuss closed session.

20 MR. ONSTOT: Based upon that response I
21 will instruct the witness not to answer.

22 MS. OKUN: So your testimony is that the
23 District, in closed session, investigated the
24 current value of the Broderson property?

25 MR. ONSTOT: Objection, mischaracterizes

1 the testimony. Objection to the extent it calls
2 for closed session communication. And I will
3 instruct the witness not to answer.

4 MS. OKUN: Well, if that misstates your
5 testimony, could you clarify your testimony?

6 MS. SCHICKER: I think I want you to ask
7 the question again because I may have answered
8 improperly.

9 MS. OKUN: Did the District do anything
10 in closed session to investigate the current value
11 of the Broderson property?

12 MR. ONSTOT: Same objection. To the
13 extent it calls for closed session communications.
14 And I will instruct the witness not to answer.

15 MS. SCHAFFNER: Whenever it's
16 appropriate I have a question for the witness, as
17 well.

18 CHAIRPERSON YOUNG: Well, I think the
19 objection may be sustained. You can ask a
20 different question.

21 MS. OKUN: Did the District or any of
22 its representatives do anything outside of closed
23 session to investigate the current value of the
24 Broderson property?

25 MS. SCHICKER: No.

1 MS. OKUN: You said that you discussed
2 with The Tribune the potential sale of the Tri-W
3 and Broderon properties as one of a list of
4 options. What are the other options on that list?

5 MS. SCHICKER: I wish I had my notes
6 here today because there's many things we
7 discussed of how to address this current
8 situation. And I don't have them here, so it may
9 not be a complete list if I give it to you now.

10 MS. OKUN: Are those notes subject to
11 the Chair's subpoena and the request to provide
12 documents after lunch?

13 MS. SCHICKER: Ms. Okun, probably the
14 best way would be to listen to some of the tapes
15 of the meetings where we discussed this openly in
16 public with everybody.

17 CHAIRPERSON YOUNG: That's kind of the
18 problem, that there are hours and hours of tapes
19 and things of that nature. And we don't have the
20 time to delve through. That's why we asked for a
21 summary of the DVDs that you wanted to put into
22 evidence.

23 MS. OKUN: Is there anything you can
24 recall off the top of your head that the District
25 is considering as an option?

1 MS. SCHICKER: We have many things in
2 motion right now that are trying to address the
3 current situation to get to water quality as
4 quickly as possible.

5 MS. OKUN: And could you tell me what
6 those are?

7 MS. SCHICKER: We're trying to resolve
8 the issues about the contractors and the state
9 revolving fund loan. We've agendized items to
10 address water quality immediately that will be
11 heard in public, both pumping the upper aquifer,
12 adopting septic management plan, water
13 conservation.

14 We've gone to the County to request an
15 RMS reading of level three severity for salt water
16 intrusion and groundwater recharge. We've asked
17 for presentations by consultants to get a better
18 handle on our current water quality issues.

19 We've filed claims to recoup money from
20 possibly illegal contracts. So, many things in
21 motion right now. Twenty-five meetings in less
22 than three months.

23 MS. OKUN: Has the District given any
24 direction to any of its employees to take any
25 actions to further investigate the sale of the

1 Broderson or Tri-W property?

2 MS. SCHICKER: No.

3 MS. OKUN: Thank you, that's all I have.

4 MS. SCHICKER: Okay, thank you.

5 MR. ONSTOT: Mr. Chair, if I may?

6 CHAIRPERSON YOUNG: Yes. Hold on one
7 second.

8 (Pause.)

9 CHAIRPERSON YOUNG: Go ahead, Mr.
10 Onstot.

11 MR. ONSTOT: Thank you, Mr. Chair.

12 REDIRECT EXAMINATION

13 MR. ONSTOT: Ms. Schicker, at any time
14 were you authorized by the CSD Board to talk to
15 the press about real estate transactions?

16 MS. SCHICKER: No.

17 MR. ONSTOT: Or the Tri-W site in
18 particular?

19 MS. SCHICKER: No.

20 MR. ONSTOT: Ms. Okun asked you a few
21 questions regarding, I think her words were
22 consideration of a sale of Tri-W and Broderson.
23 Do you recall those questions?

24 MS. SCHICKER: Yes.

25 MR. ONSTOT: And you can answer mine yes

1 or no. Were those discussions in closed session
2 held pursuant to agenda items for pending and
3 actual litigation?

4 MS. SCHICKER: Yes.

5 MR. ONSTOT: Thank you. Nothing
6 further.

7 MS. SCHAFFNER: Mr. Chair, may I ask a
8 question of the witness, as well?

9 CHAIRPERSON YOUNG: Sure.

10 MS. SCHAFFNER: Thank you.

11 MS. SCHICKER: You did mention you had
12 one.

13 MS. SCHAFFNER: Didn't let you get quite
14 as far this time, sorry. Could you -- this is in
15 follow up on some of the questions that Ms. Okun
16 asked. I was hoping for a little more
17 specificity.

18 What exactly is the Board doing? What
19 actions is the Board currently taking to regain
20 compliance with the time schedule order
21 specifically?

22 MS. SCHICKER: We've been, like I said,
23 25 meetings in three months, mostly trying to deal
24 with the leftover mess of starting construction
25 the summer before the vote.

1 And I would ask for the same respect
2 from the audience that Mr. Young --

3 CHAIRPERSON YOUNG: Yeah, I --
4 please, --

5 MS. SCHICKER: -- asked for, please.

6 CHAIRPERSON YOUNG: -- no comments from
7 the audience, no snickering, anything. I've
8 already warned everybody once. It's unbecoming of
9 this proceeding. Please stop it. And I'm
10 referring to your friend that just stepped out of
11 the door. Thank you.

12 MS. SCHAFFNER: I'm sorry, would you
13 like me to restate the question?

14 MS. SCHICKER: Yes, please. Thank you.

15 MS. SCHAFFNER: What specific steps is
16 the CSD taking to regain the compliance path, to
17 come back into compliance with the time schedule
18 order and proceed to meet the schedules -- meet
19 the milestones set out in the time schedule order?

20 MR. SEITZ: I'm just going to raise this
21 quick objection that the District is out of
22 compliance, I think, from your perspective.
23 There's no way that they can regain compliance
24 with 00-131 because they would have had to,
25 according to your own staff report, we've been out

1 of compliance since 2002.

2 I don't mind the question what are you
3 doing to rehabilitate the groundwater basin and
4 comply with 8313, but to me it's just a loose
5 question to say what are you doing to comply with
6 an order that we allege you've been out of
7 compliance with since 2002. Unless there's a time
8 machine, there's no way you can do it.

9 MS. SCHAFFNER: Well, I absolutely
10 appreciate and respect Mr. Seitz' frankness in
11 stating that the CSD is not in compliance with the
12 TSO. And it is impossible to go back in time to
13 say you can meet a deadline that's not been met --

14 MR. SEITZ: What I said is that you are
15 alleging that we've been out of compliance since
16 2002.

17 MS. SCHAFFNER: What I am asking is what
18 is the CSD doing to achieve the milestones on any
19 schedule currently?

20 MS. SCHICKER: Well, we traveled to
21 testify in Sacramento at the State Water Board
22 twice, to please ask for ability to revise and
23 amend the state revolving fund loan so we could
24 continue work on the project for the parts that
25 did comply with the measures that were voted on by

1 the public.

2 We also filed a petition that has been
3 held in abeyance that protests the time schedule
4 order because of its shortened length. We think
5 that the time was unreasonable, and it was thought
6 unreasonable then and we maintain that position.
7 We think four years was too short to do a project.
8 We think that's why we're in the mess we're in
9 today.

10 We've agendized these issues, that I've
11 already discussed. I won't repeat them, to
12 bore -- you know, about the salt water intrusion,
13 the studies, the septic tank maintenance, the
14 water conservation. All of those things have been
15 agendized.

16 We're appointing committees this month
17 to develop plans of action with full public input
18 about how to keep moving forward with a project
19 that complies and is better. And address all the
20 water quality basin needs that were not addressed
21 with the original project. And we will be
22 discussing those in meetings.

23 We've scheduled three meetings a month
24 versus the one meeting a month that was held prior
25 to our things so that we can address issues

1 quicker. We're going to have weekly committee
2 meetings with members of the public.

3 And we're trying to dialogue with all
4 agencies and establish connections with
5 environmental groups, as well, to make sure that
6 everybody's on board this time. We're very
7 interested in dialogue-ing with you and working
8 with you on getting this project done as quickly
9 as possible.

10 CHAIRPERSON YOUNG: Ms. Schicker, is it
11 fair to say that really what your Board intends to
12 do in terms of compliance with the time schedule
13 order has nothing to do with the Tri-W site? In
14 other words, you guys have made a determination,
15 whether there's been a resolution or not, to
16 essentially jettison Tri-W, get rid of it, and to
17 focus your efforts at some other location, even if
18 that location is not yet identified?

19 MR. ONSTOT: Objection, calls for
20 speculation as to what the Board will do in the
21 future. You can answer if you know.

22 MS. SCHICKER: Well, I would subject to
23 you that the voters decided. The voters are the
24 ones who decided that they didn't want a sewer
25 plant next to their library uphill from the Bay.

1 They don't want it there. That's it. It's that
2 simple.

3 And the Measure B, that initiative,
4 which was the final last resort of the people
5 asking for a voice, states, and was voted and
6 approved. And we must comply.

7 CHAIRPERSON YOUNG: Okay, that begs
8 another question that I had asked Mr. McClendon
9 before. And I realize when I listened to the tape
10 I didn't get an answer to it.

11 And that was in your deliberations after
12 the election was completed and you then had
13 Measure B, how did you weigh and balance the
14 effect of the Regional Board's time schedule order
15 and basin plan prohibition potential violations in
16 the equation of what you were going to do?

17 MR. ONSTOT: Objection to the extent --

18 CHAIRPERSON YOUNG: -- a little more
19 specific with this. You've got a local measure
20 that has passed, Measure B. On the other hand
21 you've got a state agency with an order that had
22 already been issued to your specific agency with
23 specific milestones in it. And an agency
24 enforcing both federal and state water pollution
25 laws.

1 I want to know what went on in terms of
2 balancing, what your Board decided to do. We know
3 ultimately you issued a stop-work notice. That
4 happened October 4th, 5th or 6th.

5 I want to know what consideration you
6 gave to the Regional Board's order, the time
7 schedule order.

8 MR. ONSTOT: Objection to the extent
9 that it calls for closed session discussions, or
10 attorney/client communications. And I do believe
11 that the question was framed, Ms. Schicker, as to
12 you, personally, as opposed to the Board.

13 CHAIRPERSON YOUNG: So you can answer
14 it.

15 MS. SCHICKER: Pardon me?

16 CHAIRPERSON YOUNG: You can answer the
17 question.

18 MS. SCHICKER: As far as me, personally?

19 CHAIRPERSON YOUNG: I mean I think it's
20 an important question. I think your community
21 also deserves to know how you made the decision to
22 follow one course of action and not another, and
23 not try to get something reconciled before going
24 down a certain path.

25 MS. SCHICKER: I think --

1 CHAIRPERSON YOUNG: Clearly the path
2 that was chosen has resulted in all kinds of
3 consequences to this District, whether they were
4 foreseen or not.

5 MS. SCHICKER: I would like to answer.

6 CHAIRPERSON YOUNG: Okay, go ahead, I'd
7 like to hear the answer.

8 MS. SCHICKER: I can tell you three
9 things. The first thing that we did -- well,
10 first, I want to clarify. We suspended work, we
11 did not stop work.

12 CHAIRPERSON YOUNG: Right.

13 MS. SCHICKER: Because we wanted to get
14 our grasp on the situation.

15 Second, we knew the TSO had been filed
16 and was in abeyance. And we agreed with the TSO
17 petition, and that the time schedule was always
18 unreasonable.

19 And thirdly, never -- four things --
20 never in a million years would I have guessed,
21 personally, as a Director, and being involved in
22 this case, that both the State and the Regional
23 Boards would not be willing to work with a duly
24 elected body. And work towards the goals of water
25 quality.

1 Because we've been -- that's all we've
2 been talking about, is we have salt water
3 intrusion, we have basin issues that are not
4 addressed by this project. We have a potential
5 serious pollution problem by putting a sewer plant
6 on the back Bay.

7 And never in a million years would I
8 have thought that everyone would not be willing to
9 work with us. That may be naive.

10 Fourth point. We appointed a Regional
11 Board negotiation team the first meeting that we
12 had to get working with you in cooperation, and
13 immediately.

14 So, yes, I do believe we were ready to
15 hit the ground and keep going. And we thought you
16 would be as concerned as we are about the other
17 water quality issues and basin management issues
18 that were not addressed by this project, and that
19 were ignored. And that you would be interested in
20 working with us on achieving all those goals with
21 a project now that we're finally in agreement that
22 we need a project.

23 CHAIRPERSON YOUNG: Well, you say maybe
24 you were naive or you were making some
25 assumptions. Clearly, Mr. Briggs had sent a

1 series of letters to the District over, I don't
2 know what period of time, 18 months or two years.

3 And I think that they were pretty clear
4 as to what at least Mr. Briggs' position was with
5 respect to the time schedule order and potential
6 violations.

7 Did you think that because of the
8 election and a changeover that Mr. Briggs would
9 just forget about all that? And then --

10 MR. ONSTOT: Objection, calls for
11 speculation. And I assume that the Chair's use of
12 the term you, y-o-u, refers to her personally, not
13 in speaking for the District?

14 CHAIRPERSON YOUNG: That's correct.

15 MS. SCHICKER: Mr. Briggs and I are both
16 state employees. I'm used to dealing with
17 agencies in my profession. I'm used to
18 cooperation and collaboration.

19 And I completely expected Mr. Briggs and
20 the Water Board Staff to work with us when they
21 actually heard about the other water quality
22 issues that were not being addressed by this
23 project. Absolutely I believed that. You can
24 call me naive if you want, but as a fellow state
25 employee, with the best interests of the state and

1 my community at heart, as a volunteer citizen
2 community person, you bet I believed that that's
3 what would happen.

4 In light of what we discovered with the
5 studies, the technical studies that came after the
6 design of a flawed project, that would be fined
7 just like that newspaper article over there, all
8 other places that spilled this year, we're seeing
9 ourself up for a problem.

10 I'm trying my darndest to alert you to
11 those problems at this stage before it's too late.
12 You bet I thought that we would be negotiating
13 right now and working towards a common goal, a
14 better project.

15 CHAIRPERSON YOUNG: Do you, Ms.
16 Schicker, do you know how many spills occurred in
17 the Central Coast Region in the past two years
18 from sewage plants?

19 MS. SCHICKER: I do not know that
20 number.

21 CHAIRPERSON YOUNG: Well, do you have
22 any information to back up your claims to the
23 community that this plant would have spilled and
24 contaminated the Bay? What is that based on?

25 MS. SCHICKER: It's based on every

1 Central Coast's sewer plant spilling that's a
2 gravity sewer. And this one's on the back Bay.

3 CHAIRPERSON YOUNG: Okay. Do you know
4 how close this particular one is to a surface body
5 of water compared to other ones in the region? I
6 mean, is this closer, farther away? Is this
7 unusually sited? I mean, do you know?

8 MS. SCHICKER: Yes, I do know. I mean I
9 could get out a map and a GPS and I could measure
10 it for you. Yes, I know the distances, I know the
11 plants that are on the Central Coast. Yes, I do.

12 CHAIRPERSON YOUNG: I'm getting into
13 this with you really because it has -- it's a
14 statement that I've seen repeated. And it has,
15 you know, concerned me because I don't think it's
16 based on accurate information. And I think it
17 misleads your public.

18 A well run plant does not spill. Okay.
19 It's the exception, not the rule. We have lots of
20 plants in this region that never spill. And most
21 of the spills, if they occur, are cleaned up. The
22 distance from Tri-W to the Bay is no different,
23 and even of greater distance than many other
24 plants in this region.

25 I think the prospect that all of a

1 sudden this was going to be a source of continual
2 spills into the Bay, I think is very over-stated
3 and really not based on accurate information. And
4 I don't think it serves the public well to be
5 repeating things like that.

6 If you can show me evidence and facts
7 that would support that up, I'd like to see it.
8 But I question it. And I can tell you that our
9 Board is the one agency that's responsible for
10 enforcing things like that. And I would think
11 that our staff would know about that, if this site
12 was going to be a problem.

13 And this Board sits in judgment all the
14 time for imposing fines on spills. We know what
15 comes up. We get an enforcement report with every
16 Board meeting. I just don't think it's a fair
17 thing to say to the public. I think it's really
18 very misleading on that fact.

19 But, I digressed into something that was
20 just kind of bugging me, and I apologize for that.

21 Where are we?

22 MS. SCHAFFNER: I believe --

23 CHAIRPERSON YOUNG: Ms. Okun, are you
24 examining witnesses?

25 MS. OKUN: I do have a couple follow-up

1 questions for this witness.

2 CHAIRPERSON YOUNG: Okay.

3 FURTHER RECROSS-EXAMINATION

4 MS. OKUN: Just to clarify your
5 testimony you testified that you completely
6 expected the Board to work with the District.
7 When you say you completely expected the Board to
8 work with the District, do you mean that you
9 completely expected that the Board would not
10 assess any fines?

11 MS. SCHICKER: Well, because the
12 petition was still in abeyance and it was still an
13 unsettled issue I really didn't know. I mean I am
14 not a lawyer, so I assumed that that was going to
15 carry through, and that would be decided. And
16 then we could have time to keep working and I
17 didn't think it was a necessity to fine,
18 personally. Because we've expressed our complete
19 commitment to water quality and getting a project
20 built. We've not changed that.

21 MS. OKUN: Okay. And my last question
22 is I do want to read you the quote that The
23 Tribune attributed to you and ask you if it's an
24 accurate quote.

25 And the quote is that the site is a dead

1 issue. We're not going to build there. And
2 that's referring to the Tri-W site. Is that what
3 you said?

4 MS. SCHICKER: It might be paraphrased,
5 but that's probably close.

6 MS. OKUN: And that's your position?

7 MS. SCHICKER: That's the voters'
8 position. The voters.

9 MS. OKUN: Thank you.

10 MR. BRIGGS: Question?

11 CHAIRPERSON YOUNG: Mr. Briggs.

12 MR. BRIGGS: Thank you.

13 RECROSS-EXAMINATION

14 MR. BRIGGS: Director Schicker, --

15 MS. SCHICKER: Yes.

16 MR. BRIGGS: Can you hear okay? It says
17 it's on. Can you hear me now?

18 CHAIRPERSON YOUNG: Yes.

19 MR. BRIGGS: Okay. You just mentioned
20 that the problem that you saw with the approved
21 project was the use of gravity sewers. You said
22 it's a gravity sewer right above the Bay.

23 You also said that part of what you did
24 in terms of compliance, in answer to Ms.
25 Schaffner's question, was to try to convince the

1 State Board to fund the components of the system
2 that you wanted to proceed with.

3 MS. SCHICKER: Yes, sir.

4 MR. BRIGGS: I took that to mean you
5 were talking about the collection system?

6 MS. SCHICKER: Yes.

7 MR. BRIGGS: Weren't you asking the
8 State Board to fund a gravity collection system?

9 MS. SCHICKER: Yes, but not at that
10 location. We were willing to compromise, even
11 though we had agreed with the community that we
12 would have all options on the table, we were
13 willing, in the light of the current situation, to
14 go with gravity and get the sewer treatment plant
15 away from the Bay.

16 MR. BRIGGS: The collection system
17 covers the entire prohibition area, correct?

18 MS. SCHICKER: Yes, sir.

19 MR. BRIGGS: So you were trying to get
20 funding from the State Board for gravity sewage
21 collection system for the entire prohibition area?

22 MS. SCHICKER: Yes.

23 MR. BRIGGS: Okay, thanks.

24 MS. SCHAFFNER: I'm sorry, I hate to
25 prolong this, but one thing I want to clarify for

1 the record. And I'm not sure if Ms. Schicker
2 would be the one to answer that, or whether
3 counsel would.

4 There have been numerous objections to
5 questions posed to the witness based on an
6 assertion that they were the subject of closed
7 session proceedings.

8 When you return with the documents that
9 you're going to return with this afternoon,
10 could -- I'm going to assume that those closed
11 session items will be properly noticed on agendas,
12 and you could bring those with you to show to
13 establish the foundation for these objections,
14 showing the subject of this examination being
15 properly noticed as a closed session item.

16 MR. ONSTOT: Well, what the District
17 Staff is doing now is complying with the subpoena.
18 The subpoena did not ask for agendas.

19 MS. SCHAFFNER: I'm asking you for
20 substantiation of your objection to closed session
21 information. You are implicitly asserting that
22 the information was the subject of closed session
23 discussions.

24 What I'm asking for is documentation
25 that would be reflected in the minutes if it was

1 done in compliance with -- I mean in the agenda if
2 it was done in compliance with the law, and
3 noticed as a closed session item.

4 MR. ONSTOT: I'm not sure I understand
5 the question. I think that what you want is proof
6 that what Ms. Schicker said is true? In other
7 words, I asked her if the discussions of Tri-W and
8 Broderson were done via agendized items, agendized
9 for closed session under actual or potential
10 litigation matters. She answered yes.

11 MS. SCHAFFNER: That and the real estate
12 privileged -- the privilege that you described for
13 negotiations regarding real property. That would
14 have been agendized, as well, correct?

15 MR. ONSTOT: Yeah, but there were none.
16 If you were listening to Ms. Schicker she said in
17 response to my question they were under one of two
18 categories. Anticipated litigation, actual
19 litigation. No real estate transaction were
20 agendized, none were discussed.

21 MS. SCHAFFNER: Okay, so then you
22 withdraw any objections regarding real estate
23 transaction discussions because there were none in
24 closed session?

25 MR. ONSTOT: If I made those in the

1 context, yes. Because that's why I asked Ms.
2 Schicker the clarifying question as to the agenda
3 items that were in closed session in which it was
4 discussed.

5 MS. SCHAFFNER: Okay, well, I guess what
6 would help, it's just there were a number of
7 objections that seemed to assume that these items
8 were discussed in closed session. And just to
9 keep the record nice and clear and sound, it would
10 be good to have the agenda, related agendas that
11 show that those were, indeed, closed session
12 items, so that we can say, you know, it's a valid
13 privilege and properly not a question to be
14 answered.

15 MR. ONSTOT: I understand. Mr. Chair,
16 can I ask a few follow-up questions?

17 CHAIRPERSON YOUNG: Sure. Are you done
18 with Ms. --

19 MS. OKUN: Yes, I am, thank you.

20 CHAIRPERSON YOUNG: -- Schicker? Mr.
21 Briggs, you're finished?

22 MR. BRIGGS: Yes.

23 CHAIRPERSON YOUNG: Okay. Hold on one
24 second. Let me get your --

25 MR. ONSTOT: Start my clock again?

1 CHAIRPERSON YOUNG: We have to go back
2 and forth with this. Okay, go ahead.

3 REDIRECT EXAMINATION

4 MR. ONSTOT: Ms. Schicker, Ms. Schaffner
5 brought up the subject of the time schedule order,
6 and you've reviewed that order, correct?

7 MS. SCHICKER: Yes.

8 MR. ONSTOT: And you've also reviewed
9 the ACL complaint that's before the Board today,
10 is that correct?

11 MS. SCHICKER: Yes, I have.

12 MR. ONSTOT: Now you used the term we,
13 w-e, in response to some of Ms. Schaffner's
14 questions. We meaning the Board. And I want to
15 be clear that you were referring to what I'll call
16 the new Board, which is the Board that was elected
17 on September 22nd, as opposed to the old Board
18 that was in power prior to September 22nd, is that
19 correct?

20 MS. SCHICKER: It's September 27th, but,
21 yes.

22 MR. ONSTOT: The 27th, I'm sorry, thank
23 you. Now, have you recently took a look at the
24 ACL complaint?

25 MS. SCHICKER: I have not reviewed it

1 since December 1st and 2nd.

2 MR. ONSTOT: Okay. And it's your
3 understanding that what the prosecution team is
4 asking for or recommending are fines based on per-
5 day of alleged noncompliance, is that your
6 understanding?

7 MS. SCHICKER: Yes.

8 MR. ONSTOT: And that the amount is
9 \$11,190,000?

10 MS. SCHICKER: Eleven million.

11 MR. ONSTOT: Eleven million, I'm sorry.

12 MS. SCHICKER: Yes.

13 MR. ONSTOT: I talk too fast. In your
14 review of the ACL complaint and the time schedule
15 order is it your understanding that if the Board
16 assesses that \$11 million-plus penalty that those
17 penalties were incurred during the watch of the
18 old Board, as opposed to the new Board?

19 MS. SCHICKER: Yes, it went back to
20 September 2002, I recall.

21 MR. ONSTOT: Thank you. Nothing
22 further.

23 VICE CHAIRPERSON JEFFRIES: Mr. Chair.

24 CHAIRPERSON YOUNG: Yes. Questions by
25 Board?

1 VICE CHAIRPERSON JEFFRIES: May I ask
2 her a couple questions?

3 CHAIRPERSON YOUNG: You may go ahead,
4 Mr. Jeffries.

5 VICE CHAIRPERSON JEFFRIES: Thank you.
6 In your official capacity as Chair of the Board,
7 are you not the official spokesperson for that
8 Board?

9 MS. SCHICKER: I can be a spokesperson,
10 yes. I am usually the one that's the point of
11 contact for the press and the public.

12 VICE CHAIRPERSON JEFFRIES: When you
13 talk to the press and giving statements do you
14 qualify or disqualify yourself as the Chair of the
15 Board when you're making those presentations?

16 MS. SCHICKER: I qualify myself with my
17 expressed authorities, saying I'm the Chair, but I
18 can only speak for myself unless actions are taken
19 properly in agendized Board meetings.

20 VICE CHAIRPERSON JEFFRIES: Is there
21 anyone else in your District that speaks for the
22 Board or the District, itself?

23 MS. SCHICKER: All Directors can. We've
24 kind of been --

25 VICE CHAIRPERSON JEFFRIES: No, the

1 official spokesperson.

2 MS. SCHICKER: We don't have an
3 officially designated person. We --

4 VICE CHAIRPERSON JEFFRIES: So you are
5 the official, as Chair of the Board?

6 MR. ONSTOT: Objection, mischaracterizes
7 her testimony.

8 MS. SCHICKER: Yeah. I don't know that
9 I'm the officially designated by a Board action
10 point of contact. It's informal.

11 VICE CHAIRPERSON JEFFRIES: Thank you.

12 CHAIRPERSON YOUNG: Any other? Mr.
13 Hayashi?

14 BOARD MEMBER HAYASHI: I have just a
15 simple question. The Tri-W site was purchased for
16 \$3 million. And the Bonderson site was 4.65. So
17 the total would be 7.65 million, which is a lot of
18 money.

19 If you look at that -- I'm not saying
20 you're looking at it, but if you look at that as a
21 bailout position to sell, is that property still
22 worth that money today without a use for the
23 property? I mean without a sewer system you can't
24 develop that property.

25 So was that purchased at a higher price

1 based on what it would be worth in the future
2 after the sewer plant was already there, on the
3 property?

4 MR. ONSTOT: Objection to the extent it
5 calls for speculation.

6 BOARD MEMBER HAYASHI: That's just the
7 point I wanted to get.

8 CHAIRPERSON YOUNG: Well, she can answer
9 the question if she has some estimate or if she's
10 taken that into consideration.

11 MS. SCHICKER: Yes, Mr. Hayashi, I
12 apologize, I can't answer. I really just don't
13 know. I just don't know.

14 CHAIRPERSON YOUNG: Okay. Mr.
15 Shallcross.

16 BOARD MEMBER SHALLCROSS: Yeah, at any
17 point prior to the election did you contact the
18 Regional Board to find out what staff's position
19 might be if Measure B passed and if the recall was
20 successful, whether or not the Regional Board
21 would, you know, go to enforcement or not?

22 MS. SCHICKER: Mr. Buel was more in
23 contact with the Regional Board Staff, and we were
24 receiving letters. And Mr. Briggs and staff did
25 appear at one of our meetings, too.

1 BOARD MEMBER SHALLCROSS: Okay. Did you
2 ever contact the State Board prior to the --

3 MS. SCHICKER: Oh, yes.

4 BOARD MEMBER SHALLCROSS: -- prior to
5 the election to find --

6 MS. SCHICKER: Yes, sir.

7 BOARD MEMBER SHALLCROSS: -- out what
8 their position would be on the SRF --

9 MS. SCHICKER: Yes, sir.

10 BOARD MEMBER SHALLCROSS: -- if Measure
11 B passed?

12 MS. SCHICKER: Yes, sir.

13 BOARD MEMBER SHALLCROSS: And what
14 happened at that meeting?

15 MS. SCHICKER: Numerous correspondences
16 back and forth, both between myself and other
17 Directors, and Mr. Buel, as well.

18 BOARD MEMBER SHALLCROSS: Did they
19 indicate that the SRF loan was not at risk?

20 MS. SCHICKER: I think Mr. Polhemus said
21 something to the extent, in our negotiations he
22 said something to the extent of we all looked at
23 this Measure B in the office. We all knew it was
24 coming.

25 BOARD MEMBER SHALLCROSS: I'm talking

1 about prior to the election.

2 MS. SCHICKER: Yeah, that's what he was
3 saying. He'd been looking at it since we'd been
4 up there in January 2005; Measure B was April
5 2005.

6 BOARD MEMBER SHALLCROSS: When did he
7 say this?

8 MS. SCHICKER: He said that in October
9 when we were --

10 BOARD MEMBER SHALLCROSS: I'm only
11 talking about contacts you had prior to the
12 election.

13 MS. SCHICKER: Yes. We contacted him by
14 fax, mails, email, everything.

15 BOARD MEMBER SHALLCROSS: And did he
16 indicate that the SRF loan would not be in
17 jeopardy?

18 MS. SCHICKER: What Mr. Polhemus told me
19 was, is that anything's amenable if both parties
20 are willing. And he also told me that we had till
21 December 20th to amend the project and to not lose
22 the loan.

23 BOARD MEMBER SHALLCROSS: So you didn't
24 have any assurances that you would keep the loan?

25 MS. SCHICKER: He pretty much said we

1 had till December 20th, and that we could amend
2 the loan. That's what he told me on the phone
3 several times.

4 BOARD MEMBER SHALLCROSS: Okay. And did
5 you get any assurances from the Regional Board
6 that they wouldn't take any sort of enforcement
7 action?

8 MS. SCHICKER: I didn't personally get
9 any.

10 BOARD MEMBER SHALLCROSS: Okay, thanks.

11 CHAIRPERSON YOUNG: Do you know if any
12 other of your Board Members received any
13 assurances from Regional Board Staff that as a
14 result of the election they would not take an
15 enforcement action?

16 MS. SCHICKER: I don't know that.

17 CHAIRPERSON YOUNG: Okay. All right.

18 MS. OKUN: I actually have a follow-up
19 to one of the answers to Mr. Shallcross' question.

20 CHAIRPERSON YOUNG: You have to wait so
21 that I can -- now you can ask a question.

22 MS. OKUN: Thank you.

23 RE-CROSS-EXAMINATION

24 MS. OKUN: You said that Darrin Polhemus
25 told you that you had until December -- or the

1 District had until December 20th to amend the
2 loan. To amend the loan to say what?

3 MS. SCHICKER: We posed the question to
4 Mr. Polhemus that if the election and/or if an
5 initiative would pass, and the people just wanted
6 to move the darn plant, could we do it. And he
7 said yes, you could. You'd have to amend the
8 loan.

9 And the reason we were so concerned
10 about them giving any money in the summer was it
11 made it tons -- a lot more difficult to do it
12 after the money had been let. So we were begging
13 everybody to just wait for the election to see
14 what the people wanted.

15 MS. OKUN: It make it more difficult to
16 do what? To amend the loan?

17 MS. SCHICKER: To amend the loan, um-
18 hum, yes.

19 MS. OKUN: Did he tell you he had
20 authority to amend the loan, to change the site of
21 the project?

22 MS. SCHICKER: He said that it happens
23 all the time. And, of course, it would be a Board
24 action. You know, we understand that, yes.

25 MS. OKUN: Thank you.

1 CHAIRPERSON YOUNG: Okay. Do we have
2 any other questions of this witness at this point
3 in time? Mr. Onstot?

4 MR. ONSTOT: We're fine.

5 CHAIRPERSON YOUNG: Okay. Ms. Okun?

6 MS. OKUN: I'd like to call Bruce Buel.

7 CHAIRPERSON YOUNG: Okay.

8 MR. ONSTOT: Mr. Chair, can I move that
9 we break for lunch, or at least a short break?

10 CHAIRPERSON YOUNG: Okay, we are past
11 1:30, and we do have Mr. Polhemus kind of dangling
12 somewhere. How long would your examination be of
13 Mr. Buel?

14 MS. OKUN: Well, I think only a few
15 questions, but I thought it was only going to take
16 a few minutes with Ms. Schicker.

17 CHAIRPERSON YOUNG: Okay. Shall we
18 break for lunch? I'm the boss, okay.

19 All right. We will break for lunch.
20 We'll break for, let's shoot for 2:30. Make every
21 effort.

22 An objection. Well, wait, you guys need
23 more time, is that it?

24 MR. SEITZ: Yeah.

25 CHAIRPERSON YOUNG: Okay.

1 MR. SEITZ: I was hoping I'd get back to
2 my office and get my notes.

3 CHAIRPERSON YOUNG: Okay. How much time
4 would you need?

5 MR. SEITZ: About 45 minutes I can
6 probably do it.

7 CHAIRPERSON YOUNG: Okay. Let's do that
8 and --

9 MR. SEITZ: I'm not trying to be an
10 obstructionist, I just --

11 CHAIRPERSON YOUNG: I know. And then
12 we'll wait for you anyway. But, 45 minutes then.
13 Ms. Okun, 45 minutes, so that Mr. Seitz can get to
14 his office.

15 (Whereupon, at 1:53 p.m., the hearing
16 was adjourned, to reconvene at 2:38
17 p.m., this same day.)

18 --oOo--

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1 AFTERNOON SESSION

2 2:45 p.m.

3 CHAIRPERSON YOUNG: Here's what I want
4 to do with the documents that the CSD has
5 produced. I know that Mr. Onstot has shown me a
6 box with file folders in it. Do those have the
7 minutes in with each of the Board meeting dates?
8 I know that the file folders have dates on the
9 tops of them.

10 MR. ONSTOT: I don't know. I have not
11 had a chance, obviously, to review them. They
12 were pulled right out of the file cabinets at the
13 CSD office. So they're presented as they're kept
14 in the normal course of business.

15 CHAIRPERSON YOUNG: Okay.

16 MR. ONSTOT: I don't know if they
17 contain that.

18 CHAIRPERSON YOUNG: Who would know the
19 answer to that question? Ms. Schicker, are the
20 minutes for each of those Board meetings within
21 each of those file folders?

22 MS. SCHICKER: Mr. Young, I'm just
23 looking at these quickly. They're dated for the
24 meeting dates, and they look like they're agenda
25 packets. So if we had past minutes that still

1 needed to be approved they would be part of a
2 packet that would not be the meeting of the
3 minutes. Does that make sense? Like it would be
4 two weeks ahead. We'd have the minutes from the
5 meetings two weeks prior in that packet.

6 So they're arranged by agenda meeting.
7 The minutes were not thrown into that same pile.

8 CHAIRPERSON YOUNG: So are you saying
9 that the minutes would not be in that file, but
10 the minutes of the previous meeting might be in
11 there, because that would have been approved?

12 MS. SCHICKER: Right. That's what it
13 looks like is what they did.

14 MR. ONSTOT: Mr. Chair, we just found a
15 file that contains both approved and unapproved
16 minutes.

17 CHAIRPERSON YOUNG: Okay, good. So that
18 we don't slow down the meeting, what I'm going to
19 ask Michael Thomas to do, since he is part of our
20 staff on this issue, and is most familiar with
21 what I was looking for with the subpoena, is I'm
22 going to excuse him with the box.

23 MR. THOMAS: Awesome.

24 CHAIRPERSON YOUNG: Awesome, right. And
25 to go through and really look for, you know, the

1 documents, the records that are kind of responsive
2 to the subpoena. And maybe you can get Post-Its
3 to put onto those, and don't disrupt their
4 sequencing in the files. But just to flag them.
5 And then at a break or when you're done we could
6 kind of discuss what you came up with.

7 MR. THOMAS: Okay.

8 CHAIRPERSON YOUNG: Now, before you go I
9 need the clock, the timing of where we're at.

10 MS. SCHAFFNER: While they're figuring
11 that out, does that box of documents contain the
12 notes that Mr. Bleskey took at the meetings?

13 MR. BLESKEY: Ma'am, what it contains is
14 my Board packages with my notes on the Board
15 package documents which were in the file. And I'm
16 just looking at things like, you know, old
17 girlfriends' phone numbers and stuff like that
18 that I want to remove.

19 (Laughter.)

20 MS. SCHAFFNER: Well, you can black
21 those out.

22 MR. BLESKEY: Okay. So I just have one
23 last stack to do that to and we'll be done with
24 it, can have that to you.

25 MS. SCHAFFNER: Okay.

1 MR. BLESKEY: Okay.

2 CHAIRPERSON YOUNG: So does it include
3 the new girlfriends' phone numbers, but not the
4 old girlfriends?

5 (Laughter.)

6 MR. BLESKEY: Those are going, too.

7 CHAIRPERSON YOUNG: Okay. I don't know.
8 I'm glad my wife isn't watching this.

9 MR. BRIGGS: Mr. Chairman.

10 CHAIRPERSON YOUNG: Yes.

11 MR. BRIGGS: All kidding aside, I think
12 the answer to the question was no, he did not
13 bring the notes that he referred to earlier.

14 CHAIRPERSON YOUNG: Right.

15 MS. SCHAFFNER: Could you clarify that
16 answer for us, Mr. Bleskey. Are these the
17 journal/diary type notes you mentioned earlier?
18 Or are those something different?

19 MR. BLESKEY: These are the -- what I
20 have is my marked-up notes that I take down when
21 I'm at the meeting. And then I place those in my
22 file, and they basically reflect the action or
23 items that we, you know, just my thoughts
24 regarding the agenda.

25 MS. SCHAFFNER: In your earlier

1 testimony when you said that's my diary, as it
2 were, were you talking about these notes?

3 MR. BLESKEY: No.

4 MS. SCHAFFNER: You have other notes?

5 MR. BLESKEY: That's my personal diary.

6 MS. SCHAFFNER: Which is a log of your
7 notes taken during the meetings?

8 MR. BLESKEY: Those are -- they're my
9 personal diary, which the actions that I had, if I
10 got the gist of it correctly, that my notes for
11 action in my official capacity, as the Interim
12 General Manager, are reflected on these documents
13 that I'm about to give you.

14 MS. SCHAFFNER: So what's the
15 distinction between the notes you --

16 MR. BLESKEY: Those are --

17 MS. SCHAFFNER: -- the diary and the --

18 MR. BLESKEY: Those are --

19 MS. SCHAFFNER: So you're saying they
20 have nothing to do with the business at hand when
21 you said diary?

22 MR. BLESKEY: No. They may or may not,
23 but they're my personal documents. They're not
24 part of my capacity as the Interim General
25 Manager.

1 MS. SCHAFFNER: That makes no sense to
2 me --

3 CHAIRPERSON YOUNG: I mean, are you
4 planning on writing a book?

5 MR. BLESKEY: I was thinking about it.

6 (Laughter.)

7 MS. SCHAFFNER: I will defer to the
8 Chair whether he considers that compliance
9 sufficient to avoid sanctions.

10 CHAIRPERSON YOUNG: I don't think it's
11 sufficient. I did want to see your notes. The
12 personal ones, also. Are those here?

13 MR. BLESKEY: Only a portion of them are
14 here. But I'd have to refer to my counsel on
15 that, in all respect, Mr. Chair.

16 CHAIRPERSON YOUNG: I understand that,
17 but I mean I didn't hear previously that there was
18 any privilege or protection that would pertain to
19 them.

20 MR. BLESKEY: I need to talk to counsel
21 on that.

22 MR. ONSTOT: Well, there is personal
23 notes and diaries, so there's an expectation of
24 privacy that he has with those with regards to
25 doctor's appointments, dentist's appointments,

1 whatever else would be in there.

2 So, he's already testified that they
3 don't pertain to his duties as General Manager;
4 that those notes are being produced. And if you
5 want to ask him for doctor appointments and stuff
6 like that, he's got an expectation of privacy that
7 our position is is that you're not entitled to
8 those personal things.

9 CHAIRPERSON YOUNG: Well, I would agree
10 with you that we're not entitled to know about his
11 doctor visits and things of that nature. We're
12 not interested in that information.

13 But I want to make sure that if he's
14 taking notes down that have to do with the
15 business of the Board, the CSD Board, that that's
16 an entirely appropriate topic for us to get into
17 and to look at.

18 Why are there two different sets of
19 notes? Why is there a personal diary and then why
20 are you making notes on agendas? They're not one
21 and the same.

22 MR. BLESKEY: That's correct.

23 CHAIRPERSON YOUNG: What's the purpose
24 of the personal diary?

25 MR. BLESKEY: Just like any personal

1 journal or diary, it's to reflect my thoughts from
2 my personal life that have nothing to do. They
3 may contain my opinions of anything that goes on
4 in my personal life. And it may reflect actions
5 that I've experienced. And those, you know, I'd
6 have to refer back to counsel for further
7 discussion.

8 MS. SCHAFFNER: Mr. Chairman, from what
9 I've heard I don't hear a legal basis for
10 privilege here at all. If anything, there may be
11 some question as to some portions of those entries
12 that may have an interest in privacy, personal
13 nature. That kind of material could be redacted.

14 But if there are notes taken in the
15 ordinary course of performing his job, even if
16 they are only for his own personal review, they
17 sound like a double set of books. And I don't
18 understand.

19 MR. BLESKEY: That's not what they are.
20 What they are is my thoughts and all those things
21 that I reflect personally as part of how I live my
22 life. And what you're asking for is reflected on
23 these documents I'm about to give you, if I
24 understood the nature of your request. And,
25 again, I'd have to refer back to legal counsel on

1 where we want to go with this.

2 CHAIRPERSON YOUNG: Well, I understand
3 what the objection is about. And I will honor the
4 objection as to personal medical records and
5 things of that nature. We're not interested in
6 that.

7 I would like to see the journal, and I
8 would like to be able to determine whether we can
9 just redact out portions that are privileged.
10 We're not interested in that. But, I am
11 interested if you are keeping a separate set of
12 notes that may have your thoughts as to how you
13 are going to carry out your function as the
14 General Manager. I think that's appropriate, and
15 until I see it I don't know what's in there.

16 So, somehow we're going to have to take
17 a look at them. I understand the objection. And
18 I don't know when we're going to get to that.

19 MR. ONSTOT: Well, there's also the
20 point that the notes that are taken on the agenda
21 packets are contemporaneous with what happens at
22 the meetings. Where the diary entries are at some
23 point later.

24 And I can't see how they're possibly
25 relevant if he is reflecting upon anything of that

1 matter, because it's not binding or an action of
2 the CSD.

3 So, I would advise him now not to
4 produce that diary. And if it goes to a different
5 level, the judicial level with an in camera review
6 by a court, then so be it. But I will advise him
7 not to produce the private diary.

8 Everything else we have responded to the
9 subpoena for.

10 BOARD MEMBER PRESS: Mr. Chair.

11 CHAIRPERSON YOUNG: Yes.

12 BOARD MEMBER PRESS: Is the -- getting
13 to Mr. Onstot's point, are the diary entries
14 contemporaneous with the meetings? In other
15 words, when you go to the meetings are you writing
16 on the documents that you have with you and the
17 diary? Or are you just writing on the documents
18 and then later making diary entries?

19 MR. BLESKEY: What I'm doing is that I'm
20 making my official notes here in my Board package.
21 And then I make notes to myself, and later on I
22 assemble those notes for my own personal use.

23 BOARD MEMBER PRESS: Okay. So there's a
24 legal pad and a printed agenda at a meeting.

25 MR. BLESKEY: That's correct.

1 BOARD MEMBER PRESS: And you're making
2 entries on those two? Or you're making --

3 MR. BLESKEY: My primary notes are in my
4 -- that have to do with the --

5 UNIDENTIFIED SPEAKER: I guess, I got
6 the red light. It's okay, I'm sorry.

7 CHAIRPERSON YOUNG: I'm trying to figure
8 out how to work this.

9 (Laughter.)

10 CHAIRPERSON YOUNG: Go ahead.

11 BOARD MEMBER PRESS: What are you
12 writing in when you're at the meetings?

13 MR. BLESKEY: Primarily, in my official
14 role, I write into my Board packet. And the main
15 reason why is because when we come out for our
16 Board report or my General Manager's report, that
17 we use that as the basis of what actions we
18 followed.

19 I would be more than happy to answer any
20 questions you would have that may be of a nature
21 of the information you're looking for from those
22 documents. But a lot of that is going to be
23 reflected here and you may be able to perfect
24 those questions as you read some of the documents
25 we're going to give you.

1 CHAIRPERSON YOUNG: Okay, let's do this
2 so we can move this along. Why don't we just have
3 Michael take the documents that are here; we'll
4 kind of reserve this issue for later to be
5 determined with respect to whether we want to do
6 anything about your personal journal or not.

7 MR. BLESKEY: Yes, sir.

8 CHAIRPERSON YOUNG: So why don't you go
9 ahead and take the box; go through it with respect
10 to looking for the compliance/noncompliance
11 issues. And then Post-Its or tags on those pages
12 so we can talk about it later.

13 MR. THOMAS: Okay.

14 CHAIRPERSON YOUNG: All right, Mr.
15 Bleskey.

16 MR. BLESKEY: Thank you, Mr. Chair.

17 CHAIRPERSON YOUNG: All right. Let's
18 see where we're at.

19 (Pause.)

20 CHAIRPERSON YOUNG: Okay, let's figure
21 out where we had left off.

22 MS. OKUN: Well, we still have questions
23 for Mr. Buel, the prosecution team does.

24 MS. SCHAFFNER: Right.

25 CHAIRPERSON YOUNG: Okay. That's right.

1 MS. OKUN: We also were discussing
2 whether there were any documents that were in our
3 files that weren't on our list.

4 CHAIRPERSON YOUNG: Correct.

5 MS. OKUN: And I have a response to
6 that. There was also something that we wanted to
7 correct in the record.

8 Mr. Chair, you made a statement that
9 well-run plants don't spill. And I think that
10 statement is a little too absolutist. And we
11 wanted to provide some additional information to
12 the Board on that just for purposes of having a
13 clear and accurate record. So Regional Board
14 Staff can provide some brief testimony on what
15 happens at well-run plants in terms of spills and
16 cleanups.

17 CHAIRPERSON YOUNG: Okay. You can do
18 that. But it will be on your time. But you have
19 plenty of it, so it's not going to matter.

20 Do you want to proceed with Mr. Buel, or
21 do you want to just address those comments about
22 spills? What would you like to do?

23 MS. OKUN: Why don't we go to Mr. Buel.
24 I only have two questions.

25 CHAIRPERSON YOUNG: Okay, go ahead. Let

1 me figure out something here. Now I don't have
2 Michael so I'm really at a loss. I don't want
3 this to beep, but I do want the clock to go up.
4 That's how I want to use it, Roger, instead of it
5 going down because it's going to facilitate my --

6 MR. BRIGGS: You want it to go up
7 instead of down?

8 CHAIRPERSON YOUNG: Yeah, I want it to
9 go up, I want it to count up, but I don't want the
10 beep going.

11 BOARD MEMBER HAYASHI: Mr. Buel, is
12 there any significance to today's date?

13 MR. BUEL: Today is my birthday.

14 BOARD MEMBER HAYASHI: Happy birthday.

15 MR. BUEL: Thank you, sir.

16 (Applause.)

17 MS. SCHAFFNER: So sorry you have to be
18 here.

19 MR. BUEL: It's been interesting.

20 CHAIRPERSON YOUNG: Great, we got it
21 figured out. Okay, Ms. Okun, go ahead. Thank
22 you, Mr. Briggs.

23 Whereupon,

24 BRUCE BUEL

25 was recalled as a witness herein, and having been

1 previously duly sworn, was examined and testified
2 further as follows:

3 FURTHER CROSS-EXAMINATION

4 MS. OKUN: Thank, Mr. Buel. I wish I
5 had a few more exciting questions for you on your
6 birthday, but the only thing I wanted to ask you
7 was what were the purchase dates of the Broderson
8 and Tri-W properties?

9 MR. BUEL: What I'm going to give you is
10 the escrow, close of escrow. The Tri-W property
11 closed on March 12, 2003. The Broderson site
12 escrow closed on November 26, 2002.

13 MS. OKUN: You said the Tri-W site
14 closed on 3/12/03?

15 MR. BUEL: I did.

16 MS. OKUN: And when was the escrow
17 opened?

18 MR. BUEL: That was opened in May of
19 2001.

20 MS. OKUN: And when was the Broderson
21 site opened?

22 MR. BUEL: Also May 2001.

23 MS. OKUN: Regarding Tri-W, when did the
24 seller accept your offer of purchase?

25 MR. BUEL: May 2001.

1 MS. OKUN: Okay, thank you.

2 MR. BUEL: Um-hum.

3 CHAIRPERSON YOUNG: Any other questions
4 for Mr. Buel?

5 MS. OKUN: No.

6 CHAIRPERSON YOUNG: Mr. Onstot? No. I
7 do have a couple questions while you're up here,
8 Mr. Buel.

9 The three facilities, three or four
10 facilities that staff has alleged have been
11 discharging in violation of the basin plan
12 prohibition, have those facilities been
13 discharging wastewater during this period of time?

14 MR. BUEL: Yes. The Bay Ridge Estates
15 is a community septic system that provides service
16 to about 140 homes. That's been discharging
17 continuously during this time period.

18 South Bay Fire Department has a septic
19 system for its own internal use. That has been
20 discharging consistently.

21 And Vista del Oro is a community septic
22 system for 60-some-odd households in its
23 neighborhood. And it's been discharging
24 continuously.

25 CHAIRPERSON YOUNG: Okay, thank you.

1 Yes.

2 VICE CHAIRPERSON JEFFRIES: Mr. Buel,
3 when those two sites were purchased was there an
4 official appraisal done on each one of those
5 sites?

6 MR. BUEL: Yes. We did appraisals in
7 late 2000 as part of our due diligence in
8 preparing the project report in anticipation of
9 the assessment vote.

10 VICE CHAIRPERSON JEFFRIES: And were
11 those properties purchased at the appraised value?
12 above? or below?

13 MR. BUEL: No. At. In both cases we
14 were able to negotiate a sales agreement at the
15 appraised value.

16 VICE CHAIRPERSON JEFFRIES: And that was
17 done by a bona fide appraiser?

18 MR. BUEL: Yes. District counsel was
19 adamant that we not only have a certified
20 appraiser, but one that could testify in court in
21 regard to the values.

22 VICE CHAIRPERSON JEFFRIES: Thank you.

23 CHAIRPERSON YOUNG: Okay. Mr. Seitz,
24 did you have some questions?

25 MR. SEITZ: Just one question.

1 REDIRECT EXAMINATION

2 MR. SEITZ: Mr. Buel, did the District
3 ever submit a plan to the Regional Water Quality
4 Control Board that would have provided sewer
5 service to Bay Ridge, Vista del Oro and the South
6 Bay Fire Department?

7 MR. BUEL: We submitted two plans.
8 First in January 2000, that was the Oswald project
9 report. And then again in March of 2001, and that
10 was the Montgomery, Watson, Harza project report.

11 Both projects, both plans would have
12 serviced each of the three locations referenced.

13 CHAIRPERSON YOUNG: Okay. Mr.
14 Shallcross.

15 BOARD MEMBER SHALLCROSS: On the
16 appraised value, did that take into consideration
17 that -- and I'm assuming, I looked on the map; it
18 looked to me like both properties were within the
19 prohibition zone, is that right?

20 MR. BUEL: Well, partially correct.
21 Tri-W is entirely within the prohibition zone.
22 And a portion of Broderson was within the
23 prohibition zone.

24 Understand that Broderson, the 81 acres
25 is comprised of a 40-acre parcel and a 41-acre

1 parcel. And when we did the appraisal, the
2 appraiser's opinion was that because they were in
3 common ownership that the differential for buying
4 40 versus 80 was nominal. And he recommended we
5 buy the entire 80.

6 But 40 of the 81 acres is literally
7 outside of the prohibition zone.

8 BOARD MEMBER SHALLCROSS: So the fact
9 that the properties were within the prohibition
10 zone was taken into account in the appraisal?

11 MR. BUEL: Yes. The appraiser used the
12 standard accepted principals in appraisal; looked
13 at the zoning, the general plan designation and
14 the potential to be served; and the potential for
15 the lots, the usage of the two lots at Broderson
16 in particular, to be shifted between the lots.

17 BOARD MEMBER SHALLCROSS: Okay, thanks.

18 CHAIRPERSON YOUNG: Okay. Mr. Seitz.

19 MR. SEITZ: Yes.

20 REDIRECT EXAMINATION - resumed

21 MR. SEITZ: What type of funds were used
22 to purchase Broderson?

23 MR. BUEL: Those were assessment bonds.
24 And that's the reason that there was such a long
25 period in escrow is that we were unable to issue

1 the bonds until October of 2002.

2 MR. SEITZ: Was any of those properties,
3 those two properties, purchased with grant funds?

4 MR. BUEL: Yes, thank you, counselor.
5 Broderson was partially purchased with grant
6 funds. The District was successful in getting a
7 \$2 million proposition 50 grant. That was used to
8 offset 2 million of the 4.65 million cost of the
9 Broderson property.

10 CHAIRPERSON YOUNG: Any additional
11 questions? Ms. Okun?

12 MS. OKUN: No, I don't have any
13 questions.

14 CHAIRPERSON YOUNG: Okay. Any Board
15 Members for Mr. Buel? Okay.

16 MS. SCHAFFNER: I have one question, Mr.
17 Chairman.

18 CHAIRPERSON YOUNG: Go ahead.

19 MS. SCHAFFNER: I'm trying to recall
20 your testimony in December. I think it was the
21 2nd, perhaps. And this relates to this testimony
22 of this afternoon by Ms. Schicker. Schicker,
23 sorry. I keep messing up those pronunciations.

24 Anyway, were you present during the EIR
25 when the EIR was conducted for the Tri-W site?

1 That was under your watch, correct?

2 MR. BUEL: It was. But I want to make
3 sure everybody understands the environmental
4 impact report covered the entire system, not just
5 Tri-W.

6 MS. SCHAFFNER: Understood. At the time
7 the EIR evaluated many of the issues with which
8 she has taken issue over time, as an activist and
9 a panel member, as well as a Board Member, and she
10 recited some of those today.

11 Is it your opinion that those concerns
12 about the appropriateness of this site, did you
13 share those concerns when the EIR was adopted by
14 the CSD?

15 MR. BUEL: Well, yes. Many of those
16 concerns, and if I could take the liberty of just
17 walking through them, there is always the
18 potential of a spill. That is always a concern.

19 There's a tradeoff between when you
20 build the project and when you stop receiving the
21 septic effluent from the tanks versus the risk of
22 a spill. So that's always going to be a tradeoff.

23 Clearly, the closer you are to the Bay
24 the more risk there is to upset to the Bay. That
25 was evaluated. That was discussed in the

1 environmental impact report.

2 Salt water intrusion was known, and one
3 of the purported benefits of the project was to
4 cleanse the upper basin so that that basin could
5 be used more heavily. Currently, we're using very
6 little water from the upper basin. We're drawing
7 the majority of our supply from the lower basin.
8 And that's where we're experiencing the salt water
9 intrusion.

10 So the project did not solve salt water
11 intrusion, but it started in the right direction
12 towards solving salt water intrusion.

13 MS. SCHAFFNER: At the Tri-W site?

14 MR. BUEL: Well, again, if you can shut
15 off the septic tanks and remove the nitrate
16 contamination from the septic effluent, and if you
17 can recharge -- and specifically at Broderson
18 where our hydrogeologists believe you get the best
19 opportunity for recharge, not only in the upper
20 basin, but some leakage into the lower basin,
21 you're going to get the most benefit from your
22 cleanup effort. And the most benefit in terms of
23 reversing or at least slowing salt water
24 intrusion.

25 MS. SCHAFFNER: Okay. I think I

1 remember you talking about that. Thank you.

2 CHAIRPERSON YOUNG: Mr. Jeffries.

3 VICE CHAIRPERSON JEFFRIES: Mr. Buel, I
4 didn't realize that you had received grant funds
5 to purchase some of the property.

6 MR. BUEL: Um-hum.

7 VICE CHAIRPERSON JEFFRIES: Was there
8 any strings attached to that? If you didn't
9 perform on the property did you have to return the
10 grant money?

11 MR. BUEL: I think that is a legitimate
12 question. I cannot answer that. I know that when
13 the Board accepted the grant, the Board adopted a
14 resolution that specified the conditions that the
15 state had imposed. And I'd have to go back and
16 review that resolution.

17 But I believe there is a reversion
18 clause, and I believe that if the property is
19 sold, that the state will at least want to review
20 that issue.

21 VICE CHAIRPERSON JEFFRIES: And that's
22 just on the Broderson site, only?

23 MR. BUEL: Yes, sir. We used the --

24 VICE CHAIRPERSON JEFFRIES: Was there --

25 MR. BUEL: -- assessment proceeds, the

1 bonds, to pay for Tri-W.

2 VICE CHAIRPERSON JEFFRIES: Only?

3 MR. BUEL: Only.

4 VICE CHAIRPERSON JEFFRIES: Okay, thank
5 you.

6 CHAIRPERSON YOUNG: Okay, any other
7 questions for Mr. Buel? All right, why don't we
8 move on. Thank you, Mr. Buel. Don't go, though.

9 MR. BUEL: Okay.

10 CHAIRPERSON YOUNG: Ms. Okun.

11 MS. OKUN: I'd actually like to call Ms.
12 Sorrel Marks as a rebuttal witness to some of the
13 testimony that Mr. Buel just gave.

14 CHAIRPERSON YOUNG: Go ahead.

15 Whereupon,

16 SORREL MARKS

17 was called as a witness herein, and having been
18 previously duly sworn, was examined and testified
19 as follows:

20 DIRECT EXAMINATION

21 MS. OKUN: Ms. Marks, have you been
22 sworn?

23 MS. MARKS: Yes, I have.

24 MS. OKUN: Could you state your name and
25 position for the record, please.

1 MS. MARKS: Sorrel Marks, Sanitary
2 Engineering Associate for the Water Quality
3 Control Board.

4 MS. OKUN: How long have you been
5 working on the Los Osos project?

6 MS. MARKS: About 16 years.

7 MS. OKUN: Mr. Buel just referred to a
8 January 2000 Oswald project report. Are you
9 familiar with that report?

10 MS. MARKS: Yes, I am.

11 MS. OKUN: What was it a report of?

12 MS. MARKS: It was an early proposal for
13 a community sewer system in Los Osos.

14 MS. OKUN: Was that a pond system?

15 MS. MARKS: Yes.

16 MS. OKUN: Why wasn't that pond system
17 built?

18 MS. MARKS: The Community Services
19 District modified their proposal, abandoned that
20 project.

21 MS. OKUN: So it wasn't rejected because
22 the Regional Board rejected the project?

23 MS. MARKS: The Regional Board didn't
24 reject the project.

25 MS. OKUN: And Mr. Buel also talked

1 about a March 2001 Montgomery, Watson Harza
2 project report. Are you familiar with that
3 report?

4 MS. MARKS: Yes.

5 MS. OKUN: What was the subject of that
6 report?

7 MS. MARKS: That was the revised
8 community sewer system.

9 MS. OKUN: Is that the Tri-W project?

10 MS. MARKS: Yes.

11 MS. OKUN: Thank you.

12 CHAIRPERSON YOUNG: Okay, hold on one
13 second. Go ahead.

14 CROSS-EXAMINATION

15 MR. SEITZ: The Oswald report would
16 have, the Oswald 2000 report would have sewerred
17 Vista del Oro, Bay Ridge Estates and the fire
18 department, is that correct?

19 MS. MARKS: Correct, as I recall.

20 MR. SEITZ: Secondly, did staff bring
21 that report to the Regional Water Quality Control
22 Board?

23 MS. MARKS: Regional Board Staff?

24 MR. SEITZ: Yes. This Board, that
25 report, that project plan.

1 MS. MARKS: No.

2 MR. SEITZ: Why not?

3 MS. MARKS: Because the Community
4 Services District revised the proposal.

5 MR. SEITZ: And why did they revise the
6 proposal?

7 MS. MARKS: I can offer an opinion on
8 that, but it really --

9 MR. SEITZ: Wasn't the Regional Water
10 Quality Control Board Staff critical of that
11 proposal?

12 MS. MARKS: Yes.

13 MR. SEITZ: And the criticism, if I
14 recall this correctly, of that proposal was
15 because it sewerred these three projects and only
16 sewerred those dischargers that were in the low-
17 lying area; that is, where the groundwater basin
18 was at its highest level to the residential uses.
19 And the Regional Water Quality Control Board Staff
20 demanded that the District sewer the entire
21 prohibition zone?

22 MS. MARKS: I wouldn't say that's an
23 entirely accurate portrayal. Certainly the
24 partial sewerred of the prohibition zone was one
25 of a number of questions raised in our response to

1 that particular proposal. Questions for the CSD
2 to respond how they were going to address the rest
3 of the community.

4 MR. SEITZ: Thank you.

5 REDIRECT EXAMINATION

6 MS. OKUN: Did the Regional Board Staff
7 have any other problems with that ponding
8 proposal?

9 MS. MARKS: Yes. There were several
10 pages worth of comments and questions regarding
11 that particular proposal.

12 MS. OKUN: And just so the record's
13 clear that wasn't a proposal just to sewer these
14 three facilities?

15 MS. MARKS: No.

16 MS. OKUN: Thank you.

17 CHAIRPERSON YOUNG: Any Board questions
18 for Ms. Marks? Okay. Any follow-up questions,
19 Mr. Seitz? Okay. Thank you.

20 Ms. Okun.

21 MS. OKUN: Our last witness is Matt
22 Thompson to talk about the issue of how a well-run
23 plant runs.

24 CHAIRPERSON YOUNG: Okay.

25 MR. BRIGGS: Matt or me?

1 MS. OKUN: I'm sorry, Roger Briggs.

2 CHAIRPERSON YOUNG: Go ahead.

3 Whereupon,

4 ROGER BRIGGS

5 was recalled as a witness herein, and having been
6 previously duly sworn, was examined and testified
7 further as follows:

8 DIRECT EXAMINATION

9 MS. OKUN: Do well-run plants ever
10 spill?

11 MR. BRIGGS: Yes.

12 MS. OKUN: And could you explain to the
13 Board the percentage of the total volume of
14 treated water that tends to spill, either by
15 giving examples, or a general description of how
16 plants run and what causes spills?

17 MR. BRIGGS: Well, I sure don't have a
18 percentage in my head other than it's, in terms of
19 spill volume compared to volumes of water that are
20 treated in our Region, successfully and that meet
21 waste discharge requirements, the spill volume is
22 infinitesimally small.

23 An example would be the City of San Luis
24 Obispo recently had a 20,000-gallon spill, I
25 believe. And I think a 10,000-gallon spill.

1 Which is not good. But they treat on the order
2 of, I think it's 4 million gallons a day, 3.5
3 million gallons a day, depending on the weather.
4 And that's every day throughout the year.

5 So, those are hundreds of millions of
6 gallons that are treated to essentially be
7 drinking water quality, compared to that
8 infinitesimally small volume of spill.

9 Now, we have some treatment plants that
10 have an even better record than that in terms of
11 essentially having no spills. And, of course,
12 they're treating their water, and so the
13 percentage is infinite compared to the spills, if
14 they don't have any spills.

15 MS. OKUN: Do all spills reach surface
16 water?

17 MR. BRIGGS: No. Many of the spills, as
18 the Chair was pointing out, are cleaned up
19 essentially immediately. Many, and in fact
20 probably the vast majority of spills, do not reach
21 surface waters.

22 MS. OKUN: Are there other treatment
23 plants in the Region that are as close or closer
24 to the coast than the Tri-W location is?

25 MR. BRIGGS: There are many. Many,

1 many.

2 MS. OKUN: Thank you.

3 CHAIRPERSON YOUNG: Okay. Mr. Seitz.

4 BOARD MEMBER PRESS: Put the paper down.

5 UNIDENTIFIED SPEAKER: -- keeps moving

6 the paper up and down all the time.

7 CHAIRPERSON YOUNG: Who?

8 UNIDENTIFIED SPEAKER: Please ask him to

9 remove it, or remove himself.

10 BOARD MEMBER SHALLCROSS: It's very

11 distracting.

12 CHAIRPERSON YOUNG: Okay, please keep

13 that down, Mr. Racano. I would appreciate that.

14 Okay. Mr. Seitz, did you have any

15 follow-up questions?

16 MR. SEITZ: No.

17 CHAIRPERSON YOUNG: Or Mr. Onstot, for

18 Mr. Briggs? Okay.

19 All right, does the Board have any

20 questions for Mr. Briggs on this issue? No?

21 Okay.

22 Ms. Okun, is that your final witness?

23 MS. OKUN: It is.

24 CHAIRPERSON YOUNG: Okay, question for

25 you. I know that you submitted into the record

1 copies of some documents responsive to my request
2 for compliance/noncompliance issues. I know those
3 are in the record. Were you going to address them
4 in any way with oral testimony? Or just --

5 MS. OKUN: No, we weren't planning to.

6 CHAIRPERSON YOUNG: Or just refer to
7 them in your closing or what?

8 MS. OKUN: We'll just refer to them in
9 our closing.

10 CHAIRPERSON YOUNG: Okay.

11 MS. SCHAFFNER: Who is Mr. Polhemus a
12 witness for?

13 CHAIRPERSON YOUNG: Yeah, Mr. Polhemus
14 is a witness, I believe, for the CSD. Because
15 they had specifically follow-up questions for him.

16 Okay, so you have rested your case-in-
17 chief at this point?

18 MS. OKUN: Yes.

19 CHAIRPERSON YOUNG: All right. And we
20 can now go back to the CSD, and do you want Mr.
21 Polhemus? What would you like to do?

22 MR. ONSTOT: Mr. Chair, just two
23 witnesses, as we mentioned previously, Mr. Briggs
24 and Mr. Polhemus. We can start with Mr. Polhemus,
25 it will just be a minute or two.

1 CHAIRPERSON YOUNG: Great. Okay. Is
2 Mr. Polhemus on the phone? He will be. Okay.

3 And while we're doing this, just so
4 everybody knows, Mr. Seitz, you have about eight
5 minutes left. And, Ms. Okun, you have over three
6 hours left.

7 MR. THOMPSON: Darrin?

8 MR. POLHEMUS: I'm here. Can you hear
9 me?

10 CHAIRPERSON YOUNG: We can hear you,
11 Darrin. Why don't you go ahead and identify
12 yourself now that you've come onto the
13 speakerphone. And then I'm going to turn this
14 over to Mr. Onstot or Mr. Seitz for their
15 examination of you.

16 MR. POLHEMUS: I'm Darrin Polhemus,
17 Assistant Division Chief of the Division of
18 Financial Assistance, and I guess I have been
19 sworn in previously.

20 CHAIRPERSON YOUNG: Okay, you have been
21 sworn in previously. You're still under oath.

22 MR. POLHEMUS: Okay.

23 CHAIRPERSON YOUNG: Okay. Mr. Seitz.
24 Whereupon,

25 DARRIN POLHEMUS

1 was recalled as a witness herein, and having been
2 previously duly sworn, was examined and testified
3 further as follows:

4 MR. ONSTOT: I'll take Mr. Seitz' place.

5 CHAIRPERSON YOUNG: Okay.

6 DIRECT EXAMINATION

7 MR. ONSTOT: Mr. Polhemus, this is Steve
8 Onstot. Can you hear me okay?

9 MR. POLHEMUS: Yes, I can. Can you hear
10 me?

11 MR. ONSTOT: I can, thank you very much.
12 Are you in your Sacramento Office now?

13 MR. POLHEMUS: Yes, I am.

14 MR. ONSTOT: Anybody else with you?

15 MR. POLHEMUS: Ms. Anne Hartridge of our
16 Office of Chief Counsel of the State Board and my
17 attorney in regards to state revolving plan --

18 MR. ONSTOT: And have you had any
19 discussions with anybody other than the attorney
20 who's sitting next to you now, and Ms. Okun, in
21 the last three hours?

22 MR. POLHEMUS: No, I haven't -- well,
23 not in reference to Los Osos.

24 MR. ONSTOT: But --

25 MR. POLHEMUS: I've been performing my

1 normal duties as Assistant Division Chief during
2 the day.

3 MR. ONSTOT: Okay, but with regards to
4 today you haven't discussed the Los Osos matters
5 with anybody other than counsel?

6 MR. POLHEMUS: Correct.

7 MR. ONSTOT: Mr. Polhemus, do you recall
8 back in the spring, basically when we first met,
9 you and I?

10 MR. POLHEMUS: No, I don't.

11 MR. ONSTOT: Well, do you recall that we
12 had a number of phone calls, email exchanges and
13 letters?

14 MR. POLHEMUS: I do recall a series
15 (inaudible).

16 MR. ONSTOT: Okay. And do you recall
17 the -- let's start with phone conversations. Do
18 you recall any phone conversations you and I had?

19 MR. POLHEMUS: Be more specific if
20 you're asking me, I mean I do recall I spoke with
21 you on the phone.

22 MR. ONSTOT: Okay, and do you know the
23 general substance matter of those conversations?

24 MR. POLHEMUS: They were all regarding
25 Los Osos.

1 MR. ONSTOT: And did I express any
2 concerns that I had on behalf of my client, which
3 was CASE at the time, regarding the state
4 revolving fund?

5 MR. POLHEMUS: You did. I remember an
6 occasion you tried to call our attention to what
7 you believed were discrepancies, or deficiencies
8 on the project on regard to your client, yes. And
9 I believe we also have a written communication to
10 that effect.

11 MR. ONSTOT: And is it your recollection
12 that basically I put the state on notice with
13 regards to the riskiness of the SRF fund in the
14 event that the September 22, 2005 election went a
15 certain way?

16 MR. POLHEMUS: I do believe you made
17 that contention, yes.

18 MR. ONSTOT: Um-hum. And that was prior
19 to September 27, 2005 election, is that correct?

20 MR. POLHEMUS: It was prior to that.

21 MR. ONSTOT: I think you mentioned
22 earlier that the state made one disbursement from
23 the SRF loan sometime in 2005, do you recall that?

24 MR. POLHEMUS: Yes.

25 MR. ONSTOT: When did that occur?

1 MR. POLHEMUS: It occurred approximately
2 the beginning of September of 2005.

3 MR. ONSTOT: And prior to September 2005
4 is when you and I had at least some discussions as
5 to at least CASE's view that the state should not
6 disburse any of that SRF money, do you recall
7 that?

8 MR. POLHEMUS: I do, being voiced along
9 that same line.

10 MR. ONSTOT: Okay. What consideration
11 did you give with CASE's concerns?

12 Let me strike that and I'll say it a
13 different way. Given CASE's concerns why did you
14 go ahead anyway and make the first disbursement of
15 about \$6 million of the SRF loan?

16 MR. POLHEMUS: We had legitimate
17 (inaudible) authorized District to introduce that
18 contract, so I was fulfilling an obligation of
19 that contract under the statutes of California,
20 the policies of the SRF and policies of the State
21 Water Board.

22 MR. ONSTOT: So it was your view that
23 you were compelled, despite being advised of the
24 risky nature of that disbursement, that you were
25 compelled by law and Board policy to issue that \$6

1 million to start construction, is that your
2 testimony?

3 MR. POLHEMUS: Well, your (inaudible)
4 required speculation on a possible (inaudible)
5 outcome of which no one could have known. And we
6 took that under consideration but proceeded
7 through to follow our policies and state statute.

8 MR. ONSTOT: And what statute would that
9 be that compelled you to issue that amount of
10 money at that time with the election pending?

11 MR. POLHEMUS: There's no specific
12 statute citing that decision. There is statutes
13 regarding the operation of the SRF program.

14 MR. ONSTOT: Okay. Then what statute
15 regarding the SRF program compelled you to make
16 that first disbursement at that time?

17 MR. POLHEMUS: (inaudible) had with the
18 District obligated us to make that disbursement.

19 MR. ONSTOT: I'm sorry, did you say the
20 contract with the District obligated you to make
21 that payment at that time?

22 MR. POLHEMUS: (inaudible).

23 MR. ONSTOT: There was a second
24 disbursement requested by the District as well.
25 Do you recall that?

1 MR. POLHEMUS: Please repeat the
2 question.

3 MR. ONSTOT: There was a second request
4 for a disbursement from the SRF fund by the
5 District. Do you recall that?

6 MR. POLHEMUS: Yes, I do.

7 MR. ONSTOT: And the state did not make
8 that disbursement, did it?

9 MR. POLHEMUS: Correct. We withheld
10 that.

11 MR. ONSTOT: And is it your view -- well,
12 strike that.

13 When the state chose not to make that
14 disbursement it was operating under the same
15 contract that you just testified to that the state
16 was obligated to make the first disbursement at
17 that particular time, right?

18 MR. POLHEMUS: Right.

19 MR. ONSTOT: Thank you. Nothing
20 further.

21 CHAIRPERSON YOUNG: Okay. Ms. Okun.

22 CROSS-EXAMINATION

23 MS. OKUN: Mr. Polhemus, were you
24 listening earlier when Lisa Schicker testified
25 that you told her before the election that the

1 District had until December 20th to amend the loan
2 for a new project?

3 MR. POLHEMUS: Yes.

4 MS. OKUN: Do you agree with her
5 testimony?

6 MR. POLHEMUS: No. I do not recall such
7 a conversation or giving such advice.

8 MS. OKUN: Do you recall a letter that
9 you signed dated December 23, 2005, to the
10 District?

11 MR. POLHEMUS: Yes, I do, --

12 MS. OKUN: I'm sorry, --

13 MR. POLHEMUS: -- I have a copy before
14 me.

15 MS. OKUN: -- September 23, 2005.

16 MR. POLHEMUS: Yes.

17 MS. OKUN: Could you look at question 4
18 which says will the LOCSD be able to use the
19 current state revolving fund commitment to build a
20 different project. And could you read the
21 response in that letter?

22 MR. POLHEMUS: Yes. My response was as
23 follows: No. As discussed in more detail in our
24 letter of June 22, 2005, the SRF loan commitment
25 is for the current project only. If the current

1 project is stopped and a different project
2 proposed, the SRF commitment would be withdrawn
3 and the loan agreement terminated. The Los Osos
4 Community Services District would have to repay
5 all the funds disbursed to date on the current
6 project."

7 MS. OKUN: Did you ever tell Ms.
8 Schicker anything that was contrary to that
9 statement after the January 2005 Board Meeting
10 where the State Board approved the loan
11 commitment?

12 MR. POLHEMUS: Not that I can recall,
13 no.

14 MS. OKUN: Regarding the prop 13 grant
15 for Broderson, actually I think the testimony was
16 that it was a prop 50 grant. And I'm not sure
17 whether it was prop 13 or prop 50. Could you
18 clarify that?

19 MR. POLHEMUS: It's a prop 13.

20 MS. OKUN: Were there any strings
21 attached to that grant that would kick in if the
22 District sold that property?

23 MR. POLHEMUS: We're looking this up, so
24 I'm not prepared to answer at the moment.

25 MS. OKUN: Would that be addressed by

1 looking at the terms of the grant?

2 MR. POLHEMUS: Yes.

3 MS. OKUN: Thank you, I have nothing
4 further.

5 CHAIRPERSON YOUNG: Mr. Jeffries, go
6 ahead.

7 VICE CHAIRPERSON JEFFRIES: Yes. There
8 was a question by the CSD attorney that you made
9 one disbursement on the loan, but the second one
10 was denied, is that correct?

11 MR. POLHEMUS: That's correct.

12 VICE CHAIRPERSON JEFFRIES: And why was
13 the second one denied? And what was the date of
14 denial?

15 MR. POLHEMUS: The District suspended
16 work with their construction contractors, and
17 under the clause of the contract if I fear or
18 believe that the District may suspend said
19 contract, I'm able to withhold payment at that
20 time, and so I initiated that clause of the
21 contract.

22 VICE CHAIRPERSON JEFFRIES: What was the
23 date of that denial? Was there a letter sent out?

24 MR. POLHEMUS: Yes. In one second I
25 will be able to tell you. It was in October,

1 October 18th, addressed to Mr. Dan Bleskey,
2 Interim General Manager, notice of withholding of
3 loan payment.

4 VICE CHAIRPERSON JEFFRIES: Thank you.

5 MR. ONSTOT: Mr. Chair, if I can have a
6 couple of clarification questions?

7 CHAIRPERSON YOUNG: Go ahead.

8 REDIRECT EXAMINATION

9 MR. ONSTOT: Can you hear me, Darrin?

10 MR. POLHEMUS: I can.

11 MR. ONSTOT: Okay. This is Steve
12 Onstot, again. Obviously you have your file in
13 front of you. As a follow-up to Mr. Jeffries'
14 question, when was the request made by the CSD for
15 the second disbursement?

16 MR. POLHEMUS: I'd have to scan for the
17 date. I do recall off the top of my head that it
18 came in in late September. It was in the process
19 of going through our administrative processing
20 during the time of the election, and during the
21 time that the District then issued a suspension of
22 the contractors. And shortly after that I
23 (inaudible). Those are the general timeframes. I
24 can try to find the exact timeframe if you'd like
25 to wait a second.

1 MR. ONSTOT: No, that's okay. My next
2 question, and I think my last one, is you
3 mentioned the requirements of the contract between
4 the District and the State for the SRF money.

5 That contract called for the State to
6 make disbursements within a certain period of time
7 after requests are made, is that correct?

8 MR. POLHEMUS: Yes, it does.

9 MR. ONSTOT: And what is that time
10 period?

11 MR. POLHEMUS: Well, actually, hang on a
12 second, my legal counsel is questioning whether it
13 does or not. I believe that is in section 2.52;
14 however, those are considering the normal
15 processing and assuming that the District is
16 meeting its obligations towards the contract, as
17 well.

18 MR. ONSTOT: No, I'm sorry, Mr.
19 Polhemus, that wasn't my question. Under the
20 contract, the same one that you claimed that the
21 state was obligated to make the first disbursement
22 under, what does that contract say with regards to
23 the state's obligation to make a disbursement
24 payment within certain days, how many days of the
25 request being made?

1 MR. POLHEMUS: Under section 2.5 of the
2 contract it says that upon execution and delivery
3 of this agreement the agency (inaudible)
4 disbursement of any incurred (inaudible) as to the
5 final exhibit A.

6 It then goes on to say that additional
7 project funds will be promptly disbursed to the
8 agency upon receipt of disbursement request form
9 260.

10 MR. ONSTOT: Is that your full answer?

11 MR. POLHEMUS: Yes.

12 MR. ONSTOT: So it's your view that no
13 specified -- no dates are specified in the
14 contract by which you have to make the
15 disbursements after request is made?

16 MR. POLHEMUS: We make the -- after the
17 first disbursement we made the additional project
18 under the disbursement process.

19 MR. ONSTOT: Thank you, nothing further.

20 CHAIRPERSON YOUNG: Okay. Any further
21 questions for Mr. Polhemus? Okay, Ms. Okun says
22 no. Any Board Members want to question him?
23 Okay. Darrin, thank you very much.

24 MR. POLHEMUS: You're welcome.

25 CHAIRPERSON YOUNG: Oh, Mr. Seitz.

1 MR. SEITZ: This isn't a question for
2 Darrin.

3 CHAIRPERSON YOUNG: Okay.

4 MR. SEITZ: Well, maybe it is, but I
5 think Darrin should hang on. Mr. Polhemus
6 testified to a number of documents. I just want
7 to make sure those documents are in the
8 administrative record. I know he's testifying
9 from Sacramento, but I do believe that if we're
10 going to have a complete administrative record of
11 all the documents that have been testified to
12 here, that somehow we accommodate those documents
13 being in the administrative record.

14 MS. OKUN: Both the September 23, '05
15 letter and the loan agreement are in the record.
16 They're on our list. I don't think he referred to
17 any other documents.

18 MR. SEITZ: Could I just suggest that
19 Mr. Polhemus -- Polhemus, I'm sorry, it's almost
20 like my name -- that he said he was testifying
21 from a file.

22 Darrin, how large is that file?

23 MR. POLHEMUS: Well, the Los Osos file
24 runs into thousands of pages.

25 MR. SEITZ: No, but the file that you

1 have in front of you right -- is that the
2 thousands of pages?

3 MR. POLHEMUS: Well, it's our
4 correspondence file, so it's certainly not a
5 thousand, but probably on the order of several
6 hundred.

7 MR. SEITZ: Okay, I think we don't need
8 it. Thank you.

9 CHAIRPERSON YOUNG: Okay, thank you.
10 All right, do we want to have Mr. Polhemus just
11 listen to this on the internet and await a phone
12 call so he's not online? Is that how we should
13 proceed? Mr. Onstot?

14 MR. ONSTOT: He can go home as far as
15 we're concerned.

16 CHAIRPERSON YOUNG: All right, great.
17 Thank you, Darrin.

18 MR. POLHEMUS: You're welcome.

19 CHAIRPERSON YOUNG: All right. Okay,
20 Mr. Seitz.

21 MR. SEITZ: Before we move forward I'm
22 curious, how much time do we have left?

23 CHAIRPERSON YOUNG: Okay, 71 minutes.

24 MR. SEITZ: Can I just kibitz with
25 my --

1 CHAIRPERSON YOUNG: Sure.

2 (Pause.)

3 MR. SEITZ: Yes, we would want to call
4 Mr. Briggs.

5 CHAIRPERSON YOUNG: Okay, that's your
6 prerogative. Mr. Briggs.

7 MR. BRIGGS: Present.

8 MR. SEITZ: Let me just say this.
9 Before we start my time, I hope, we had this issue
10 about the prosecution team responding to
11 questions. I don't know if you recall how that
12 went the first day?

13 CHAIRPERSON YOUNG: I do.

14 MR. SEITZ: So I really can't say that -
15 - I think Mr. Briggs can testify to all the
16 questions I'm going to answer, but it could be
17 possible that another member of the prosecution
18 team will be responding. I just want to bring it
19 to the Chair's attention.

20 CHAIRPERSON YOUNG: That's fine, I don't
21 have a problem with that.

22 MR. SEITZ: So it may not be important
23 that Mr. Briggs go up to the podium, because I
24 don't want to waste my time --

25 CHAIRPERSON YOUNG: Fine.

1 MR. SEITZ: -- watching people switch.

2 CHAIRPERSON YOUNG: Okay. You got it,
3 go.

4 Whereupon,

5 ROGER BRIGGS

6 was recalled as a witness herein, and having been
7 previously duly sworn, was examined and testified
8 further as follows:

9 MR. ONSTOT: Push the button. We'll
10 start.

11 MR. BRIGGS: Okay, good.

12 DIRECT EXAMINATION

13 MR. ONSTOT: Mr. Briggs, at what point
14 did you first consider drafting an ACL complaint
15 against the CSD?

16 MR. BRIGGS: Probably several years ago.

17 MR. ONSTOT: Can you be more specific?

18 MR. BRIGGS: Well, we've prepared
19 reports for the Board on the status of the Los
20 Osos project on several occasions. There were a
21 couple of reports that specifically focused on
22 potential enforcement actions.

23 And so in developing those reports we
24 considered administrative civil liabilities as one
25 of the options.

1 MR. ONSTOT: And, again, the question
2 was when. Can you at least narrow it down to a
3 year?

4 MR. BRIGGS: Well, we had a July 2004
5 report, and I believe we had one a couple years
6 prior to that. So, maybe we're talking about four
7 years ago.

8 MR. ONSTOT: 2002?

9 MR. BRIGGS: Yeah, and perhaps earlier
10 than that. That's my recollection.

11 MR. ONSTOT: Well, this ACL complaint
12 basically starts the days of violation, clock
13 ticking in 2002, right?

14 MR. BRIGGS: I believe that's correct as
15 far as the first date of missed milestone.

16 MR. ONSTOT: So did you consider an ACL
17 complaint against the CSD prior to that date?

18 MR. BRIGGS: Well, I might have if we
19 prepared, as I said, prepared enforcement action
20 possibilities for the Board specially. I don't
21 recall the earlier dates specifically prior to the
22 July 2004 report.

23 MR. ONSTOT: Okay, so sometime between
24 2000-something and now you or your staff drafted
25 an ACL complaint, is that correct?

1 MR. BRIGGS: That's true.

2 MR. ONSTOT: When did you -- strike
3 that. Did you actually put the pen to paper in
4 drafting the ACL complaint that's at issue here?

5 MR. BRIGGS: Did I actually draft it?

6 MR. ONSTOT: Yes.

7 MR. BRIGGS: No.

8 MR. ONSTOT: Who did?

9 MR. BRIGGS: Sorrel Marks.

10 MR. ONSTOT: At your direction?

11 MR. BRIGGS: Yes.

12 MR. ONSTOT: And when was that?

13 MR. BRIGGS: I believe that was the
14 Monday, might have been Tuesday, that the District
15 noticed the agenda item for terminating the
16 contract, for stopping work on the construction I
17 should say.

18 MR. ONSTOT: So you directed Ms. Marks
19 to prepare the ACL complaint supposedly for your
20 review when the notice of termination, or the
21 Board decided to terminate the work for the sewer
22 project?

23 MR. BRIGGS: Yeah, they indicated by way
24 of their agenda notice that that was apparently
25 their intention.

1 MR. ONSTOT: So was it when you saw the
2 agenda notice that you directed Ms. Marks to
3 prepare the ACL complaint?

4 MR. BRIGGS: When I saw the agenda
5 notice; I believe that's correct.

6 MR. ONSTOT: Do you recall the date?

7 MR. BRIGGS: I think I just gave it.

8 MR. ONSTOT: Well, you said the Monday
9 or Tuesday, but -- if you don't recall that date,
10 that's fine, but you don't remember the date?

11 MR. BRIGGS: Might have been October 1st
12 of 2005, whatever that -- I think it was a Monday.

13 MR. ONSTOT: Okay. And why did you ask
14 Ms. Marks to draft the ACL complaint?

15 MR. BRIGGS: Because we had told the
16 District numerous times that that's what we would
17 do if they decided to delay the project. And it
18 looks like that was what they decided to do. So,
19 we're following through with what we told the
20 District we would do.

21 MR. ONSTOT: And why was an ACL
22 complaint not drafted prior to the September 27,
23 2005 election, even though according to your
24 allegations the CSD was in severe multi-million-
25 dollar civil penalty liability posture?

1 MR. BRIGGS: Right. And that was
2 exactly the kind of discussion we had in that July
3 2005 report to the Board. And we concluded that
4 the District was, as far as we were concerned, the
5 District was proceeding as quickly as they could
6 proceed with the approved project. And we were
7 glad to see that. That was an effort towards
8 complying.

9 And we didn't see at that time that
10 issuing penalties would further that solution.

11 MR. ONSTOT: And during that timeframe I
12 believe you testified either on December 1st or
13 December 2nd, that there was requests made to
14 modify the time schedule order, is that correct?

15 MR. BRIGGS: Correct.

16 MR. ONSTOT: To make it more realistic?

17 MR. BRIGGS: That was part of the reason
18 for request.

19 MR. ONSTOT: And --

20 MR. BRIGGS: Well, I should say, in the
21 eyes of the requestor.

22 MR. ONSTOT: Which was the District,
23 right?

24 MR. BRIGGS: There were other parties
25 who requested it, as well.

1 MR. ONSTOT: Well, the District was one
2 of them, correct?

3 MR. BRIGGS: Right.

4 MR. ONSTOT: And you didn't want to
5 propose to this Board a modified time schedule
6 order that would be more realistic, did you?

7 MR. BRIGGS: That would be more
8 realistic?

9 MR. ONSTOT: Correct.

10 MS. OKUN: That misstates his testimony.

11 MR. ONSTOT: Okay, I'll back up. Mr.
12 Briggs, you just said that the CSD proposed to
13 amend the time schedule order, is that correct?

14 MR. BRIGGS: Right.

15 MR. ONSTOT: And the purpose for that
16 requested amendment was to make it more realistic,
17 correct?

18 MR. BRIGGS: I said the requestor, in
19 the requestor's view, that was one of the reasons.

20 MR. ONSTOT: Okay. And you were against
21 that amendment, or an amendment to the time
22 schedule order, is that true?

23 MR. BRIGGS: Correct.

24 MR. ONSTOT: And the reason that you
25 were against it is because if there was an

1 election that would change the direction of the
2 sewer project you would have ample grounds to
3 recommend the Board assess increased penalties
4 based on a per-day violation, is that correct?

5 MR. BRIGGS: There were a couple reasons
6 for not recommending a change in the time schedule
7 order. One is that there was an ongoing liability
8 under the time schedule order. And I had
9 indicated to the District on numerous occasions
10 that we would recommend enforcement and basically
11 calling in those liabilities if there were delays
12 that were within the control of the District.

13 Another reason is -- that was one
14 reason. Another reason was that, as I said, there
15 was more than one rationale for the requests that
16 we were receiving. One of the reasons was that
17 some folks wanted to go out and evaluate
18 alternatives some more, and take more time to do
19 that.

20 And it was my feeling, and I believe I
21 stated this to the District Board directly at the
22 January 2005 District Board meeting, that that
23 would -- if I were to agree to that, that would
24 seem to me to be a form of encouraging additional
25 alternatives evaluation. And that was definitely

1 not appropriate.

2 MR. ONSTOT: Do you know anybody named
3 Pandora Nash-Karner?

4 MR. BRIGGS: Yes.

5 MR. ONSTOT: Have you had communications
6 with -- strike that. Who is Pandora Nash-Karner?

7 MR. BRIGGS: She's an original District
8 Board Member, I believe.

9 MR. ONSTOT: Have you had discussions
10 with her either in person or correspondence within
11 the last six months --

12 MR. BRIGGS: Yes.

13 MR. ONSTOT: -- regarding enforcement
14 action that you would recommend to this Board with
15 Ms. Nash-Karner?

16 MR. BRIGGS: Yes.

17 MR. ONSTOT: Do you know anybody named
18 Director LeGros, previous Director of the CSD?

19 MR. BRIGGS: Yes.

20 MR. ONSTOT: Did you have any
21 discussions or correspondence with him regarding
22 enforcement action that you would propose to this
23 Board?

24 MR. BRIGGS: Regarding enforcement
25 action I would propose? Yes.

1 MR. ONSTOT: Yes. Did you make any
2 statements to Director LeGros that your
3 recommendation would be to fine the District into
4 bankruptcy?

5 MR. BRIGGS: No.

6 MR. ONSTOT: At any time, in particular
7 July of -- excuse me, July of 2005?

8 MR. BRIGGS: No, not that I recall. I
9 don't --

10 MR. ONSTOT: At any time --

11 MR. BRIGGS: -- think I said that to
12 anybody.

13 MR. ONSTOT: At any time did you make
14 any statements to Pandora Nash-Karner that you
15 were preparing an ACL complaint so that the
16 District would know what they're stepping into if
17 they choose the wrong direction with regards to
18 Tri-W?

19 MR. BRIGGS: Yes, I told perhaps
20 hundreds of people that I was receiving hundreds
21 of emails, phone calls, including from reporters.
22 And I said essentially the same thing to all of
23 them. I wanted the District to know that, in
24 fact, I said in my transmittal letter of the ACL,
25 that we hoped the District would see that they

1 needed to proceed with the approved project, and
2 this would be incentive to do so.

3 MR. ONSTOT: Well, what prompted the
4 drafting of the ACL was basically the voters
5 exercising their rights in an election, is that
6 correct?

7 MR. BRIGGS: No. It was the District's
8 proposed action.

9 MR. ONSTOT: What proposed action?

10 MR. BRIGGS: In their agenda they
11 agendized termination of the project -- pardon me,
12 cessation of work on the construction contracts.

13 MR. ONSTOT: At anytime, Mr. Briggs, did
14 you make the statement to anybody that the reason
15 you wanted to bring this enforcement action at
16 this time, namely after the election, was to
17 pressure the current Board into backing off and
18 building at the Tri-W site?

19 MR. BRIGGS: I think part of the reason
20 for the enforcement action is incentive for the
21 District to proceed to comply with the discharge
22 prohibition. And I think we've been extremely
23 clear that we think the way to do that is with the
24 approved project.

25 MR. ONSTOT: Okay. Now, you have

1 submitted declarations, and in fact, been deposed
2 by one of my partners with regards to your view
3 that the Board is mandating that Tri-W be built.
4 Do you recall that?

5 MR. BRIGGS: We're not mandating that
6 the Tri-W project be built. It was up to the
7 District to decide what project was necessary to
8 solve the water quality problems. And so it's the
9 District's proposed project.

10 MR. ONSTOT: So is it your testimony now
11 that you did not say in a deposition or in a
12 declaration that was submitted to a court in San
13 Luis Obispo that the Water Board was mandating
14 construction of the sewage treatment plant at Tri-
15 W?

16 MR. BRIGGS: I think I just answered
17 that.

18 MR. ONSTOT: Oh, I'm sorry, then I
19 missed it. Can you answer it again, please?

20 MR. BRIGGS: Right. We don't mandate
21 the method of compliance. The time schedule order
22 ordered the District to complete the milestones
23 for the project that it proposed --

24 MR. ONSTOT: No, I understand --

25 MR. BRIGGS: -- as the solution.

1 MR. ONSTOT: I'm sorry, Mr. Briggs, I
2 understand that. My question was is it your
3 testimony here today that you did not say either
4 in a deposition or in a sworn declaration, both
5 that were before the Superior Court in San Luis
6 Obispo, that the Water Board was mandating
7 construction of a sewage treatment plant at Tri-W?

8 MR. BRIGGS: I think my testimony was
9 along the lines of the way I just answered the
10 question twice.

11 MR. ONSTOT: So your answer is no?

12 MR. BRIGGS: I'll stand by the answers
13 that I just gave.

14 MR. ONSTOT: Is it your understanding
15 that Ms. Okun was also deposed and gave a
16 declaration regarding the Water Board's interest
17 in having a sewage treatment plant built at Tri-W?

18 MS. OKUN: Objection, that's hearsay.
19 And the deposition transcript is in the record.

20 MR. BRIGGS: Would it help to refer to
21 the specific statement that you're referencing?

22 CHAIRPERSON YOUNG: I think it would be
23 helpful. Mr. Onstot, let me stop the clock. If
24 you have some specific testimony that you want to
25 examine them on and --

1 MR. ONSTOT: No, Your Honor. Your
2 Honor, I'm not seeking to introduce the deposition
3 testimony or the declaration testimony now. The
4 court records of that case are in.

5 I can ask Mr. Briggs without referencing
6 the deposition transcript what his testimony was,
7 or what Ms. Okun's was. So I'm not referring to
8 anything. If he doesn't know, he can say he
9 doesn't know.

10 CHAIRPERSON YOUNG: Okay. I'm just
11 suggesting it would facilitate things that if you
12 do have testimony that they made outside this
13 hearing that you would like to hold their feet to
14 the fire on, --

15 MR. ONSTOT: I understand that.

16 CHAIRPERSON YOUNG: -- it would be much
17 simpler just to pull it out. And then you can get
18 them to either, you know, agree to it or not.

19 But I'll let you go --

20 MR. ONSTOT: I understand.

21 CHAIRPERSON YOUNG: -- the way you want.
22 I'm just trying to expedite you getting to where I
23 think you want to do with this.

24 I understand. But an objection was
25 raised, and that's why I interjected this. So,

1 all right.

2 MR. ONSTOT: Mr. Briggs, did you review
3 Ms. Okun's deposition testimony?

4 MR. BRIGGS: Her deposition testimony in
5 which instance?

6 MR. ONSTOT: In the District v. Rodawald
7 (phonetic) suit, the one that you were deposed in;
8 the one that you gave a declaration on Tri-W, and
9 the one that Ms. Okun was deposed in, and the one
10 that Ms. Okun gave a declaration in. That
11 lawsuit.

12 Did you review the transcript of Ms.
13 Oklun's (sic) deposition testimony?

14 MR. BRIGGS: It's Okun, and --

15 MR. ONSTOT: I'm sorry.

16 MR. BRIGGS: -- I believe I did.

17 MR. ONSTOT: And did you review the
18 declaration that Ms. Okun submitted in that case?

19 MR. BRIGGS: I believe I did.

20 MR. ONSTOT: And did you, when you
21 reviewed it did you agree with what Ms. Okun said
22 in both of those documents?

23 MR. BRIGGS: As I recall, I did.

24 MR. ONSTOT: Mr. Briggs, I'm going to
25 show you an email that you had sent to Pandora

1 Nash-Karner. It's part of the record but I don't
2 have a document number.

3 If you have it in front of you, it's
4 119.

5 MS. OKUN: He doesn't have that in front
6 of him.

7 MR. ONSTOT: As you look at that, Mr.
8 Briggs, the date of that email is September 28th,
9 the day after the election of 2005, is that
10 correct?

11 MR. BRIGGS: That's what it says here.

12 MR. ONSTOT: And it's a short email.
13 Can you go ahead and read it into the record,
14 please?

15 MR. BRIGGS: We're just wrapping up the
16 October agenda right now, and legally required
17 lead times for hearing may not reasonably allow
18 it. But I've already received and reviewed a
19 draft ACL complaint, so we're rolling. I'm
20 shooting for getting an ACL to the District next
21 week even before the new Board can meet. I want
22 them to understand what they will be stepping into
23 before they vote on the motion to delay.

24 MR. ONSTOT: Now, a few minutes ago you
25 testified that you only instructed Ms. Sorrel to

1 draft that ACL complaint after the agenda item
2 came out for termination of the work regarding the
3 sewer treatment plant. And this email contradicts
4 that testimony, would you agree with that?

5 MR. BRIGGS: I don't know if it does or
6 not because I wasn't sure of the dates, as I said
7 earlier.

8 MR. ONSTOT: Well, --

9 MR. BRIGGS: This is 9/28, if that date
10 is accurate.

11 MR. ONSTOT: Which is the day after the
12 election. And according to that email you had a
13 draft ACL complaint on your desk, is that correct?

14 MR. BRIGGS: According to this it says
15 that we do have a draft ACL.

16 MR. ONSTOT: And do you recall the date
17 that the election was certified and the new Board
18 Members sworn in?

19 MR. BRIGGS: No, I don't.

20 MR. ONSTOT: Would it refresh your
21 recollection if I told you that it was September
22 29th or 30th?

23 MR. BRIGGS: Not necessarily.

24 MR. ONSTOT: Okay. Nothing further.

25 CHAIRPERSON YOUNG: Okay. Hold on.

1 Okay, Ms. Okun, follow-up questions?

2 CROSS-EXAMINATION

3 MS. OKUN: Mr. Onstot asked you a
4 question that the clock started in 2002, and I
5 think you agreed with that. That clock was for
6 the violations of the time schedule order,
7 correct?

8 MR. BRIGGS: That's right.

9 MS. OKUN: When did the clock start for
10 the violations of the basin plan prohibition?

11 MR. BRIGGS: Well, the basin plan
12 prohibition was in 1983 and was effective in 1988.
13 So, the violations, I suppose it would be accurate
14 to say that the clock started ticking on those
15 violations in 1988.

16 MS. OKUN: But as to the District, did
17 the clock start ticking only after the District
18 was formed?

19 MR. BRIGGS: Right, because if it didn't
20 exist then it couldn't have applied. And that was
21 '98 or '99.

22 MS. OKUN: Regardless of the date that
23 the complaint was drafted, had the project
24 continued, the Tri-W project, would you have
25 issued the complaint?

1 MR. BRIGGS: No.

2 MS. OKUN: Prior to the election were
3 you concerned that if either Measure B passed or
4 the recall passed that the District would stop
5 construction of the Tri-W project?

6 MR. BRIGGS: Yes, they had essentially
7 promised that. I say they, being the two sitting
8 Board Members who were not subject to recall, and
9 then the three Board Members who were running to
10 replace the recalled Board Members.

11 MS. OKUN: Did the recalled Board
12 Members also express any concerns to you that if
13 the recall passed the new Board would try to stop
14 the project?

15 MR. BRIGGS: Well, I believe they did.
16 I'm not sure I could give you any instance of
17 that.

18 MS. OKUN: So as soon as the election
19 occurred were you already concerned that, based on
20 what you already knew, the project was going to
21 stop?

22 MR. BRIGGS: Yes.

23 MS. OKUN: Regarding mandating building
24 at Tri-W, who selected the Tri-W site?

25 MR. BRIGGS: The Community Services

1 District.

2 MS. OKUN: And the time schedule order
3 included milestones for completing the project
4 based on the District having selected the Tri-W
5 site, correct?

6 MR. BRIGGS: That's correct.

7 MS. OKUN: At the time that your
8 deposition was taken in July 2005 of this year,
9 was there any other project on the table or any
10 other alternative that could have allowed the
11 District to even come close to not catching up
12 with the time schedule, which was impossible, but
13 in any way achieving any kind of compliance with
14 the time schedule to complete a treatment plant?

15 MR. BRIGGS: No.

16 MS. OKUN: So although the Regional
17 Board never told the District, you must build Tri-
18 W, was there any other way to comply with Regional
19 Board orders other than building Tri-W?

20 MR. BRIGGS: That was the only practical
21 solution that we saw.

22 MS. OKUN: Is that what you testified
23 to?

24 MR. BRIGGS: I believe --

25 MS. OKUN: And if you don't recall just

1 say you don't recall.

2 MR. BRIGGS: Right. I think the main
3 issue I was having is that we didn't say to the
4 District that originally you have to build at Tri-
5 W. Once the District selected the Tri-W site,
6 then that became the only practical solution.

7 MS. OKUN: Thank you, I have nothing
8 further.

9 CHAIRPERSON YOUNG: Any follow-up
10 questions for Mr. Briggs?

11 MR. SEITZ: Just two quick ones.

12 REDIRECT EXAMINATION

13 MR. SEITZ: What event in 2002 are you
14 predicating the District being in default of 00-
15 131? What specific failure?

16 MS. OKUN: I have a copy of the
17 complaint if it would help you to look at that.

18 MR. BRIGGS: Yeah, I think it would
19 help. I think it was design completion, but I'm
20 not sure about that.

21 (Pause.)

22 MR. BRIGGS: I guess I was right. After
23 design completion it was commence construction was
24 the milestone that we had for September 6, 2002.

25 MR. SEITZ: December?

1 MR. BRIGGS: September 6.

2 MR. SEITZ: Mr. Briggs, could the
3 District construct the wastewater treatment
4 project without a waste discharge permit?

5 MR. BRIGGS: Yes.

6 MR. SEITZ: They could construct a
7 project without the District having a waste
8 discharge permit from the Regional Water Quality
9 Control Board?

10 MR. BRIGGS: They would not be able to
11 discharge from the facility without the -- well, I
12 mean they could, but they would be in violation if
13 they discharged with requirements.

14 MR. SEITZ: And could the District
15 receive an SRF loan without a waste discharge
16 permit?

17 MR. BRIGGS: I don't know.

18 MR. SEITZ: Thank you.

19 MR. ONSTOT: Nothing further.

20 CHAIRPERSON YOUNG: Okay.

21 RE-CROSS-EXAMINATION

22 MS. OKUN: Mr. Briggs, do you know when
23 the District applied for the waste discharge
24 requirements?

25 MR. BRIGGS: No.

1 MS. OKUN: I have nothing further.

2 CHAIRPERSON YOUNG: That was it, okay.
3 Any other witnesses? Let's see, Ms. Okun, you've
4 already rested your presentation of evidence.

5 Mr. Onstot, Mr. Seitz, Mr. McClendon?

6 MR. ONSTOT: Nothing further.

7 CHAIRPERSON YOUNG: Okay. So I think
8 where we are at is the close now of testimony.
9 And we can proceed to closing arguments.

10 MS. OKUN: Actually I think we still
11 have some document issues, both the documents that
12 Mr. Thomas is looking at, and the additional
13 documents that are on our list.

14 CHAIRPERSON YOUNG: True. Okay. Well,
15 the diary we've kind of put aside, at least for
16 the moment. I think maybe pending our review of
17 what Mr. Thomas comes up with, we can see whether
18 we need to get into the diary or not.

19 MS. SCHAFFNER: Perhaps we could, while
20 we wait for Mr. Thomas to finish with the box of
21 documents he's with, we could hear back from the
22 prosecution team on their review of the index
23 during the break.

24 CHAIRPERSON YOUNG: Okay. Why don't we
25 do that.

1 MS. OKUN: I do have a list of documents
2 that are not on the list. Some of them were
3 provided at the last hearing, and some of them
4 weren't.

5 There are some documents that the
6 District submitted regarding requests for
7 reconsideration to the Coastal Commission of the
8 coastal development permit. And in our revised
9 list I included a few responses from the District.
10 And I believe I referenced one Coastal Commission
11 Staff report. There may have been other Coastal
12 Commission Staff reports or decision documents
13 that are in our record that aren't on the list. I
14 didn't have time to go through the record, but if
15 there are any other Coastal Commission documents
16 that fit that description I would add those to the
17 list.

18 The court's decision in the CalCities
19 case, we have the CalCities record, but not the
20 court's decision, which wouldn't be part of the
21 administrative record.

22 There is a letter or a memorandum from
23 the CSD to the State Water Board dated 10/31/05.
24 I questioned Ms. Schicker about that at the last
25 hearing. Attached to that was an October 30, '05

1 motion that I think was signed on October 31, '05.
2 I don't think that that's on our list. But it was
3 discussed and I think we may have passed out
4 copies of it.

5 There were various letters from the
6 District to the contractors regarding stopping
7 work and resuming work. Some of those are on our
8 list but I don't think all of them are. I did
9 question Mr. Moore about those, and those are
10 referenced in his testimony and my questions by
11 date.

12 There are also three letters from
13 Monterey Mechanical to Montgomery, Watson Harza
14 that were part of his testimony that were
15 distributed to the Board that aren't on our list.

16 There's a video of the November 16, 2005
17 State Board meeting. The District actually
18 included on their list of documents a video and
19 transcript of that meeting. And we didn't have a
20 transcript, so I objected to the reference to the
21 transcript. But the video we do have. I don't
22 know if we have a copy or it was accessed
23 electronically, but that should be in the record.

24 And it's kind of unclear from the
25 document list because the description of video and

1 transcript video isn't red, but everything else
2 is. So the video actually is in the record, but
3 not the transcript because it doesn't exist.
4 That's on the District's list.

5 And then while I have the floor I also
6 have a statement to make. It doesn't relate to
7 documents, but I do have something I'd like to
8 tell the Board.

9 On about December 21, 2005, the Attorney
10 General filed a lawsuit on behalf of the Regional
11 Board against the District, contesting Measure B,
12 seeking to invalidate Measure B.

13 MS. SCHAFFNER: I'm sorry, when you say
14 Board, you mean the CSD Board?

15 MS. OKUN: No, the Regional Board.

16 MS. SCHAFFNER: Oh, okay, the Attorney
17 General --

18 MS. OKUN: The Central Coast Regional
19 Board.

20 Mr. Briggs has delegated authority from
21 this Board under Water Code section 13223 and a
22 1990 resolution to exercise all of the powers of
23 the Regional Board. So pursuant to that delegated
24 authority he directed me to work with the AG's
25 Office to file that lawsuit.

1 I just want to state for the record that
2 the Board, itself, the Board Members, did not
3 direct the filing of that lawsuit. And unless you
4 found out about it some other way, until right
5 now, the Board didn't know about it.

6 So, for the benefit of the public, I
7 don't think that the validity or invalidity of
8 Measure B needs to be a part of this proceeding,
9 or the Board needs to consider that. But I was
10 concerned that there would be an allegation that
11 this board was biased because it was suing the
12 District while it was considering this action.

13 But I would like to make it clear to the
14 District and to the public that the Board Members,
15 themselves, who are hearing this action did not
16 direct the filing of that lawsuit. There was no
17 closed session directing the filing of that
18 lawsuit. And there won't be any discussions with
19 me about it until after a final order is issued in
20 this matter.

21 CHAIRPERSON YOUNG: When was that done?

22 MS. OKUN: When was it filed?

23 CHAIRPERSON YOUNG: Yeah.

24 MS. OKUN: It was dated December 20th; I
25 think it was probably filed the 21st. And the

1 District is aware of it.

2 CHAIRPERSON YOUNG: Okay.

3 MS. SCHAFFNER: Just to --

4 MS. OKUN: There was a notice of -- I
5 heard someone saying, no, we're not. There was a
6 notice of related case -- or a related case notice
7 that was filed by the AG because the Taxpayer
8 Watch litigation challenging Measure B had a
9 hearing on December 30th. And I believe before
10 that hearing the AG filed the related case notice
11 and served a copy of the related case notice on
12 Mr. Onstot on behalf of the District.

13 CHAIRPERSON YOUNG: Okay.

14 MS. SCHAFFNER: Just to clarify from the
15 Board's perspective, that was the testimony of the
16 prosecution staff, and certainly news to me as
17 counsel. I didn't -- have no prior knowledge of
18 this lawsuit until just now, myself.

19 Could you speak to this for the record,
20 as well, Mr. Young. Did you participate in the --

21 CHAIRPERSON YOUNG: No, I did not
22 participate at all in the discussions or
23 preparation of any litigation against the
24 District. This is the first time I've learned
25 about it.

1 MS. SCHAFFNER: Just wanted to confirm
2 that .

3 CHAIRPERSON YOUNG: And, in fact, I have
4 not had discussions really with anyone other than
5 yourself or Mr. Thomas regarding Los Osos at all,
6 anything related to Los Osos.

7 MS. OKUN: And I do have a copy of the
8 complaint and the related case notice, but I would
9 prefer not to give it to the Board until this
10 matter is concluded.

11 MS. SCHAFFNER: I would appreciate that
12 if you would not. Keep the record clean.

13 CHAIRPERSON YOUNG: Okay.

14 MS. SCHAFFNER: Oh, and --

15 CHAIRPERSON YOUNG: Back to the
16 documents.

17 MS. SCHAFFNER: Yeah.

18 CHAIRPERSON YOUNG: So these documents
19 that you just have gone through, Ms. Okun, these
20 are documents that were not part of the record?
21 That the District had asked --

22 MS. OKUN: They are part of the record,
23 they weren't part of the list.

24 CHAIRPERSON YOUNG: I see.

25 MS. OKUN: Some of them may be on the

1 list, but I didn't see them when I was looking at
2 the list.

3 CHAIRPERSON YOUNG: Okay.

4 MS. SCHAFFNER: I think the concept
5 here, Mr. Chairman, is to take the general
6 reference in the prior index to all the files of
7 the staff, which seemed an awfully broad referent
8 for such a formal proceeding, we're trying to
9 narrow that to the specific documents that are
10 truly germane to this ACL, instead of the entire
11 20-year history of this matter, which could
12 probably fill up at least one bookshelf, if not --
13 I mean one entire wall of bookshelves, if not a
14 room.

15 So if the District is comfortable with
16 that, we could go either way. Either the entire
17 file, or we could go with the more narrow list if
18 everybody's amenable with that.

19 MR. SEITZ: It was my understanding from
20 right before we left for lunch that the CalCities
21 administrative record --

22 MS. SCHAFFNER: Yes.

23 MR. SEITZ: -- was going to be in; the
24 District's documents that weren't rejected --

25 MS. SCHAFFNER: Right.

1 MR. SEITZ: -- on the list were going to
2 be in. And then just those documents that Ms.
3 Okun has just testified to were going to be in the
4 -- I don't want to summarize because I know I'll
5 miss, it's like, you know, listing all your
6 friends, you're going to miss some, the documents
7 that the District produced that are being tagged
8 by Mr. Thomas right now.

9 I don't know if there's any other ones,
10 but that's sort of a summation of my
11 understanding.

12 CHAIRPERSON YOUNG: And, Ms. Okun, those
13 documents that you just enumerated, you don't have
14 an objection to those being included --

15 MS. SCHAFFNER: Those are her records.

16 CHAIRPERSON YOUNG: -- for the record --

17 MS. OKUN: Yeah, those are -- I'm sorry,
18 I think I missed Mr. Seitz' point.

19 MR. SEITZ: Well, what I was trying to
20 ferret out is that the entire Board's file on this
21 matter isn't going to be part of the
22 administrative record.

23 MS. SCHAFFNER: We're trying to narrow
24 that down --

25 MR. SEITZ: Right.

1 MS. SCHAFFNER: -- for everybody's sake.
2 It had been up to this point. And we're wondering
3 if you are amenable to narrowing it to the
4 specified documents that Ms. Okun just listed, or
5 you'd rather have the whole file.

6 MS. OKUN: And the ones that are already
7 on the list.

8 MS. SCHAFFNER: And the ones that are
9 already on the list. That's fine.

10 MR. SEITZ: I think we're fine with
11 that.

12 MS. SCHAFFNER: With which?

13 CHAIRPERSON YOUNG: With what?

14 (Laughter.)

15 MR. SEITZ: With your statement, that it
16 be the CalCities administrative record, the
17 documents that have been summarized. I would also
18 interject that I know that I have a PowerPoint for
19 closing. I think Ms. Okun --

20 MS. SCHAFFNER: Of course.

21 MR. SEITZ: -- if I read tea leaves
22 correctly, has a PowerPoint --

23 MS. SCHAFFNER: Of course.

24 MR. SEITZ: -- for closing. That those
25 documents be in the administrative record. And I

1 understand from Ms. Okun's testimony that those
2 documents and Mr. Polhemus testified to, are
3 already in the administrative record.

4 MS. OKUN: Right.

5 MS. SCHAFFNER: Okay, so --

6 MS. OKUN: And, again, for the record,
7 I'm not providing testimony, I'm not a witness in
8 this matter.

9 In addition, there are various briefs
10 that the parties have filed. There's the staff
11 report, the agenda notice, the emails back and
12 forth among all the parties. I've been sending
13 those to staff to print and put in the files, and
14 those are all part of the record. They're not
15 listed anywhere.

16 MS. SCHAFFNER: Right. I think those
17 were mentioned earlier in the day when I noted all
18 the submittals in connection with the hearing were
19 also part of the record.

20 So it sounds like we're all in agreement
21 and there are no outstanding, unaddressed
22 objections.

23 CHAIRPERSON YOUNG: Okay. Now that we
24 have resolved that, everything is crystal clear.

25 MS. SCHAFFNER: Except, of course, the

1 diary.

2 CHAIRPERSON YOUNG: What's that?

3 MS. SCHAFFNER: Except, of course, the
4 diary. And the --

5 CHAIRPERSON YOUNG: Well, I --

6 MS. SCHAFFNER: We'll come back to that
7 later.

8 CHAIRPERSON YOUNG: -- think where we're
9 at, at this point, is to see where Michael is with
10 his review of those documents. And then we would
11 go into closing arguments, okay.

12 And so I would like to break for a few
13 minutes just to give the lawyers time to kind of
14 collect things and put their notes together.

15 MS. OKUN: And your initial order of
16 hearing on the first day was that the District
17 would give the first closing argument. Is that
18 still the case?

19 MR. SEITZ: No. We defer. We want to
20 hear -- your prosecution team has the burden here.
21 We would love to hear their closing argument
22 first.

23 (Pause.)

24 MS. SCHAFFNER: I would point out that
25 the one with the burden does normally go first.

1 And normally, they also get the last word in
2 customary settings.

3 So you could let them do their closing
4 statement first, and then do the rebuttal last, or
5 vice versa. It's totally up to the Chair, though.
6 It is a procedural matter within his discretion.

7 CHAIRPERSON YOUNG: I would prefer that
8 the staff goes first. I just think that's kind of
9 appropriate because, you know, you are the one
10 bringing the complaint and prosecuting it. And
11 you do have the burden to convince the Board of
12 the validity of your recommendations.

13 Let the District go second, which is, I
14 think, more customary in defending something. And
15 then you would be given some rebuttal time.

16 MS. OKUN: Okay.

17 CHAIRPERSON YOUNG: That's usually the
18 way these things go, so why don't we stick to that
19 normal course.

20 MR. ONSTOT: Mr. Chair, I have no
21 problem with that as long as what, again, is the
22 normal course of procedure is that the rebuttal is
23 not a sandbag opportunity to put forth anything
24 further.

25 CHAIRPERSON YOUNG: Well, the rebuttal

1 is going to be limited --

2 MR. ONSTOT: To rebutting --

3 CHAIRPERSON YOUNG: -- rebuttal of --

4 MR. ONSTOT: -- as to what we put on.

5 CHAIRPERSON YOUNG: Exactly.

6 MR. ONSTOT: Okay. That's fine.

7 CHAIRPERSON YOUNG: That's right. And
8 if I miss something, you just bring it to my
9 attention, so we can address it at that point in
10 time.

11 MR. ONSTOT: Can I ask what our time
12 balance is?

13 CHAIRPERSON YOUNG: Yeah, your time is
14 52.5 minutes. The prosecution staff has three and
15 a half hours, something like that. So, I think
16 that's kind of not too important at this point.

17 So, we're going to break. Let's say,
18 you know, optimistically ten minutes. I mean, Mr.
19 Seitz, Mr. Onstot, how much time do you want for
20 collecting yourselves for closing? And I'd ask
21 Ms. Okun the same question.

22 MR. SEITZ: I'm about as collected as
23 I'm going to get.

24 CHAIRPERSON YOUNG: Okay.

25 MR. ONSTOT: Ten minutes is fine.

1 CHAIRPERSON YOUNG: Okay.

2 MS. OKUN: Ditto.

3 CHAIRPERSON YOUNG: So you guys are
4 ready. All right, then let's maybe make it ten
5 minutes, and let's just find Michael Thomas.

6 (Brief recess.)

7 CHAIRPERSON YOUNG: While we're waiting
8 we can resume. I think Mr. Thomas is going to
9 come back in. Sheryl, is Michael coming in?

10 MS. SCHAFFNER: Yes.

11 CHAIRPERSON YOUNG: Yeah, okay. And
12 while we're waiting for Mr. Thomas, right after we
13 deal with the issue of the documents and Mr.
14 Thomas' review of them, we'll go to public forum
15 just to dispense with that.

16 I have three speaker cards; and if
17 there's anyone else in the public that wants to
18 address the Board on any item not involving this
19 Los Osos ACL, you can get a speaker card and speak
20 to us for three minutes.

21 I noticed here that Mr. Racano -- are
22 you still here?

23 UNIDENTIFIED SPEAKER: He was outside a
24 minute ago.

25 CHAIRPERSON YOUNG: Okay. And Marla Jo

1 Bruton had put on here Los Osos fines. That was
2 going to be their topic. And then when they were
3 told that they are not going to be able to address
4 this in public forum about this, they then
5 scratched out Los Osos fines. I'd like to know
6 what they want to address us on. So.

7 Okay, we're all here. All right, so,
8 Mr. Thomas, I did review or speak with Mr. Thomas
9 about his document review. And he told me that he
10 went through a representative sample. He could
11 not go through everything that was in that box.
12 But he went through a representative sample
13 looking for those documents responsive to the
14 subpoena.

15 And based on what he has shared with me
16 there's really nothing in there in terms of new
17 evidence that is not also in the record elsewhere,
18 either in other documents or in testimony by
19 witnesses. Is that correct, Michael?

20 MR. THOMAS: That's correct, yes.

21 CHAIRPERSON YOUNG: Okay, so based on
22 that, I'm not going to have him review any more
23 documents. And for the sake of brevity, we will
24 dispose of our issue with Mr. Bleskey's personal
25 journal diary, although I'm sure, Mr. Bleskey,

1 there are some things in there that would be very
2 interesting to us. We'll just leave that for
3 another point in time. And so that'll dispense
4 with that.

5 Okay, so there will be no documents put
6 into the record that came from the box Mr. Onstot
7 gave me. We did flag a few to discuss, but there
8 was nothing new about that. And we're going to
9 leave those out of the record. Okay?

10 All right.

11 MR. SEITZ: And, Mr. Chair, --

12 CHAIRPERSON YOUNG: Yes.

13 MR. SEITZ: -- I assume at the end of
14 this hearing we'll get the box back?

15 CHAIRPERSON YOUNG: Yes, in fact, --

16 MR. THOMAS: The box is in the file
17 review area where I was --

18 CHAIRPERSON YOUNG: And you'll get it
19 back.

20 MS. SCHAFFNER: Yeah, one thing I wanted
21 to note was I noted that they were all copies, not
22 originals. And that they were still warm, fresh
23 off the copier. I just wanted to thank you folks
24 for jumping on that so fast and making the
25 duplication happen. And they're all just as you

1 brought them, still in the same file folders.

2 CHAIRPERSON YOUNG: Okay. All right,
3 let's do this. We'll go to public forum. Mr.
4 Perlman. Yeah, Mr. Jeffries?

5 (Pause.)

6 CHAIRPERSON YOUNG: Okay. Mr. Perlman,
7 you're going to talk to us about something other
8 than the Los Osos Administrative Civil Liability,
9 right?

10 MR. PERLMAN: I hoped to.

11 CHAIRPERSON YOUNG: Okay, go ahead.
12 You've got three minutes.

13 MR. PERLMAN: Yeah. One of my first
14 questions, assuming that I was the first one, was
15 can I say California, can I say Los Osos, can I
16 say Baywood?

17 I asked for no interruptions and I ask
18 for questions directed to me after I finish, that
19 if you wish to ask me questions after my time has
20 elapsed, please allow me to give a complete
21 answer, as opposed to a yes or no question.
22 Because I've had that experience previously, and I
23 think it's a misuse of public time to have a
24 member of the public challenged on something that
25 is said without them being allowed to rebut.

1 I notice that Cambria recently has
2 elected to maintain its CSD, to remain
3 unincorporated. And that's something that
4 happened after the last meeting in this building.
5 Is someone who lives in San Luis Obispo came up
6 and expressed how interested he was in what we
7 were doing with the sewer and how the CSD is
8 really the last bastion of democracy. It's of
9 direct democracy that's accessible to the people.

10 And I think that was a very valuable
11 comment. It gave me some perspective as to the
12 value. I really hope that, without going into
13 what might possibly happen to this CSD, I really
14 hope that nothing bad happens. This is a CSD
15 elected by the people and for purposes that are
16 obviously good.

17 Obviously one thing that I should be
18 able to talk about is the CSD is committed to
19 clean water and sufficient sustainable water in
20 this area.

21 And I do appreciate this time. To some
22 extent, I would like to bring up Lori Okun's
23 comments, which took place at the State Water
24 Board. She did mention that engineers -- this is
25 to do with the State Water Board testimony and not

1 with the Regional Board -- but she did state that
2 the engineers, and I don't know where those
3 engineers -- which one of the boards they
4 represented, she stated those engineers stated
5 that it would take five to ten years to restart
6 the sewer. And she said that one of the engineers
7 said they would never be done in their opinion.

8 I wanted to comment that I believe while
9 five and ten years are acceptable timeframes,
10 possibly, and that's debatable, never, I don't
11 believe, is a timeframe that's taught in any
12 engineering school. That would have had to have
13 been a political statement.

14 CHAIRPERSON YOUNG: Okay, can you wrap
15 it up? It's three minutes. And I didn't reverse
16 the clock, because I wanted to keep it going from
17 zero to three, and that's why you're not seeing
18 the lights flash.

19 MR. PERLMAN: Oh, I appreciate it.

20 CHAIRPERSON YOUNG: So you had three
21 minutes, but I'll give you another few seconds
22 just to wrap it up.

23 MR. PERLMAN: All right. It's just
24 simply to say then that the physical realities of
25 the CSD boundaries, one other thing Lori

1 mentioned, that the CSD cannot attempt to enlarge
2 its area of influence.

3 However, molecules of salt water, ions
4 of salt water or nitrate molecules do not respect
5 these artificial boundaries. They do migrate from
6 areas such as Cabrillo Estates. And I hope that
7 scientific and real measurements are used in
8 future deliberations.

9 Thank you.

10 CHAIRPERSON YOUNG: Thank you for your
11 comments.

12 BOARD MEMBER PRESS: Mr. Chair.

13 CHAIRPERSON YOUNG: Yes.

14 BOARD MEMBER PRESS: The public comment
15 period on this item was closed after the last
16 hearing. Maybe you would like to remind the
17 public that you are serious about that, and that
18 you would appreciate it if they don't go around
19 your proscription of that point, so that we can
20 get through this, and listen to closing arguments.

21 CHAIRPERSON YOUNG: Thank you. I agree
22 with Dr. Press. Please keep your comments to not
23 the agenda item before us with Los Osos.

24 Joey Racano.

25 MR. RACANO: Honorable Board Members,

1 Staff, Friends, friends at home, Joey Racano, the
2 Ocean Outfall Group.

3 I thank you for all your effort here
4 today on all sides of this issue. I think we all
5 have one thing in common and that is the pursuit
6 of a clean healthy water environment for our
7 coast.

8 I'd like to take a moment to thank Ellen
9 Stern-Harris for a lifetime of giving and the
10 coast is better for it. I think we all feel that
11 way.

12 As you may know, recently at the State
13 Board level there was a precedent set. I spoke
14 about it before. It's the WWWDR, the watershed-
15 wide waste discharge requirement. And what it
16 means is we are now required and expected to take
17 entire watersheds into consideration when we
18 formulate our plans for our water cycle.

19 In this particular case I've come to the
20 central coast and taken a look, and there are
21 fundamental problems, but there's a lot of
22 possibility here.

23 Los Osos, Morro Bay and Cayucas all need
24 the same thing at the same time. To me it is the
25 height of lunacy to pursue these projects

1 separately. And it seems to me that the only
2 thing that's keeping it from happening is that
3 there is a climate of uncertainty.

4 I think it's time for us to put the
5 uncertainty behind us. I think that the best
6 interests of water quality are served when we work
7 together. I think it's pretty obvious that
8 President Schicker and her Board want the best
9 thing. I think you guys want the best thing, and
10 ladies. I know I want the best thing.

11 Now, I'm hoping that what we can do is
12 we can come together in a spirit of cooperation --

13 CHAIRPERSON YOUNG: Mr. Racano, you're
14 getting into the ACL merits and what we're here
15 today to vote on.

16 MR. RACANO: Yes, sir.

17 CHAIRPERSON YOUNG: So, keep --

18 MR. RACANO: Okay, let me get away from
19 that, then.

20 CHAIRPERSON YOUNG: -- Ms. Shicker out
21 of it and --

22 MR. RACANO: Yes, yes, Mr. Young.

23 CHAIRPERSON YOUNG: -- Ms. Tacker out of
24 it, the CSD.

25 MR. RACANO: Yes, sir, let me continue

1 on a different tangent. I have -- I'm in the
2 process of creating what I call an ensemble. My
3 ensemble is a group of progressive elected
4 officials from the central coast, you'd recognize
5 their names, and environmental activists from the
6 central coast.

7 And what we're going to do is we're
8 going to be getting together and discussing
9 progressive issues as pertain to the water cycle
10 of the Morro Bay Estuary watershed.

11 I hope that you will pay attention to
12 the ideas behind these things, such as not
13 building wastewater treatment plants upstream,
14 uphill from waterways. Because what happens is we
15 wind up polluting that which we were trying to
16 protect.

17 And so I hope that we can keep the
18 WWWDR, the watershed-wide waste discharge
19 requirement in mind when we make our decisions.

20 And I thank you for this opportunity to
21 address the Board today.

22 CHAIRPERSON YOUNG: Thank you. Okay,
23 Marla Jo Bruton.

24 MS. BRUTON: Good afternoon, Board. My
25 name is Marla Bruton and I am from Morro Bay,

1 California. I'm here today to speak to you about
2 the 301H waiver at the Morro Bay treatment plant
3 and Cayucas treatment plant.

4 I believe that in February, yeah, well,
5 I know that you've already written settlement
6 agreements with the Morro Bay and Cayucas plant
7 for a 9.5 year timeline to update that plant to
8 secondary.

9 The plant has been operating under four
10 301H waivers for a total of 20 years, with less
11 than the mandated required treatment of a plant.
12 All of this water goes into the same Bay, the same
13 esha and the same bight.

14 I'm asking you to look at the issue
15 holistically; to look at giving these people four
16 years and Morro Bay nine and a half years --

17 CHAIRPERSON YOUNG: I've asked people
18 not to address the issue before us --

19 MS. BRUTON: I'm asking to do this
20 holistically, sir.

21 CHAIRPERSON YOUNG: If you -- come on.

22 MS. BRUTON: You come on.

23 CHAIRPERSON YOUNG: Listen, --

24 MS. BRUTON: Are you in a tower, the
25 white tower, or what?

1 CHAIRPERSON YOUNG: No, but I'm trying
2 to move the process along. We have public forum
3 for things not on the agenda.

4 MS. BRUTON: Okay, well, I want --

5 CHAIRPERSON YOUNG: You've --

6 MS. BRUTON: -- to re --

7 CHAIRPERSON YOUNG: Excuse me, excuse
8 me. You testified --

9 MS. BRUTON: This is my minutes, do you
10 mind?

11 CHAIRPERSON YOUNG: I'll stop the clock.
12 You have a minute and a half.

13 MS. BRUTON: Thank you.

14 CHAIRPERSON YOUNG: You essentially
15 addressed some of these things before when you
16 spoke. If you want to address us on things not
17 involving Los Osos and this ACL, you're welcome to
18 do so.

19 But I'm not inviting the public to speak
20 now --

21 MS. BRUTON: All right, this is --

22 CHAIRPERSON YOUNG: -- on Los Osos.

23 MS. BRUTON: Okay.

24 CHAIRPERSON YOUNG: You have a minute
25 and a half.

1 MS. BRUTON: I have a minute and a half,
2 and I believe that the nine-and-a-half-year
3 timeline for Morro Bay and Cayucas to come to
4 secondary treatment is preposterous, preposterous.
5 And I don't know who is running this. If anybody
6 up there has like minds that can look at real
7 issues and deal with real issues, but that's
8 ridiculous.

9 Nine and a half years. The NRDC,
10 Natural Resources Defense Council, says that it's
11 ridiculous. Sierra Club says it's ridiculous.
12 SurfRider says it's ridiculous. Morro Bay
13 residents say it's ridiculous.

14 And I just ask you to please, I know
15 that I'm grating on your nerves up here, but it's
16 a little grating to the citizens, as well. And I
17 ask you to look at this holistically and not
18 selectively, you know, giving extra time to some
19 people, and I won't mention what else to the other
20 people. But it's not fair.

21 CHAIRPERSON YOUNG: Eric Greening.

22 MR. GREENING: Hello, I'm Eric Greening.

23 BOARD MEMBER SHALLCROSS: Just a second.
24 So far we've had three out of three talk about Los
25 Osos. Just a little warning there.

1 CHAIRPERSON YOUNG: Wait a minute. Are
2 there more cards coming up here? No. That's it.
3 No more public comment after the cards I have.

4 Environmentally preferred site? Are you
5 going to tell me that's not related to what we're
6 dealing with? Okay. Mr. Greening.

7 MR. GREENING: I am Eric Greening. I
8 live -

9 CHAIRPERSON YOUNG: Okay, hang on. Jack
10 Hunter; Al Barrow; David Duggan. No more public
11 comment. I want to close the public forum after
12 that card.

13 Go ahead, Mr. Greening.

14 MR. GREENING: All right, now I am Eric
15 Greening. I live in Atascadero. And the issue
16 I'm addressing is north of Los Osos, in the Estero
17 Bay and some of the interior areas. And it's my
18 concern, I know normally you act reactively
19 because that's essentially the mandate you're
20 given. A problem develops, you figure out how to
21 address it.

22 I'm just kind of giving you a heads-up
23 to find if there's any way you can act proactively
24 before our area faces a real disaster.

25 The Bureau of Reclamation still is

1 considering a viable option for dealing with the
2 selenium-tainted tailwater in the western central
3 valley, they are still considering as a viable
4 option the so-called ocean disposal alternative,
5 which would mean a pipeline carrying this tainted
6 water across 104 blue-line streams and dumping it
7 in the ocean somewhere near Cayucas.

8 The final EIS is likely to be issued
9 within the next 30 to 60 days. We don't know
10 when. We don't know what their choice will be.
11 We do know that there are fewer voters here than
12 there are in the central valley and in the Bay
13 Area, and so they may try something that is
14 physically absurd and preposterous simply because
15 there are fewer people to object to it.

16 However, the EIS will not be certifiable
17 and it needs to be challenged because it
18 insufficiently characterized the project they
19 intend to do. There was nothing showing the
20 actual location of the pipeline, the precautions
21 that would be taken at the streams. Nothing
22 showing the food chain in the ocean. Nothing
23 actually characterizing or limiting the substance
24 or substances that could be placed in this
25 pipeline.

1 There will be no revenue stream for
2 ongoing maintenance of this pipeline, for
3 oversight of the construction. It's not like a
4 water pipeline where you have paying customers who
5 are going to continue paying for what comes
6 through it. This is stuff nobody wants.

7 Essentially this whole central coast
8 area needs to be prepared to do everything
9 possible to combat any choice that might be made
10 to dump the central valley's problem in our area,
11 in our ocean, and cross our watersheds with a
12 pipeline that hasn't even been described, its
13 route hasn't been described.

14 And so I would just ask first of all
15 that your staff stay abreast of this. Second,
16 that perhaps you have some kind of an information
17 item on it at a future meeting. And third, that
18 you simply investigate all your options to help
19 the others of us in the central coast that are
20 trying to keep our watersheds free of
21 sedimentation and poison.

22 Thank you.

23 CHAIRPERSON YOUNG: Thank you.

24 MR. BRIGGS: Mr. Chairman.

25 CHAIRPERSON YOUNG: Yes.

1 MR. BRIGGS: I'd point out that we did
2 send a comment letter on the draft EIR, maybe it
3 was an EIS --

4 MR. GREENING: EIS.

5 MR. BRIGGS: And we commented on many of
6 the issues that Mr. Greening just brought up in
7 his very thoughtful and appropriate comments.

8 CHAIRPERSON YOUNG: Does he have a copy
9 of your letter?

10 MR. BRIGGS: We can provide that --

11 CHAIRPERSON YOUNG: Please provide it to
12 him.

13 MR. BRIGGS: -- and we can provide it
14 for the Board, as well.

15 CHAIRPERSON YOUNG: Okay. All right.
16 Mr. Hunter.

17 MR. HUNTER: Thank you. I'm Jack
18 Hunter, a resident of Los Osos. I'd just like
19 to --

20 CHAIRPERSON YOUNG: Mr. Hunter, you are
21 Monica's spouse?

22 MR. HUNTER: I am.

23 CHAIRPERSON YOUNG: Okay. It just is
24 appropriate, you know, for spouses to identify
25 themselves.

1 MR. HUNTER: To acknowledge that?

2 CHAIRPERSON YOUNG: Yeah, we had Bruce
3 Daniels' wife, when she would like to speak she
4 would always forewarn us who she was, and that she
5 hadn't spoken to her spouse Board Member about an
6 issue, but I think that would be helpful --

7 MR. HUNTER: That seems fair.

8 CHAIRPERSON YOUNG: -- that the Board
9 knows who you are.

10 MR. HUNTER: Then I am so admitting now
11 that Monica Hunter, sitting recused in the
12 audience, is my wife.

13 CHAIRPERSON YOUNG: Okay.

14 MR. HUNTER: And thank you for
15 introducing that dynamic to our relationship.
16 When she has something I don't want to hear, I
17 recuse her.

18 (Laughter.)

19 MR. HUNTER: She doesn't always go along
20 with it.

21 I'm going to try to talk above and
22 beyond the local issue here that we're not
23 supposed to talk about.

24 CHAIRPERSON YOUNG: Okay.

25 MR. HUNTER: Many communities along the

1 California coast and other places find three great
2 threats to their continued existence. And that is
3 seawater intrusion, groundwater recharge, and
4 potentially nitrate and other types of pollution
5 in their aquifers.

6 Any community that does not address all
7 three at the same time has a very high possibility
8 of tying up all their capital in the near and far
9 future against operating on all three of them.
10 And that seems to be what's happening in some
11 communities. I need not name who that is.

12 And that is a fear of many of our
13 citizens, that if the disposal income in our
14 community is wrapped up in a project that does not
15 solve all three issues, we are doomed.

16 Thank you.

17 CHAIRPERSON YOUNG: Thank you. And you
18 weren't referring to the admonition, were you?
19 Okay. Mr. Barrow.

20 MR. BARROW: Thank you, august Board
21 Members, public and fan club for affordable
22 housing. My name is Al Barrow and I'm the founder
23 of Citizens for Affordable and Safe -- excuse me,
24 Affordable --

25 (Laughter.)

1 MR. BARROW: -- jeez, I forgot this.
2 Let me tell you about the other one. It's
3 Coalition for Low Income Housing, which is why I
4 got involved in the first place. And you can see
5 the information on the website. We are concerned
6 about housing for workforce and other individuals
7 as housing costs get more and more up and up.

8 There's a lot of other things that
9 affect their costs. Some of them could be sewer
10 fees, if they're out of line with state
11 guidelines.

12 CASE is Citizens for Affordable and Safe
13 Environment. And you can see all the different
14 technologies that we've suggested regarding Los
15 Osos, which is another subject. But that's all on
16 that website.

17 What I want to talk about today is the
18 state laws, how they play together. How the
19 Coastal Commission, how the Water Board, how the
20 Department of Health Services, Department of Water
21 Resources all working hopefully in concert to
22 advance the state's best interests.

23 You all have your own mission
24 statements. And it seems sometimes there's a
25 conflict where your mission is more important than

1 the other guy's missions. Where the Coastal
2 Commission thinks that well, maybe they should
3 tread lightly because you guys are the big
4 gorilla, you know, these kinds of things seem to
5 affect the way business is conducted for our
6 state.

7 And if you look at the state website on
8 affordable housing, it says housing is of the
9 utmost concern for all the citizens of the state.
10 And when things come before you that affect
11 housing issues for people, I would appreciate it,
12 even though it may not be your direct mission,
13 it's still state law. And if you would consider
14 that I would greatly appreciate that.

15 Thank you. And I know I'm a little
16 late, please don't fine me, but happy new year.

17 CHAIRPERSON YOUNG: Thank you.

18 MR. BARROW: You're welcome.

19 CHAIRPERSON YOUNG: Okay. David Duggan,
20 and that's our last speaker.

21 MR. DUGGAN: Dave Duggan, Los Osos. I
22 want to speak towards water. Los Osos just got a
23 severity 3 level rating for their water. And
24 totally ignored by our local press. They talked
25 about Nipomo and other places. I didn't find

1 anything in any of the press the fact that we just
2 got granted the level 3 severity rating.

3 Not to talk about what we were talking
4 about before, but seems to me there seems to be
5 some kind of information blackout on things that
6 concern Los Osos unless it's derogatory.

7 This is very important. I would advise
8 the news agencies to get on this one. They are
9 missing the facts, as they stand on the ground
10 now, no spin. Thank you.

11 CHAIRPERSON YOUNG: Okay, thank you.
12 All right, that concludes public forum. And we
13 can now move to closing arguments. And, Ms. Okun,
14 you were going to go first.

15 MS. OKUN: Yes. I'm going to start off
16 by addressing some of the legal arguments that the
17 District has raised in this proceeding. And then
18 Mr. Briggs will give a summary and present the
19 staff recommendation following the evidence.

20 Before I start talking about the legal
21 arguments, though, I did want to briefly discuss
22 the additional documents that the prosecution
23 staff submitted on December 12th.

24 I submitted a memorandum discussing some
25 of those documents, but I'm not sure if the

1 Board's read that, so I'll just quickly go through
2 what the documents were.

3 First, there were four additional
4 settlements in addition to the Measure B
5 settlement that was introduced at the December 2
6 hearing. There were four other pending lawsuits
7 related to the wastewater treatment plant that the
8 District also settled. And the total amount of
9 those settlement payments, they were all attorneys
10 fees similar to the structure of the \$125,000
11 Measure B settlement. The total amount under
12 those settlements was \$488,000, which was paid in
13 attorneys fees. And that's relevant to the
14 District's ability to pay, and we'll be discussing
15 that more later.

16 I also submitted some court documents,
17 some of the complaints and some dismissals,
18 actually, related to those settlements. A few of
19 the cases involved matters that had already been
20 resolved in the District's favor.

21 I submitted a letter from the Chief
22 Counsel of the State Water Board, Michael Laufer
23 (phonetic). I don't have the date, but it was a
24 letter to the District in response to a claim that
25 it submitted regarding the state revolving fund

1 loan, and gave a long discussion of the State
2 Board's position about why the District was in
3 breach of the SRF loan agreement.

4 The District, on December 7th, filed a
5 breach of contract complaint against the State
6 Board. So I included that in the record, as well.
7 They sought a temporary restraining order from the
8 court as part of that action right after they
9 filed it. And in rejecting the temporary
10 restraining order the court found that it was
11 highly unlikely that the District would prevail on
12 its breach of contract claim.

13 And keep in mind that that was a
14 temporary restraining order, which is a different
15 legal standard than proving their case. So it was
16 a preliminary ruling with a very high burden of
17 proof for the District. But normally in a TRO
18 hearing a court doesn't say it's highly unlikely
19 that the plaintiff will win its case.

20 The next document is a claim that the
21 District filed against Montgomery, Watson Harza,
22 who's been working on this project since 1999.
23 You've heard a lot of testimony about them, and
24 some of the role that they've played in this
25 project.

1 As far as I can tell, some procedural
2 irregularities on the dates that documents were
3 signed. The District is claiming that all of the
4 invoices that Montgomery, Watson Harza has ever
5 submitted to the District are false claims.

6 Basically, if I understand their
7 argument, the contract with Montgomery Watson was
8 signed in about September of 1999 by Bruce Buel.
9 And the District approved the contract shortly
10 after that, and signed an employment contract with
11 Mr. Buel shortly after that.

12 And so since the Montgomery, Watson
13 Harza agreement was signed by Mr. Buel before it
14 was authorized, even though for five years the
15 District has been treating that contract as being
16 in effect, basically they're claiming that all of
17 the invoices that Montgomery, Watson Harza
18 submitted and that the District paid were
19 improper. And they're seeking, in reimbursement
20 payments and damages, a total of \$6.5 million from
21 Montgomery, Watson Harza.

22 Finally, we submitted a copy of the
23 State Board Staff report and the State Board
24 resolution from December 9th that basically
25 defunded the District's loan. We talked about at

1 the last hearing that the State Board intended to
2 do that. And that is, in fact, what they did.

3 When Mr. McClendon started the
4 District's presentation on December 1st, he said
5 that before we talk about damages, the prosecution
6 staff has to prove culpability. Proving
7 culpability in this case is very easy. There's a
8 time schedule order with some dates in it, and
9 those dates have not been complied with.

10 There's a basin plan prohibition saying
11 that the District is prohibited from discharging
12 from these septic systems, and it violated that
13 prohibition.

14 The only issue left before the Board is
15 the amount of the -- an appropriate and fair
16 amount of administrative civil liability, and
17 that's really all we've been talking about for the
18 past three days.

19 Front and center in this case has been
20 Measure B. The District argues that Measure B
21 prevents them from building the Tri-W project and
22 requires them to develop a new project.

23 Measure B enacted an ordinance. As the
24 District has said, the District can act by
25 ordinance, resolution or motion of its Board. But

1 the District can also act by an ordinance adopted
2 by an initiative of the voters. That's how
3 Measure B was enacted. It is an ordinance adopted
4 by the voters, and that's an act of the District.

5 The District Board agreed in the
6 settlement that Measure B was valid. The District
7 and the State Board both agree that Measure B
8 prevents the District from moving forward with the
9 Tri-W portion of the project.

10 But Measure B is not an act of an
11 unrelated third party. In this context there's no
12 difference between the voters and the Board. So
13 the District can't claim that complying with the
14 time schedule order or coming as close as they can
15 to comply with the time schedule order is beyond
16 their reasonable control because of some unrelated
17 act.

18 The District also argues that the
19 District Board has a fiduciary obligation to
20 uphold Measure B. Even if that's the case,
21 Measure B still isn't an unrelated act of a third
22 party because the District, via the voters,
23 enacted it in the first place.

24 The District also hasn't cited any
25 authority for their fiduciary obligation to

1 support Measure B. The Lockyer case that they
2 cited just prohibits the District from refusing to
3 enforce a statute until a court invalidates the
4 statute. It doesn't prevent the District or
5 another local entity from seeking to invalidate
6 the statute in the first place. It just means
7 that until the statute is invalidated the local
8 government has to comply with it.

9 It's also not even clear that the
10 Lockyer case applies here, because it discussed a
11 law that was a state law that a local entity was
12 refusing to adopt. Here we're not dealing with a
13 state law. We're dealing with a local ordinance.

14 There is case law regarding a general
15 fiduciary duty to the public owed by a public
16 entity. And that the oath of office that the
17 public officials take when they're sworn in
18 requires them to uphold the law.

19 But the basic idea here is that it's the
20 province of the court to declare a law
21 unconstitutional or invalid. And so until that's
22 done, the District can't declare the law invalid,
23 itself. But nothing in any of those principles
24 prevents the District from challenging the law.

25 There's also a policy reason to now

1 allow the District to hide behind Measure B. For
2 the voters to think that they can just vote to
3 violate state orders and avoid ACLs because now
4 their elected representatives are stuck justifies
5 logic.

6 Imagine the implications of this if any
7 electorate could vote, for example, not to upgrade
8 a failing treatment plant or to strip city
9 officials of authority to implement a stormwater
10 management plan to comply with Clean Water Act
11 stormwater requirements. And then say that this
12 Board has no authority to sanction the discharger
13 because the voters have spoken.

14 The District Board can't divorce itself
15 from the District, the voters. But even if it
16 could, the Board representatives have said that
17 they don't intend to build the project, with or
18 without Measure B, and not even if the property
19 owners agree to pay assessments to repay an SRF
20 loan or build the project. Therefore, Measure B,
21 for that reason in addition, does not relieve the
22 District from culpability.

23 Again, Measure B is not something beyond
24 the District's reasonable control. Nor is the
25 decision to move the project.

1 The consequences of these actions, such
2 as the loss of the state funding, therefore, can't
3 be said to be outside the District's control,
4 either.

5 The current posture of Measure B and the
6 District's Board not allowing the project to move
7 forward also makes the reasonableness of past
8 delays irrelevant. In the past the Executive
9 Officer has said that he won't recommend
10 enforcement action if delays are beyond the
11 reasonable control of the District.

12 But at this point the delays aren't
13 because there was a Coastal Commission challenge
14 or a lawsuit challenging the DWRs or other
15 challenges of the Tri-W project, because that
16 project's off the table. It's not different than
17 if they hadn't spent the last five years working
18 on that project.

19 Basically the District's argument is
20 that the Tri-W project was a bad project and they
21 have to start over. Well, whether or not it was a
22 bad project, if it was a bad project, it was the
23 District's bad project, and the District spent the
24 last five years working on that project. And that
25 was what the delay was attributable to for the

1 last five years.

2 Regarding the SRF loan. The State Board
3 was clear in January of '05 that the loan was
4 site-specific. The District showed a clip of Art
5 Baggett saying that if the District didn't like
6 the location of the project they should complain
7 to their local government. But the District
8 didn't show the extensive discussion at that
9 meeting that the loan was site-specific.

10 Mr. Baggett did not imply any intent to
11 amend the loan to fund whatever this new
12 government wanted, wherever they wanted to build
13 it.

14 Both the Chief Counsel and Darrin
15 Polhemus, who's been in charge of this project for
16 the SRF program for years, have said that the loan
17 was site-specific. Ed Moore testified that the
18 contract specifications that Monterey Mechanical
19 had were site-specific. And the SRF contract
20 incorporates those specifications.

21 But most importantly, the contract,
22 itself, is very clear that it's site-specific.
23 You can see some of the provisions on the screen
24 that are in the contract. The District agrees to
25 expeditiously proceed with and complete

1 construction of the project in substantial
2 accordance with approved plans and specifications,
3 which are the Monterey Mechanical specifications
4 for a project at Tri-W.

5 The District agreed to make all
6 reasonable efforts to complete construction by
7 October 15, 2007. And the District was required
8 to obtain State Board Staff approval of any
9 substantial change in the scope of the project.

10 There was also some citations to section
11 13(a) (2) and (3) of the contract, which was just a
12 requirement that if work stopped on the project,
13 or if it appeared that the District wasn't going
14 to be able to meet the 2007 completion date, it
15 had to notify the State Board.

16 The fact that the District has to notify
17 the State Board doesn't mean that the State Board
18 will accept those delays. It just means that they
19 have to provide notice. And conceivably the
20 reason that they have to provide notice is that so
21 the State Board is aware that they're in violation
22 of the provisions of the contract.

23 The SRF contract incorporates the
24 construction specs, as I said, and it also
25 incorporates your waste discharge requirements,

1 which are site-specific. And not only are they
2 site-specific, but they're project-specific.

3 Next slide. Back. No, next. Okay.
4 Mr. Bleskey read a detailed description of the
5 collection system, citing section 01010 of the
6 construction document, paragraph 1.2. He recited
7 a long description of the collection system, and
8 then stopped at the description of the plant,
9 itself, saying, and then it goes on to describe
10 the plant.

11 I have a copy of the agreement between
12 the District and Monterey Mechanical. And it
13 describes the treatment building. And I'll read
14 that to you. I'll try to skip through some of
15 this. It's a treatment building with buried pre-
16 anoxic basins with submersible mixers, buried
17 aeration basin with fine bubble diffusers, post-
18 anoxic basins with submersible mixers, and mixed
19 liquor recirculation pumps. A membrane bioreactor
20 tanks with submerged membrane cassettes, UV
21 disinfection unit, et cetera.

22 That's about half of it describing the
23 project that's proposed for Tri-W, not a
24 theoretical ponding project at a theoretical
25 location.

1 Clearly, the SRF contract is site-
2 specific, as are the construction contracts, or at
3 least the Tri-W contract. And any decision to
4 move or change or delay without State Board
5 consent is a breach of the SRF agreement. It's
6 not the State Board's fault.

7 The District next argues that ACLs are
8 punitive or retroactive, or that the complaint
9 represents a moving target. The District
10 misconstrues the concept of punitive for purposes
11 of section 13308 of the Water Code.

12 That section provides that the amount of
13 the civil penalty shall be based upon the amount
14 reasonably necessary to achieve compliance, and
15 may not include any amount intended to punish or
16 redress previous violations.

17 In order to interpret that you have to
18 consider the legislative history of section 13308.
19 It was enacted in response to a U.S. Supreme Court
20 decision holding that states can't penalize the
21 federal government for violations of environmental
22 statutes by imposing punitive sanctions. But they
23 can impose coercive sanctions.

24 Basically a punitive sanction is a
25 penalty that's assessed for past violations.

1 Whereas, a coercive sanction is an order like the
2 time schedule order saying you have to do this
3 based on this schedule. And if you violate it,
4 we'll issue sanctions. It's like a court issuing
5 contempt citations. And that's exactly what the
6 time schedule order did.

7 So when section 13308 talks about not
8 punishing prior violations, it's talking about
9 violations before the issuance of the time
10 schedule order. And the complaint only alleges
11 violations that occurred obviously after the time
12 schedule order was issued.

13 The complaint isn't retroactive; we're
14 not penalizing the District for any, not only
15 violations before the District was formed, but
16 before September of 2002 under the time schedule
17 order. And the violations of the basin plan
18 prohibition are alleged back to when the District
19 was formed.

20 As Mr. Shallcross noted at the last
21 hearing, we're not starting from scratch here.
22 The past history of the project even before the
23 District was formed is relevant to the seriousness
24 of the delay in determining whether another round
25 of reconsidering alternatives and redesigning the

1 project is acceptable or reasonable.

2 And this isn't even the first time that
3 this District has started over. When the District
4 was formed there was already a County project that
5 had been designed. The CSD elected to design this
6 new project, the Tri-W project, rather than
7 continuing with the pending County project.

8 When the time schedule order was issued,
9 the District did agree to the negotiated schedule.
10 And sure, they didn't want a time schedule order,
11 but nobody wants an enforcement action. And as
12 the District's own testimony showed, the time
13 schedule order was an alternative for this Board
14 considering administrative civil liability.

15 Also the District suggested in their
16 testimony that they petition -- their 2000
17 petition challenged the time schedule as being too
18 short. They did file a petition challenging the
19 time schedule order, but that was not one of the
20 bases for the petition.

21 The argument about the moving target is
22 somewhat difficult to understand. Mr. Onstot
23 suggested this morning that there was a moving
24 target because new evidence was being introduced.
25 This is an evidentiary hearing and that's the

1 purpose of the hearing in the first place, to
2 introduce evidence.

3 The complaint is clear and hasn't
4 changed throughout these proceedings. It alleges
5 breaches of the time schedule order and the basin
6 plan prohibition, and included a worksheet
7 describing the statutory factors for each.

8 The worksheet actually changed from the
9 one attached to the complaint to the revised
10 version in the staff report, but the change was to
11 reduce the maximum civil liability under section
12 13308(f).

13 Also, the proposed order that the
14 prosecution staff submitted was based on
15 violations of the time schedule order, which
16 provides for a maximum liability that's
17 approximately only a third of the maximum for
18 prohibition violations, or 2 percent if you use
19 the higher per-gallon calculation.

20 Another basis for the moving target
21 claim, as I can understand it, is that we've
22 talked about events that occurred after October
23 1st. As we've said, these events are relevant to
24 factors that the Board can consider for all of the
25 violations. It's relevant to culpability, the

1 District's ability to pay, the lack of voluntary
2 cleanup efforts, and economic savings. And it's
3 also relevant to the District's own defense that
4 it's done nothing to delay the project.

5 The proposed action is consistent with
6 prior assurances of the executive order, that no
7 enforcement would result only if all delays were
8 beyond the reasonable control of the District.

9 Once the project was stopped, the Executive
10 Officer has always said that enforcement will be
11 recommended.

12 And he never promised to not enforce all
13 violations, including those that occurred before
14 the project was stopped. This was one of the
15 reasons for not amending the time schedule after
16 repeated requests from the discharger. If there
17 was no intent to enforce all of the violations,
18 then there would be no reason -- well, there would
19 be one less reason not to amend the time schedule
20 order.

21 The last thing I want to address is the
22 ability to pay. Mr. Briggs is going to discuss
23 the 13327 factors in more detail, but I wanted to
24 mention two points.

25 The first is the complexity that the

1 District claims that's involved with their
2 budgeting. I don't think that the District's
3 budget is any more complex than the budget of any
4 other municipality.

5 The District says that cities are better
6 equipped to pay fines because they have general
7 funds. But the CSD gets property taxes and it
8 allocates them freely, just like cities. The CSD
9 has reserves and property tax revenue that it can
10 transfer and has transferred among funds, just
11 like cities.

12 Like the CSD, a city would be subject to
13 restrictions under proposition 13 and prop 218
14 regarding the amount of taxes that it can raise
15 for its general fund, or for anything else, to pay
16 fines.

17 When asked why all of the District funds
18 were restricted Mr. Seitz could only cite
19 proposition 218, which requires voter approval for
20 taxes and assessments, and also makes a
21 distinction between special taxes, which are taxes
22 for a specific purpose, and general taxes. And he
23 also referred to the fact that he advised the
24 District to impose franchise fees in a manner that
25 restricted he District's ability to use them.

1 The District could have established a
2 reserve for contingencies. Or it could transfer
3 additional reserves or property taxes to fund 600,
4 which is their sewer fund.

5 So, again, without doing a detailed
6 analysis of the special district accounting, it
7 does appear that this complexity, again, is a
8 consequence of the District's own actions.

9 Finally, I wanted to cite a few
10 provisions of the enforcement policy regarding
11 ability to pay. The enforcement policy consistent
12 with case law places the burden of proving an
13 inability to pay on the District.

14 Evidence that's presented to this Board
15 can be used to reduce the Administrative Civil
16 Liability amount to an amount that the discharger
17 can reasonably pay and still bring operations into
18 compliance.

19 This is basically what the District's
20 been arguing, and they're right. This is one of
21 the things that the Board can consider, but it's
22 not mandatory. It's one of the factors that the
23 Board considers in its discretion.

24 Finally, the enforcement policy says
25 that the downward adjustment for the ability to

1 pay should be made only in cases where the
2 discharger is cooperative and has the ability and
3 the intention to bring operations into compliance
4 within a reasonable amount of time.

5 And I actually do think that the
6 District does have this intention. I think that
7 they do want to come into compliance with the
8 prohibition. But unfortunately, their recent
9 actions seem to make this a pretty unrealistic
10 possibility.

11 I have nothing further. If there are
12 any questions, I can answer them. Otherwise, I'll
13 turn it over to Mr. Briggs.

14 CHAIRPERSON YOUNG: Let me see, any
15 Members of the Board want to ask Ms. Okun
16 questions?

17 BOARD MEMBER SHALLCROSS: I have one.

18 CHAIRPERSON YOUNG: Go ahead, Mr.
19 Shallcross.

20 BOARD MEMBER SHALLCROSS: Just one point
21 of clarification. At the beginning of your
22 statement you said there were four other
23 settlements that they've paid, that the District
24 paid on.

25 And did you say that two of them were

1 settlements that were settled in favor of the
2 District? What did you say? Something --

3 MS. OKUN: Let me move over to my
4 laptop, it's where I have the list of the cases.

5 The first case was a case filed by
6 Concerned Citizens of Los Osos against the Coastal
7 Commission. And I believe the State Board was
8 originally a defendant in that case, and was
9 dismissed on demur.

10 The first two causes of action in that
11 case were dismissed on demur without leave to
12 amend.

13 There was a remaining cause of action
14 alleging illegal discharges of pumped shallow
15 groundwater and filter backwash into surface
16 waters without a coastal development permit.
17 Basically to lower the water table so that there's
18 not a problem with ponding septage. The District
19 pumps that water and discharges it into the Bay.

20 The District paid \$48,848 to settle that
21 remaining claim. And that still was an
22 outstanding claim, even though the first two had
23 been dismissed.

24 The next case was Concerned Citizens of
25 Los Osos v. LOCSD. The District won that case in

1 the trial court. The court sustained a demur
2 without leave to amend and dismissed the entire
3 case. The petitioners appealed and the District
4 won the appeal.

5 The trial court didn't enter a judgment,
6 so technically the case was still pending,
7 although the District had won on all levels. The
8 settlement payment in that case for the attorneys
9 fees was \$193,620.

10 BOARD MEMBER SHALLCROSS: So they paid
11 \$193,000 on a case that they won?

12 MS. OKUN: Yes.

13 BOARD MEMBER SHALLCROSS: To the losing
14 side?

15 MS. OKUN: Yes.

16 BOARD MEMBER SHALLCROSS: Okay, thanks.

17 MS. OKUN: Al Barrow, CASE and CCLO v.
18 The State Water Board and Darrin Polhemus with Los
19 Osos Community Services District, as real party in
20 interest, sought an injunction to prevent the
21 State Water Board from disbursing any funds under
22 the SRF loan.

23 On July 14, 2005, the court refused to
24 grant a TRO, in part because the petitioners
25 failed to demonstrate a reasonable likelihood of

1 success on the merits. And because and almost --
2 not almost identical -- similar case was pending
3 in San Luis Obispo County seeking the same relief.

4 And there were different entities, but
5 the person verifying the petition was the same in
6 both cases. That claim was settled for \$41,000
7 and attorneys fees. Even though the District has
8 control over -- and the issue was repayment of the
9 loan proceeds. The District has control over
10 whether it repays the loan disbursement. And at
11 the time of the settlement agreement, which was
12 November 23, 2005, any further payments under the
13 State Water Board loan appeared highly unlikely.

14 Basically that was seeking an injunction
15 against the State Board to prevent them from
16 disbursing loan funds when the State Board had
17 already decided that they weren't going to.

18 The last case, CCLO v. The Los Osos
19 Community Services District, alleged violations of
20 CEQA. The District certified the EIR in March of
21 2001. And as you know, the CEQA statute of
22 limitations is 30 days. The case was filed on
23 August 24, 2005. And basically alleged minor
24 changes in the project that the petitioners claim
25 required a new EIR.

1 Similar issues were raised before the
2 Coastal Commission before it issued its permit to
3 the project, and the Coastal Commission process is
4 a certified substitute environmental process like
5 our basin planning process. So the staff report
6 and the Coastal Commission's issuance of the
7 permit was a CEQA document.

8 So, to the extent there were any defects
9 in the CEQA document, for those reasons they were
10 cured when the Coastal Commission issued its
11 permit. Even if those deficiencies in the EIR did
12 exist, the statute of limitations had long since
13 run. And I can check on the amount of settlement
14 in that case. But it's part of the \$488,000.

15 CHAIRPERSON YOUNG: Normally attorney
16 fees are paid in cases either by contractual
17 agreement or by some statute. And in these
18 situations, from those settlements, it looks like
19 they were using the private attorney general
20 statute.

21 MS. OKUN: That's my understanding.

22 CHAIRPERSON YOUNG: Okay. And I thought
23 normally you have a judicial determination first
24 that attorney fees would be appropriate and in
25 what amount.

1 MS. OKUN: Well, under the private
2 attorneys fees statute, just like anything else,
3 you can settle a case. So if the District thought
4 that it was at risk of losing those cases, then it
5 could agree to settle. And Mr. McClendon
6 testified that the reason it settled the Measure B
7 case was that the District was afraid it would
8 lose and have to pay a lot more than 125,000.

9 So you can settle an attorneys fees
10 claim under that statute. But generally that's
11 only done if there's a risk of losing.

12 CHAIRPERSON YOUNG: Mr. McClendon said
13 he thought that they would lose? On appeal? The
14 Measure B case?

15 MS. OKUN: I think he's better able to
16 address that, but my recollection of his
17 testimony, and I can look it up, was that they
18 settled that case for two reasons. One was to
19 protect the District from having to pay attorneys
20 fees that were much higher than 125,000 because he
21 was concerned that there would be a multiplier.
22 And because he felt that the District obtained a
23 valuable concession from Mr. Barrow and CASE in
24 how Measure B should be interpreted.

25 CHAIRPERSON YOUNG: Okay. All right,

1 Mr. Shallcross, that, I think, answered the
2 questions you had.

3 BOARD MEMBER SHALLCROSS: -- answered
4 the question. I'm just as perplexed as you on why
5 they --

6 (Parties speaking simultaneously.)

7 BOARD MEMBER SHALLCROSS: -- paying
8 attorneys fees.

9 CHAIRPERSON YOUNG: Yeah, I think why --
10 is it -- I think the fact is that they paid them,
11 and they paid them. And they paid them out of
12 funds that, you know, may not have been dedicated,
13 and they may have some flexibility over. I mean I
14 don't know what else we can take from that at this
15 point.

16 Okay, Ms. Okun, you were going to move
17 to Mr. Briggs' portion of the closing? Okay.

18 MR. BRIGGS: Roger Briggs, Regional
19 Board Staff. The Los Osos Community Services
20 District has discharged waste in violation of a
21 prohibition contained in the basin plan. In doing
22 so the CSD is liable for up to \$15,000 per day
23 since October 1st of '99 for discharges from three
24 onsite disposal systems. And that's \$5000 per day
25 for each one of the systems.

1 If the penalty is calculated on a per-
2 gallon basis the maximum daily liability is
3 \$380,000 just for the two subdivisions, so two of
4 the facilities.

5 In addition, the Los Osos Community
6 Services District has failed to comply with the
7 dates specified in the time schedule order 00-131.
8 The District does not contest that they violated
9 the dates or that their systems discharge in
10 violation of the discharge prohibition. Rather
11 the District argues, incredibly, that because it
12 refuses to continue with its approved project, the
13 District just needs more time; and the District
14 argues it has done nothing to delay the project.
15 Because others are to blame, including the Board
16 District, itself, that is the old Board.

17 The period of violations in the
18 complaint ends on October 1, 2005. However, the
19 recent events are relevant to explain why the
20 staff does not believe -- our staff does not
21 believe the District is on a path to stopping the
22 violations, as it had been until the end of
23 September.

24 The District argues that considering the
25 limited amount of contribution of its septic tank

1 effluent to the groundwater basin and the impact
2 the fines would have on the continued operation of
3 the facilities, the Board must reduce or avoid
4 fines under Water Code section 13327 regarding the
5 ability to stay in business and the ability to
6 pay.

7 However, the District's discharges are
8 about 4 percent of total flow from the community,
9 and have discharged over 83 million gallons in
10 violation of the prohibition. The proposed
11 penalty is only 2 percent of the maximum liability
12 if the highest daily maximum is used.

13 If this District argument were accepted
14 by the Board all of their discharges in the Los
15 Osos prohibition zone could argue the same thing.
16 The end result would be that no one would have a
17 significant discharge; no one is responsible.
18 Each individual homeowner discharges about 1/5000
19 of the total, while the CSD discharges about
20 1/25th. That is the CSD's discharge is 200 times
21 the discharge of individuals.

22 The District presented testimony on
23 nitrate tests from its Bay Ridge Estates
24 discharge. The District's engineer said some soil
25 column denitrification occurs before the effluent

1 reaches the groundwater.

2 The District's purpose in providing this
3 information isn't clear, but as the District, old
4 and new, has maintained, the community needs a
5 sewer system. And so this information is
6 irrelevant since the prohibition of discharge is
7 not a question in these proceedings.

8 However, the District's engineer
9 displayed a map of groundwater nitrate
10 concentrations. The District's map showed that
11 the two monitoring wells most directly down
12 gradient from the two CSD facilities, the Bay
13 Ridge and Vista del Oro discharges, are 150
14 percent and 280 percent respectively of the
15 maximum contaminant level for nitrate. Under
16 cross-examination the District's witness indicated
17 a sewer is definitely needed.

18 The CSD claims that since the new CSD
19 Board took office it has done nothing to
20 contravene the time schedule order. The CSD's
21 claims contrast with its own actions to stop the
22 approved project. That stoppage has the effect of
23 causing years of additional violations, as the
24 District wanders into areas outside the
25 prohibition zone, outside the District, in the

1 neighborhoods of those who are not discharging
2 illegally, looking for some place to put a
3 treatment plant that the CSD thought could be
4 cheaper by not having mitigation for visual and
5 odor aesthetics.

6 That is, the District argues that the
7 mitigated treatment plant is not acceptable within
8 its boundaries within the area of waste
9 generation, but their visual and odor unmitigated
10 design is okay in someone else's backyard.

11 This lack of concern for aesthetics for
12 people living outside the District is somewhat
13 ironic in that the competing interests in this
14 case are basically this:

15 On the one hand, on the left side here
16 we have a concern by some fraction of the
17 community that the approved project might be an
18 aesthetic problem. Versus on the other hand
19 continued years of violation of prohibition that
20 was enacted over 20 years ago, continued pollution
21 of the groundwater basin, continued public health
22 threats from surfacing septic effluent in wet
23 weather cycles, with runoff of contaminated water
24 to the Bay, and continued oozing of fecal coliform
25 bacteria to the Morro Bay National Estuary.

1 These competing interests are so out of
2 bounds they're not even on the same scale.

3 Now, on the left side we heard, just
4 today we heard some additional arguments regarding
5 the problems, perceived problems with the Tri-W
6 site about spills. But spills are a red herring
7 issue. And as we talked about, with a properly
8 run treatment plant you have an infinitesimal
9 percentage of spills. And in some cases a zero
10 percentage of spills from a properly run plant
11 versus the, in our Region, billions of gallons
12 that are treated and are in accord with the waste
13 discharge requirements. They're discharging
14 legally, and they're protecting the beneficial
15 uses; versus on the right side, for this
16 community, 365 million gallons per year roughly of
17 discharge that is in violation and is continually
18 destroying beneficial uses of the groundwater.

19 Again, it's a balancing act where
20 there's no question. They're not on the same
21 scale.

22 Another thing I'd mention is on the left
23 side, as I said, there are some people who think
24 there might be an aesthetic problem. It's not
25 that it's an aesthetic problem to balance. It's

1 in the perception of some people that there might
2 be an aesthetic problem in the future versus the
3 very real consequences that we're dealing with
4 today because of improper disposal of wastewater.

5 Although the penalties we're proposing
6 are for the District's violations and not the
7 violations of the whole community, the Board may
8 consider this ongoing pollution in the interests
9 of justice. By stopping a project, the District
10 will not only continue its violations, but those
11 of the entire community that relied on the
12 District to provide a way for everyone to stop
13 violating the prohibition.

14 The remaining alternatives the community
15 has for timely compliance are less feasible than
16 hooking up to a treatment plant that was to have
17 been completed by October of next year.

18 The District is now saying the project
19 is too expensive. But the District proposes to
20 spend its money studying alternatives the County
21 already studied for doing work that's already been
22 done.

23 The CSD is offering to do mitigations
24 like a septic tank management plan and water
25 conservation that it should be doing anyway. The

1 management plan is required by the waste discharge
2 requirements. And these are programs that were
3 already underway by the, quote, "old District."

4 But really that's all irrelevant. Even
5 if not the best or the perfect project, the
6 approved project is the one the District chose.
7 The project meets all applicable legal
8 requirements as evidenced by the fact that it won
9 all permit challenges. And if the District wants,
10 once again, to start over again, it cannot avoid
11 penalties by saying years later it realized it
12 doesn't want that project after all.

13 The CSD's decision to abandon the
14 approved project and cause years of additional
15 violations must exact a penalty.

16 Also the time schedule order's validity
17 is not the point of this hearing. That issue is
18 the subject of a State Water Board petition that
19 the District activated just a few weeks ago. The
20 question is what's an appropriate enforcement
21 action for the District's violation of that time
22 schedule order.

23 Nevertheless, we'll respond briefly to
24 the CSD's testimony regarding the reasonableness
25 of the schedule in the time schedule order. The

1 CSD argued on the one hand that the schedule was
2 imposed on them, instead of the CSD ever believing
3 it was do-able. On the other hand, Mr. Seitz
4 testified it was negotiated, implying the CSD
5 ended up with something acceptable.

6 On the third hand, if you will, their
7 own witness, Mr. Buel, said the CSD did concur
8 with the timelines and the CSD Board concurred by
9 Board motion. Also, the District met the first
10 three dates. So those dates were definitely do-
11 able.

12 In this hearing Mr. Seitz questioned the
13 reasonableness of the schedule as it required the
14 District to proceed to construction within about
15 two years; and to finish the project within about
16 four years.

17 At the time of the time schedule order
18 adoption the CSD had completed analysis of many
19 alternatives, had the benefit of many years of
20 analysis the County had done. The CSD was already
21 just about to release the draft environmental
22 impact report which included the Tri-W site.

23 The Regional Board adopted the time
24 schedule order on October 27, 2000. And the
25 District issued the draft EIR the very next month,

1 November of 2000. And they purchased the Tri-W
2 site about the same time. We learned today that
3 they actually completed those negotiations within
4 a few months, by May of 2001.

5 And as Lori Okun pointed out, the CSD
6 could have continued with the already-approved
7 project that the County was going to build. The
8 CSD therefore had a huge head start on the project
9 when the Board adopted the time schedule.

10 Now, if this schedule was unreasonable,
11 as the District claims, why did the current CSD
12 Board and representatives claim to us in October
13 2005 that the CSD could start from scratch,
14 searching for a site, completing facilities
15 planning and alternative evaluations, going
16 through environmental review, acquiring land,
17 going through permitting, designing a different
18 treatment plant, preparing requests for bids,
19 getting bids, selecting a contractor and claim
20 they could do all that with no delay in the
21 project startup.

22 The District said it could change the
23 treatment plant site within the float time and the
24 collection system timeline with no delay
25 whatsoever in total project completion.

1 After meeting with State Board Staff the
2 District representatives extended that estimate
3 from what would have been about six months to two
4 years. And that's still much faster than what was
5 required by the time schedule order.

6 The time schedule order allowed the
7 District, from its inception in 1998 to September
8 of 2002, that's a period of just under four years,
9 to start construction. The CSD cannot argue that
10 the time schedule's allowance of four years was
11 unreasonably short while telling us they can now
12 move to another site and it will only take two
13 years.

14 This is all smokescreen evidence, and it
15 doesn't help the District's case. It is
16 smokescreen that simply highlights the churning by
17 the District and diversions about new ideas that
18 don't change the fact of the District's
19 violations.

20 The District's practice, unfortunately,
21 is to blame others for problems when it's the
22 District's own actions that are the cause of the
23 delays.

24 We even heard from the community and the
25 District that they should be conserving water, and

1 somehow it's the Regional Board's fault that
2 they're using too much water.

3 The District blames the State Board for
4 its current predicament, although the State Board
5 offered to let the District resolve the legal and
6 the funding issues, and hold the loan funds for
7 the District. In the meantime, the District
8 refused.

9 The refusal letter stated that the
10 District would only consider solutions that
11 assured construction away from the Tri-W site.
12 Mr. Bleskey said that some unspecified state
13 agencies failed to provide proper oversight before
14 the election. Again, blaming others, the state.

15 Lisa Schicker, Board President, said
16 that it's this Board's fault for pushing too fast
17 to build a project. But as I already explained,
18 the District was not starting from scratch.

19 A result of this blaming of others is
20 litigation or investigations whenever someone
21 doesn't get their way. In other communities in
22 the region with wastewater issues, such as Nipomo,
23 which was also on septic tanks and converted to a
24 sewer system, communities have gone through their
25 established CEQA processes, made their decisions,

1 settled any disputes as allowed by the CEQA
2 determination reviews, and moved on.

3 That doesn't mean everybody is in
4 agreement or is happy, but they move on with their
5 projects and they abide by the law. They stop
6 their pollution.

7 Instead of simply proceeding with their
8 approved and funded project, the District's halt
9 of construction, as testified in this hearing,
10 that they are asking for investigations of past
11 District Board Member, State Board loan staff and
12 others.

13 The District has reverted to studying
14 alternatives, including some that have been
15 studied, analyzed and rejected numerous times;
16 frequently rationalized this approach by using
17 mis-information even after the inaccuracies have
18 been brought to their attention.

19 District Director Cesena provided more
20 information in this hearing by discussing our
21 initial meeting with the District Board
22 negotiating team. Mr. Cesena testified that,
23 quote, "Staff reluctant to meet" and, quote,
24 "Exchange discourteous." End quote.

25 We were not reluctant to meet. In fact,

1 we agreed to meet October 12, 2005, two weeks
2 after they were sworn in, and immediately upon
3 their request for a meeting. And we were civil in
4 that meeting and a subsequent meeting. In fact,
5 Chairman Young was in on the first part of that
6 meeting dealing with procedural issues with
7 Messrs. McClendon and Bleskey, as a demonstration
8 of civility, and contrary to Mr. Cesena's
9 characterizations of our relationship being too
10 far gone to communicate with the District.

11 In the October 12th meeting I said I
12 thought Mr. Fouche's idea about water trading had
13 some merit and something they should explore with
14 treated effluent from the approved project.

15 If the District kills this project we
16 will work with them in a civil manner to insure
17 they develop another project and obtain new waste
18 discharge requirements as quickly as legally
19 possible so that the illegal discharges can
20 finally stop. But that doesn't mean that this
21 Board should idly stand by while the District
22 kills the project or that its violations should be
23 excused.

24 They're in violation of the time
25 schedule order, their discharging in violation of

1 the prohibition and their actions have insured
2 these violations will continue for an unknown
3 period of time.

4 Recent examples of District actions that
5 have contributed to the delay include the first
6 dash there, reevaluation of pond technology when
7 the CSD already investigated ponds and found them
8 incapable of reliably meeting their specific
9 requirements.

10 STEP-STEG, that's a small diameter
11 collection system that continues use of existing
12 septic tanks. The District's General Manager
13 testified to you in these proceedings that the
14 District halted collection system construction to
15 take a timeout in order to evaluate elements that
16 would be common to many alternatives.

17 However, it is now beyond dispute that
18 the District will not continue with the Tri-W
19 project. The reason for the temporary stop-work
20 orders is now irrelevant since it's clear they've
21 now become permanent, at least for the Tri-W site,
22 and indefinite for the collection and disposal
23 system, which could be resumed if funding is
24 secured. But ultimate completion depends on
25 having a treatment plant.

1 Also contradicting the District's
2 testimony about the reason for stopping collection
3 system work was the additional example of going
4 back and studying what was already been studied
5 and rejected. The District informed us at the
6 October 12th meeting that they intended to
7 evaluate STEP, septic tank effluent pumping
8 systems. This change would require -- let me back
9 up. Mr. Bleskey admitted that during cross-
10 examination.

11 This change would require redesigning
12 the entire collection system, scrapping what had
13 already been installed, and rebidding with huge
14 delays.

15 At the October 12th meeting Regional
16 Board Staff informed the District representatives
17 that the District and the County, before it, had
18 already evaluated STEP systems and rejected them.
19 However, in spite of that, ten days later Mr.
20 Bleskey reported to us their, quote, "progress" in
21 having rejected STEP.

22 Another action by the District as far as
23 delays, that is assuming that they can realize
24 large cost savings in part by cost comparisons
25 with projects that are modifications of existing

1 facilities on existing sites, versus starting from
2 scratch, not only with treatment works, but with
3 property acquisition and cost.

4 The current CSD was surprised to learn
5 this fact from the Regional Board at our October
6 12th meeting. The District should never have made
7 this mistake in the first place, as all it
8 required to avoid was the easiest of inquiries. A
9 reasonable person would correct their erroneous
10 assumptions based on the corrected information.
11 Incredibly, the CSD continued relying on the
12 erroneous information.

13 In their pleading submitted weeks after
14 what should have been a revelation on this point
15 of mis-information, the District stuck with the
16 invalid cost comparisons with the Pismo and the
17 California Mens Colony projects. The District
18 continues to use this inappropriate unequal
19 comparison in this proceeding as justification for
20 delay, even though, as Mr. Seitz summed it up
21 perfectly during cross-examination, it's apples
22 and oranges.

23 Another example of using misinformation
24 to justify delaying the project is that the
25 current District has taken a position that the

1 State Board loan was for any site, and the
2 District could simply transfer the loan to its
3 virtual site, it's yet to be found or evaluated or
4 acquired site, without an agreement by the State
5 Board to amend the loan contract or approve a new
6 loan application.

7 The State Board was clear in January of
8 '05 that the loan is project specific; the loan
9 contract is clear; but the District continues to
10 take a contrary position. The District's response
11 to the State Board's consistent position on this
12 issue is to be indignant that the State Board
13 meant what it said.

14 The District's response, rather than
15 proceeding with the approved project, is to accuse
16 the State Board of bad faith and breach of
17 contract.

18 The District's representatives stated
19 publicly, including at their own Board meetings,
20 that either the Regional Board won't issue
21 penalties so don't worry about violations or more
22 delays, or they're just defiant about the
23 penalties, or they assume the penalties actually
24 coming due would be delayed for a long time via
25 petitions and more court action.

1 An enforcement program that allows a
2 violator to disregard the Board's orders in this
3 manner is no enforcement program at all.

4 We've heard about the new District Board
5 versus the old Board, and that we should give them
6 some time. Twenty-five years isn't quite enough.
7 The Regional Board isn't patient enough.

8 Regardless of the change in makeup of
9 the District Board, our action is against the
10 District, and the elections do not absolve the
11 District's actions or past actions. We warned the
12 District frequently, including two currently
13 sitting members, and the three new members who
14 have a history of active involvement in this
15 project should have known, too, the District
16 delays would result in enforcement action.

17 In spite of being warned of these
18 consequences, the District stopped the treatment
19 plant project with a stated goal of never resuming
20 the approved project. The District stopped the
21 collection system work. Measure B was an
22 ordinance of the District, even though it was
23 enacted by the voters. So the District enacted
24 Measure B. Then delayed resolution of Measure B.
25 And then agreed to validate Measure B. All the

1 while claiming that Measure B required the
2 District to stop the project.

3 We have the unprecedented situation of a
4 discharger stating its goal of violation, asking
5 if there would be penalties, being told yes there
6 would be penalties, and the discharger still
7 proceeding with deliberately violating orders of
8 the Board. These facts make it difficult to argue
9 a lesser penalty.

10 We normally end with our final
11 recommendation. However, in this case I'll give
12 you our recommendation, and then I want to follow
13 that with my concluding concluding statement.

14 Our recommendation is modified in
15 response to a couple of the Water Code section
16 13327 factors. One of those factors is ability to
17 pay. The District made much of the language in
18 the 2004 staff report that penalties would
19 bankrupt the District. We don't know what amount
20 of fines will bankrupt the District because we
21 have incomplete information about their assets and
22 their liabilities.

23 We said in response to the Chair's
24 questions that this Board can't bankrupt the
25 District; only the District can declare

1 bankruptcy. And all that does is allow the
2 District to reorganize, that is avoid some debts.

3 We don't know what amount of fines would
4 bankrupt the District. What we do know is the
5 Tri-W site was purchased in 2000 for 3.3 million,
6 I believe that was the figure we had, 3.0 --
7 3.something million. And Broderon was purchased
8 for 4.4 million, I believe is the figure -- 4.65,
9 thank you.

10 That there is roughly \$4 million
11 remaining from the state revolving fund loan.
12 That can't be used to pay fines from our
13 understanding, but can be used to pay other debts
14 to free up money. District claims no obligation
15 to repay. And even further, that the state is
16 obligated to disburse additional funds. Again,
17 that frees up other assets if the District is to
18 be believed.

19 District claims that the Montgomery,
20 Watson Harza Company owes them over \$6 million
21 because its September 1, '99 contract was never
22 authorized. And Ms. Okun went over that.

23 The District has reserve funds that its
24 representatives testified the District freely
25 transferred between projects. The District

1 collected 1.4 million in property taxes in 2004.
2 The District decided to lower taxes for the fire
3 district by \$140,000 for the current fiscal year.

4 The water division has assets that can
5 be used for water supply programs. Assets that
6 can be used for protecting and improving drinking
7 water supply, which a treatment plant would
8 clearly do.

9 In the event of a collection action, I
10 mean a monetary collection action, installment
11 payments of ACLs could avoid bankruptcy, and would
12 certainly increase the District's ability to pay.

13 On the other side of the balance sheet
14 there's money owed to contractors; we don't know
15 how much. And I don't think the contractors or
16 the District know.

17 On the factor of economic benefit of
18 savings, Director Schicker said the pond system
19 out of town would save \$25 million in capital
20 costs; that's \$21 million versus the \$46 million
21 for the Tri-W site. That's an economic savings of
22 \$25 million.

23 She also said electricity costs of the
24 MBR system are 50 to 80 percent higher at the Tri-
25 W site. She also said the cost of replacing the

1 MBR filters possibly as often as every seven years
2 would equal 40 percent of the capital costs and
3 O&M costs of the pond system are about half.

4 So those are all claimed economic
5 benefits by the District delaying compliance.

6 Two points regarding that, from our
7 perspective. We disagree with cost savings
8 argument. But accepting the District's own
9 admissions for the sake of argument, if they're
10 right its economic savings for the new project are
11 well in excess of the proposed penalty. If we're
12 right, then this reason to stop the project is not
13 a valid reason at all.

14 However, in recognition that the
15 District has provided some evidence of inability
16 to pay or reduced ability to pay, we are
17 recommending the penalty amount be lowered to \$6
18 million.

19 Keep in mind the Board can impose
20 additional penalties necessary. Just since I
21 issued the complaint the District has incurred an
22 additional \$950,000 in potential penalties under
23 the time schedule order, and \$36,100,000 under
24 section 13350 per-gallon basis.

25 This changed recommendation does not

1 suggest that the time schedule order was improper
2 in the first place, because the time schedule
3 order always allowed the Board to consider these
4 13327 factors in assessing penalties based on
5 facts at the time of the penalty assessment.

6 While the statute for setting the time
7 schedule penalty only allowed the Board to
8 consider the amount necessary to prevent
9 violations, considered as of October 2000, not as
10 of today.

11 Clearly, \$10,000 per day was not enough
12 since the District has deliberately stopped
13 compliance. However, because we do want the
14 District to be able to eventually build some
15 project, we do recommend this reduction from the
16 complaint amount.

17 We recommend you consider the proposed
18 order with a suspended portion based on a schedule
19 of actions by the District. We have not prepared
20 a specific schedule because the District has thus
21 far made it to clear it's not going to build this
22 project. But if the Board is inclined to go in
23 that direction, the Board should ask the District
24 if it wants to pursue the suspended penalty
25 option.

1 If it does, we could work out a schedule
2 during a break. Basically giving the District one
3 last chance at this hearing.

4 A schedule should include at least a few
5 milestones that I'll show in a minute. I'll go to
6 those milestones. And, as I said, these are not
7 to be all-inclusive, but I said that they should -
8 - a suspension should at least include these
9 milestones.

10 One, a statement of intent to complete
11 the approved project. And evidence the
12 contractors are willing to proceed if funding is
13 assured by date certain.

14 Two, evidence of joining in litigation
15 to uphold the Superior Court's decision on Measure
16 B, or taking action to have the voters rescind it.

17 And third, which I guess I don't have
18 there, proof of ability to obtain funding.

19 In lieu of submitting the above items
20 the District must submit the entire penalty amount
21 of \$5 million by February 5, 2006.

22 So to be clear, I'm not suggesting we
23 pursue this unless the District indicates its
24 interest to you in pursuing these terms as a term
25 of suspension.

1 The District argues incredibly that it
2 has done nothing to delay the project. However,
3 if you wanted to draw up a plan for how to torpedo
4 the solution to the District's long-standing
5 sewage problems, your best bet would be to
6 incorporate nearly every action the CSD has taken
7 since September 27th, including the adoption of
8 Measure B.

9 You can blank the screen. What matters
10 is compliance to solve the problems. Regardless
11 of their motives, their actions have stopped
12 progress towards compliance. The effect of the
13 CSD's actions is worse than just delay; it's much
14 worse than simple delay, as they may have
15 eliminated the only viable solution, at least for
16 the foreseeable future.

17 Think of where we would be had this
18 District not stopped everything October 3rd of
19 last year. Construction started in August and
20 would now be nearly a half year along. Much of
21 the treatment plant would be done and large
22 sections of the town would now have completed
23 collection trunk lines.

24 The District would be far along toward a
25 solution to the ongoing damage to groundwater and

1 surface waters and public health threats from its
2 discharges. And the residents would have the same
3 benefit. The project would have been finished by
4 October of next year.

5 Instead, the District said initially
6 they could be into construction at a new site in
7 six months. We're into the fourth month of those
8 six months. The District said they would have
9 planning done, property selected, environmental
10 review done, property purchased, design drawings
11 done, permitting done in six months. How far
12 along is the District toward compliance?

13 The Regional Board Chair asked for new
14 evidence to answer that very question. The
15 District's evidence of progress towards compliance
16 consists of nothing. Zero. What you heard is
17 that they've met a lot. And that they've gone
18 after conservation plans that the District was
19 already doing. Other peripheral items. No
20 concrete tangible progress towards compliance.
21 Not one single piece of evidence of any progress
22 towards compliance.

23 The District's actions since I issued
24 the complaint indicate nothing but a continued
25 trend of noncompliance. What's worse in this case

1 than any other case the Regional Board's ever
2 considered is that the District's actions to
3 violate the time schedule order were not caused by
4 some equipment failure or lack of maintenance, or
5 from simple lack of attention.

6 The District's actions to violate were
7 intentional. The District had a chance to hear us
8 say in advance, that's wrong, and if you stop the
9 project we will enforce. The District,
10 nevertheless, acted to stop the project. The
11 District acted to cause years and years of
12 additional violations by the District facilities,
13 and make it more difficult for the rest of the
14 community to stop pollution and damage to
15 receiving waters and continued threats to public
16 health.

17 Thank you very much for your attention.

18 CHAIRPERSON YOUNG: Okay. Let's see,
19 any Board questions of Mr. Briggs at this point?
20 Does that conclude your -- okay.

21 One question I do have, and I would like
22 you to address, either Ms. Okun or Mr. Briggs,
23 something that's kind of been on my mind. And I'd
24 like to hear your rationale for it.

25 And that is the District has raised the

1 issue that in the past Mr. Briggs has made
2 comments and statements in staff reports and
3 letters that it was not going to recommend an
4 enforcement item for previous delays in completing
5 the project.

6 And so I'd like you to address how you
7 think the Board should look at that same time
8 period, and then decide that we should go ahead
9 and take a different position and fine the
10 District based on that same time period.

11 MS. OKUN: I don't think he ever said
12 that he wouldn't recommend enforcement for
13 previous violations. I think what he said was as
14 long as the District kept moving forward, except
15 to the extent, and there were factors beyond the
16 District's reasonable control, he wouldn't
17 recommend any enforcement action.

18 But if the project were stopped, he
19 would recommend enforcement action. He did refuse
20 all requests to amend the schedule, suggesting
21 that the enforcement action he would recommend in
22 that event would include all violations.

23 And in addition, the things that were
24 beyond the District's reasonable control were
25 various challenges to the Tri-W project. Where we

1 are now is that they're not building the Tri-W
2 project for various reasons, Measure B, various
3 members of the community and the Board have
4 decided it's a bad project.

5 So the reason the project is stopped now
6 isn't because of any of those factors beyond the
7 District's control. And they could have sat there
8 for five years and done nothing, because they're
9 not going to build that project.

10 So, why there's a delay now is because
11 the current District says the project was a bad
12 project. That's not beyond the District's
13 control. It was the District's project.

14 CHAIRPERSON YOUNG: Right, but I think,
15 you know, my question goes to how much of this
16 prior timeframe should the District be held for
17 violations for acts that they were not generating.
18 I mean, you know, the previous CSD Board, in
19 defending litigation and doing things that Mr.
20 Briggs had decided, at least he felt were not
21 within their control.

22 We're kind of -- I mean there's a
23 timeframe historically that has been bootstrapped
24 into the current violations on the time schedule
25 order. So I want to get that fleshed out as to

1 why we should now seek a penalty for time periods
2 that had delay possibly not because of what the
3 District, itself, was doing.

4 MS. OKUN: Our position is that the
5 Board should assess penalties for that entire
6 period of time.

7 MR. BRIGGS: Can I add to that?

8 CHAIRPERSON YOUNG: Yeah.

9 MR. BRIGGS: One of the ways I look at
10 it is that when the District violated the first
11 milestone they were in jeopardy. They had
12 potential liabilities for violations.

13 We started saying we would not recommend
14 that we bring those penalties to you as long as
15 they were proceeding as expeditiously as possible.

16 The longer the District violated the
17 time schedule order the higher the stakes,
18 essentially. The greater the potential liability.

19 And so when you asked the District what
20 were you thinking about in terms of balancing, and
21 they should have been balancing the fact that they
22 had waited so long in the process, incredibly
23 waiting until they they're into construction to
24 change their minds about the project, I mean that
25 in itself is a huge liability.

1 They also had this huge liability from
2 being so far down the line in terms of being out
3 of compliance with the time schedule order.

4 So, that's part of the idea of
5 enforcement, is to have consequences, and in this
6 case, we'd hoped the District would weigh those
7 consequences and make the right decision.

8 CHAIRPERSON YOUNG: Okay. Ms.
9 Schaffner.

10 MS. SCHAFFNER: One quick clarifying
11 question, if I could.

12 Mr. Briggs, I believe, testified as to,
13 summarized some prior testimony, which was both in
14 December and this hearing, about surfacing
15 effluent and seeping bacterial discharges to Morro
16 Bay, and a variety of basically public health and
17 safety issues related to the discharges in
18 violation of the prohibition.

19 And I heard all that and that's all in
20 the record, which leads me to my question which is
21 Ms. Okun had suggested a suggested attachment A
22 with some revisions to it for supplemental
23 findings for this item.

24 And one of them involves the striking of
25 some of the references to surfacing effluent and

1 related water quality and public health and safety
2 issues.

3 And I just wanted to be clear, you are
4 not backing off from those factual positions or
5 findings. It was simply just to -- what was the
6 purpose of the striking of this from the proposed
7 findings?

8 Perhaps Ms. Okun can address that.

9 MR. SEITZ: Just before Ms. Okun, we
10 object to that document, that was emailed to us at
11 4:15 last night, being considered by this Board in
12 closed session. We have not had an opportunity to
13 respond to it. I think you have Mr. Briggs'
14 testimony and so forth. And to put that document
15 into question, Ms. Okun, on a document that we
16 received at 4:15 the eve of this hearing. And
17 then take that document in closed session to
18 discuss it, we want to register our objection
19 strong and clear.

20 MS. SCHAFFNER: Would the prosecution
21 staff like to respond to that objection?

22 MS. OKUN: Yes. The Board needs to make
23 findings to support whatever order it issues. And
24 typically the Board's attorney, which would be
25 you, helps the Board to draft the findings.

1 And as a party I was just suggesting
2 proposed findings for the Board to use. The Board
3 can throw this document away and go into closed
4 session and draft new findings completely from
5 scratch, and that would be perfectly appropriate.

6 MS. SCHAFFNER: These are the findings
7 that you had foreshadowed in an email a couple of
8 weeks ago, I imagine, that you suggested the CSD
9 could propose its own findings if it wishes. I
10 don't think we got any proposed findings from the
11 CSD.

12 But it's up to the Chairman whether he
13 would like to sustain or overrule the objection as
14 to considering these proposed findings.

15 MR. SEITZ: And I object to Ms.
16 Schaffner's characterization of what was offered
17 to both sides. And the Chair didn't offer that to
18 both sides. We've been operating under Chair
19 orders, that's my assumption, not orders from the
20 prosecution team.

21 MS. SCHAFFNER: It wasn't an order. It
22 certainly isn't -- it's Ms. Okun's suggestion that
23 she would like to offer some proposed findings,
24 was certainly not an order of the Chair.

25 CHAIRPERSON YOUNG: I guess what can be

1 done, Mr. Seitz, is that you can both make
2 suggestions as to what changes can be put into a
3 proposed order, you know, based on what you hear
4 the Board deliberate on and come to a conclusion
5 on.

6 I don't think it's inappropriate for
7 either side to propose what should go into an
8 order.

9 MR. ONSTOT: Mr. Chairman, I don't --
10 what Mr. Seitz' objection is and our objection is,
11 as a matter of fact, is that this was presented at
12 a late hour and it's not the customary rule that
13 these findings or competing findings go into
14 closed session with the Board.

15 The standard rule is that once a
16 decision is made, the prevailing party, if asked,
17 will draft findings or orders, or in this case,
18 Board counsel, for review and comment by the
19 parties and other Board Members, after a decision
20 is made.

21 But a roadmap to get where they want you
22 to do and do that in closed session is, in our
23 view, completely inappropriate.

24 CHAIRPERSON YOUNG: Gary.

25 BOARD MEMBER SHALLCROSS: Well, I mean I

1 think that's true in most court cases. It's a
2 little different here. However, I don't know what
3 the document is, and I don't know why do we
4 need --

5 CHAIRPERSON YOUNG: Well, okay, so --

6 BOARD MEMBER SHALLCROSS: -- drafting.
7 We've drafted findings before.

8 CHAIRPERSON YOUNG: Okay.

9 BOARD MEMBER SHALLCROSS: You know, we
10 don't need it.

11 CHAIRPERSON YOUNG: Okay. Well, we'll
12 keep it out of closed session.

13 MR. SEITZ: Thank you.

14 VICE CHAIRPERSON JEFFRIES: I'll back
15 him up.

16 CHAIRPERSON YOUNG: Okay. All right.

17 VICE CHAIRPERSON JEFFRIES: Mr. Chair,
18 before you go, --

19 CHAIRPERSON YOUNG: Yes.

20 VICE CHAIRPERSON JEFFRIES: -- I think
21 you should point out to the public we have not
22 seen -- I have not seen that document. So you're
23 the only one that has seen that --

24 CHAIRPERSON YOUNG: Well, I have seen it
25 and I've read a few pages of it, but frankly I

1 don't know what it has in it that is that much
2 different. And I think that's why Ms. Schaffner
3 was asking Ms. Okun questions like that.

4 VICE CHAIRPERSON JEFFRIES: But the
5 point is I just want the public to know that we
6 have, us Board Members --

7 CHAIRPERSON YOUNG: Okay.

8 VICE CHAIRPERSON JEFFRIES: -- have not.
9 As the Chair, you're the only one who's seen that
10 document.

11 CHAIRPERSON YOUNG: Okay.

12 VICE CHAIRPERSON JEFFRIES: I just
13 wanted to point that out.

14 CHAIRPERSON YOUNG: That's fine. All
15 right. Mr Thomas.

16 MR. THOMAS: The prosecution team, Mr.
17 Thompson, can you put that slide up that has the
18 balancing scale on it?

19 Ms. Okun stated that, she said the
20 statement something like this: If it was a bad
21 project it was the CSD's bad project. And that's
22 related to this.

23 And one could interpret that statement
24 as if it's a bad project, we really don't care,
25 it's your problem. And I wonder, if it is a bad

1 project, if the project was poorly designed, if it
2 presented greater threats than it would solve, so
3 to speak, do we care about that? Do we have a
4 position on that?

5 MS. OKUN: If those were the facts. I
6 think that that's something that the Board could
7 and should consider in deciding what's a fair
8 penalty.

9 But that's not what the prosecution
10 staff's testimony has been. Their testimony has
11 been that this is a good project; that it meets
12 all legal requirements; and that it will solve the
13 problems with the septic systems.

14 MR. BRIGGS: Also, the District's own
15 witness said that it's a good project. Mr. Buel.

16 MR. THOMAS: Okay, so the information
17 that you have on this slide is on one side there's
18 the perception of a problem, that there might be a
19 aesthetic problem.

20 But what the CSD listed in their
21 testimony was actually a long list of problems.
22 And your position is that those are not -- that
23 those, themselves, are perceptions. That there's
24 no evidence to support that?

25 MR. BRIGGS: That's right. I think from

1 our standpoint the evidence is that those issues
2 were resolved. Again, the District's own witness,
3 Mr. Buel, testified that those issues came up
4 during the District's deliberations. They
5 considered those issues. And either considered
6 the risks as acceptable, or had mitigation
7 measures. And the project is a good project that
8 does address those issues.

9 MR. THOMAS: So the prosecution staff is
10 concerned with the concerns that are out there as
11 far as that project goes? You have considered
12 those?

13 MR. BRIGGS: Well, another part of our
14 testimony was that we did provide comments on an
15 earlier CSD proposal that was referred to as the
16 Oswald proposal. We didn't say they couldn't do
17 it, but we provided comments we thought the
18 District should seriously consider.

19 So that's how we interact with the
20 District in terms of giving them our perspective
21 on the project that they ultimately choose.

22 MR. THOMAS: Thank you.

23 CHAIRPERSON YOUNG: Okay, any other
24 Board questions before we allow the District its
25 53 minutes for closing?

1 MR. ONSTOT: Mr. Chairman, Mr. Seitz and
2 I have decided to split closing like --

3 CHAIRPERSON YOUNG: That's fine.

4 MR. ONSTOT: -- the prosecution team
5 did. And given the late hour, we don't want to
6 have to ask for more time and think we can do it
7 in the 52 minutes. But could I ask the Chair,
8 when there's 15 minutes left to go, to give us a
9 heads-up so we --

10 CHAIRPERSON YOUNG: Yes.

11 MR. ONSTOT: Actually, that's for Mr.
12 Seitz' benefit more than mine, but we want to make
13 sure that we don't go over and have to ask for
14 more time.

15 CHAIRPERSON YOUNG: Right.

16 MR. ONSTOT: Thank you.

17 CHAIRPERSON YOUNG: And you can have
18 anyone else, also, participate in your closing. I
19 mean they had Mr. Briggs speak. If you want Ms.
20 Schicker or someone else from the District to
21 participate, I mean that's fine with me. But I'll
22 leave that up to you.

23 MR. SEITZ: We're just going to need a
24 minute.

25 CHAIRPERSON YOUNG: Okay.

1 MR. SEITZ: We're going to see if --

2 CHAIRPERSON YOUNG: Okay. Okay, we'll
3 take a five-minute break.

4 (Brief recess.)

5 CHAIRPERSON YOUNG: Okay, we will now
6 turn to the CSD's closing arguments. Mr. Seitz.

7 MR. SEITZ: Right, and before you start,
8 I just -- I'm not going to be arguing here. I've
9 passed out to, I think, every Board Member our
10 closing -- our exhibits on our PowerPoint. And I
11 think the prosecution team also --

12 CHAIRPERSON YOUNG: Do you have a copy,
13 Ms. Okun? Okay.

14 MR. SEITZ: -- also has our exhibits.
15 By the way, they're the same exhibits that are
16 going to be up here on the show -- on the
17 PowerPoint, sorry, except that there's one
18 document that's going to be out of order. I think
19 7 is actually going to be 3. Just to give you a
20 heads-up if you're going to follow along.

21 And now I'm ready to begin.

22 CHAIRPERSON YOUNG: Okay.

23 MS. SCHAFFNER: I'm sorry, just to be
24 clear, did you state that all of these documents
25 were already elsewhere in the record? None of

1 them are new, right?

2 MR. SEITZ: There is, 7 is a new
3 document, which is just a picture of the County.
4 So I want to make sure there's no --

5 MS. SCHAFFNER: But aside from that the
6 rest of them are in the record? Okay?

7 MR. SEITZ: Yes.

8 MS. SCHAFFNER: That'd be yes? Okay,
9 thank you.

10 CHAIRPERSON YOUNG: I'm starting the
11 clock, go ahead.

12 MR. SEITZ: Thank you, Mr. Chair,
13 Members of the Board, prosecution staff and the
14 audience. First of all, I want you to be assured
15 that we are not going to be using a PowerPoint to
16 overstate testimony. We're going to show you
17 actual documents.

18 Second, it's disingenuous for the
19 prosecution team to stipulate that the Bay Ridge
20 and Vista Del Oro and the fire department are the
21 only dischargers that you can be held accountable
22 for, and then go right through the entire litany
23 of their closing argument based on a violation --
24 a basin-wide violation of 00-131.

25 The settlement that they proposed, I

1 like the format, but if it was applied to Vista
2 del Oro, clean up Vista del Oro, clean up Bay
3 Ridge and clean up the fire department with a time
4 schedule, because that's what everybody has
5 stipulated to is that we're responsible for. Now
6 we're off on these million-dollar fines based on
7 failure to do a project that treats the entire
8 town.

9 As to the issue on points and
10 authorities that I haven't given you any. In my
11 responsive pleadings, in the answer to the
12 complaint, I cited article XIII of the California
13 Constitution and Government Code section 50076 for
14 the proposition that you can't willy-nilly switch
15 funds from the fire department to the sewer
16 department, from the water department to the sewer
17 department. I want you to know, that is the law.

18 Our challenge is based on the
19 application of TSO-00-131 and the application of
20 8313. We are not stipulating that it's the
21 application of those that we are contesting. The
22 idea that these are valid orders, maybe, maybe
23 not. We're going to find that out.

24 But what we're contesting here is how
25 they are applied to this particular situation.

1 And secondly, we have put the assets in mind, or
2 at issue.

3 With those opening comments, I want to
4 go to -- this is 8413. All I can tell you, this
5 is the State Water Resources Control Board
6 resolution that actually amended the basin plan.

7 The prohibition enunciated by that is
8 found in here as the second column, last phrase;
9 I'll just read it into the record: Discharges of
10 waste from individual and community sewer disposal
11 systems are prohibited effective November 1, 1988,
12 in the Los Osos Baywood area, and more
13 particularly described as -- and that's slide
14 number 2. The prohibition zone.

15 That is what we would call, as lawyers,
16 an in rem action. It is prohibiting property from
17 being used in a particular way, and that is to
18 discharge waste into the aquifers.

19 It is also predicated on a public
20 nuisance because the discharges from these septic
21 systems tend to migrate off of the property.
22 That's the predication. If you take a look at the
23 findings of both 8313 and 8413 you can't come to a
24 different conclusion, that this is an in rem
25 issue.

1 And therefore the District can only be
2 responsible for its discharges. How it operates
3 its properties on behalf of its citizens. It
4 cannot be held responsible as the prosecution team
5 would allege.

6 More importantly, if I can have slide
7 number 7, when 8313 was formed it was basically
8 the paradigm on 8313 or 8413, depending whether
9 you go with the State Water, was based on a
10 paradigm of the residents within the prohibition
11 zone, the property owners in the prohibition zone
12 that were violating 8313 and the County of San
13 Luis Obispo and this Regional Water Quality
14 Control Board.

15 That looks off, but my engineer tells me
16 it's because it includes the ocean. So just sort
17 of keep in mind, we know that Los Osos isn't
18 inland.

19 The issue there is clear, that you had a
20 paradigm with a County that was elected, had a
21 five-member Board that sat at San Luis Obispo and
22 the pact was between the Regional Board, the folks
23 within the -- the property owners within the
24 prohibition zone, and the County of San Luis
25 Obispo.

1 The folks in the prohibition zone, or
2 the folks in the community, whether they were
3 registered voters or et cetera, had very little
4 influence on the Country because it was a regional
5 government. They could only elect or participate
6 in electing District 2 Supervisor. Otherwise, the
7 other four were impervious to elections, recalls,
8 et cetera. That was the paradigm.

9 When 8313 was enacted the Coastal
10 Commission I don't even believe was in existence.
11 The regulatory framework of putting in a
12 wastewater treatment project was virtually
13 nonexistent, other than, as we all know, we got
14 big grants to do it.

15 Next slide, please. No, I'm sorry,
16 should be -- that should be 6. When the District
17 was formed that paradigm shifted dramatically.
18 The prohibition zone is shown in white; the total
19 District boundary and the voters changed -- sorry,
20 in the orange there.

21 The paradigm shifted dramatically. The
22 voters, the registered voters now within the
23 District elected the administrators of Regional
24 Water Quality Control Board orders. It wasn't the
25 County electing them, it was the voters within the

1 District that elected them. That paradigm
2 shifted. The paradigm shifted from a registered
3 voter base that was local control to -- for an
4 issue with the property owners within the
5 prohibition zone and the Regional Water Quality
6 Control Board. A dramatic paradigm shift on how
7 to develop a project.

8 No one, the Regional Board, in enacting
9 00-131 or any of these orders ever recognized that
10 paradigm shift, and how. And it is a paradigm
11 shift that you are going to have to address if you
12 want to see a wastewater treatment project in Los
13 Osos.

14 The idea of fining these types of issues
15 isn't going to provide you with the basis. What
16 you're going to get, a consensus between the
17 registered voters, the property owners within that
18 District. You have choices to make, but when you
19 sit back in closed session, you think how am I
20 achieving water quality, if you don't consider the
21 paradigm that is up there on that, how am I going
22 to do it, how am I going to get the people in the
23 orange in synch with the people in the white.

24 Because they all elect the same five
25 Board Members. And not only that, there are

1 property owners within the prohibition zone that
2 don't even live in the prohibition zone. Not only
3 that, there are properties within the prohibition
4 zone that aren't violating 8313, because they're
5 vacant.

6 That is the paradigm that you need to
7 address. It's the very paradigm that 00-131
8 ignores, 100 percent, total. And if you think
9 that fining somebody is going to shift that
10 paradigm I think you're mistaken.

11 Everybody in that District boundary has
12 to have an equal stake in seeing this wastewater
13 treatment -- a, whatever wastewater treatment
14 project is going to move forward. Whether you
15 expand the prohibition zone so that it's District-
16 wide, AB-885, or your own inherent powers. If you
17 don't implement a paradigm shift on how this
18 governmental agency actually interacts between its
19 voters and this project and the prohibition zone,
20 we will be here again.

21 I want you to really seriously consider
22 the dramatic difference between the County's
23 project when 8313 was enacted and those cease and
24 desist orders and all those things. Big
25 difference.

1 Next slide, please. No, I think it's
2 document number 8. Part of that paradigm is how
3 the Los Osos Community Services District actually
4 interacts with its different zones of benefit.

5 You saw this slide as part of our case-
6 in-chief. The point of it is that it's zone E --
7 I bought this, too, just for this purpose -- this
8 and this and the fire department are the ones that
9 are violating the 8313.

10 These folks and these folks pay, those
11 are the folks that pay the District to discharge.
12 Those are the people that are on the hook for
13 whatever fines you come up with based on their
14 discharge to the groundwater basin. And I think
15 you heard it was 140 residential units, from
16 someplace, from Mr. Buel, I think 60 from the
17 other one.

18 The fire department provides fire
19 service total District-wide, which means that they
20 provide service to people within the prohibition
21 zone and people outside the prohibition zone.
22 They provide service to folks that aren't
23 violating 8313 and they provide service to folks
24 that are violating 8313 with their septage.

25 When you take a look, that's why I've

1 been so strong on this, these ar the folks that
2 are violating the discharge. It's this little
3 zone of benefit, it's this little zone of benefit,
4 it's this fire department. The issue that we keep
5 hearing about property taxes being, well, they can
6 do something with the property taxes, you had
7 direct testimony that 99.9 percent of that goes to
8 the fire department.

9 So what are you telling the residents of
10 Los Osos? You have a discharge at your fire
11 department that can probably be cleaned up very
12 easily, because it's a very limited septic system,
13 and now we're just going to levy a million dollar,
14 \$2 million, \$12 million fine for the entire
15 prohibition zone against the fire department.

16 These folks, when you take a look at
17 that 11307 and you start thinking about the effect
18 on health and safety of this community, on what
19 your staff is proposing that you do, or the
20 effects on E and F up here, without a time
21 schedule to fix it, the very same time schedule
22 you've offered every other zone, including E and F
23 when the County had the project, to fix these
24 issues that you perceive, is violating your own
25 State Water Resources Control Board policies that

1 tell you that cease and desist orders and clean up
2 and abatement orders with timelines are the
3 applicable avenue for cleaning up prohibition,
4 violations of prohibitions.

5 And I can read them to you, but I don't
6 think I have the time. But, if you're going to
7 carry those policies in there, if I have time at
8 the end, I will reflect on them.

9 CHAIRPERSON YOUNG: Mr. Seitz, could I
10 just interrupt you just quickly because I thought
11 I heard testimony that there are cease and desist
12 orders applicable against those entities that
13 you're speaking of.

14 MR. SEITZ: When we get to that, that is
15 -- we queried that a thousand time, and we have
16 statements from your prosecution team, and we're
17 going to provide you a document that those cease
18 and desist orders are not the subject of this ACL
19 complaint.

20 Staff hasn't told you that. Staff
21 hasn't argued these cease and desist orders
22 because they know that there's a document in our
23 files, in their administrative record, that
24 specifically states those cease and desist orders
25 are stale. And we're going to show you that

1 document.

2 May we see the next slide, please. This
3 gives you the reserve balances in these accounts.
4 And remember, we're talking about the Vista del
5 Oro account, 19,000; we're talking about the fire
6 fund that had 669,000. Mr. Buel testified as to
7 what that money is used for. And you have the Bay
8 Ridge Estates, 31,624.

9 Does anybody here think that you're
10 going to use assessment District money from the
11 prohibition zone that have no relationship or an
12 on-and-off relationship with these zones of
13 benefit for their alleged violations, and they're
14 going to be charged?

15 You're going to fine the entire District
16 for -- you really think that you're going to take
17 assessment District money from all the folks in
18 the assessment District, even though they don't
19 live in Bay Ridge? They don't live in Vista del
20 Oro. And you're going to say, well, they got
21 money, they paid their lawyers, they got this,
22 they did that, they got this. That money isn't
23 Bay Ridge Estate money, and it's certainly not
24 Vista del Oro money, and it's certainly not fire
25 department money.

1 It's just, we asked for these
2 stipulations as to what are we being liable for,
3 and we keep hearing it's these discharges.

4 Next slide, please. What makes this
5 more complicated and why I keep coming back to
6 this, because we talk about the water department.
7 Well, the water department just got some money
8 because they settled an MTBE violation; that's
9 going to clean up MTBE issues and water
10 contamination.

11 So, let's not give it to the fire
12 department. Let's transfer it over to the sewer
13 department. I want you to know, take a look at
14 how many water departments operate in the
15 prohibition zone. Three. That's the District
16 one, this is CalCities, and this is S&T.

17 Next slide, please. Here's 00-131. And
18 if I can go to -- oh, by the way, this is slide
19 11. I keep getting so excited. If you take a
20 look on paragraph 13, and it's 11 in your packet,
21 13 says: The civil penalty established by this
22 order, \$10,000 per day of violation of the time
23 schedule is established in an amount necessary to
24 achieve compliance and does not include any amount
25 intended to redress previous violations.

1 Here's the kicker: The amount is
2 necessary to achieve compliance in light of the
3 project's cost. Estimated at \$70 million.

4 Again, what staff is asking you to do is
5 to apply a total project cost in a time schedule
6 order of \$70 million to these three uses of septic
7 tanks. And we keep telling -- we keep wondering,
8 where are you getting this? How can you go from,
9 they say, this isn't prohibition oriented, it's
10 project oriented towards these three operations.
11 Yet the very penalties, \$10,000 per day, isn't
12 based on the discharge from Bay Ridge, Vista del
13 Oro or anybody else. It's primarily based on us
14 not constructing a wastewater treatment project.

15 That's 00-131, paragraph 13.

16 Secondly of all, it's uncontradicted
17 testimony that 00-131 was based on the timeline
18 for the State Water Resources Control Board loan.
19 Let's not lose track of that.

20 It was not based on a stipulated
21 agreement. Now, I'm going to show you the next
22 slide. If you can go back up to 15, sorry, slide
23 15, please.

24 This is the minutes when this Board
25 adopted 00-131. The Board did conduct a special

1 meeting or an adjourned meeting so that the Board
2 Members could be present at this meeting.

3 And what I want to point out to you,
4 what this says is number one, President Bowker and
5 Gary Grimm added testimony in support of revising
6 the cease and desist orders. The cease and desist
7 orders at Bay Ridge, the cease and desist orders
8 at the fire department, the cease and desist
9 orders that were at the Vista del Oro and Bay
10 Ridge. And not adopting 00-131.

11 This whole idea that there was some type
12 of agreement that this was all hunky-dory is
13 refuted directly by this slide. And going up to,
14 again it's repeated right here, Gary Grimm urged
15 the Regional Water Quality Control Board not to
16 adopt 00-131, since LOCSD was already highly
17 motivated.

18 Executive Officer Briggs recommended
19 that RWQCB adopt order 00-131 as a new layer of
20 directive to the LOCSD on the theory that existing
21 cease and desist orders had become stale.

22 The District has always had a position
23 that if the Regional Water Quality Control Board
24 was indeed interested in these cease and desist
25 orders that they should have been expanded.

1 Understand this, that at the time 00-131
2 was ordered, the District had already submitted a
3 plan, the Oswald plan, that was a STEP system that
4 would have complied with those existing cease and
5 desist orders. Now, it may have had objections,
6 and there may have been things to have worked out,
7 and your staff may not have been as happy because
8 it didn't sewer the entire prohibition zone, it
9 only sewered the lower ones, but the District had
10 the ability at that time to comply with those
11 cease and desist orders. Don't lose fact of that
12 one -- don't lose sight of that one fact.

13 Next slide, please. And additionally,
14 the District filed a petition, by the way, with
15 the State Water Resources Control Board
16 immediately after that.

17 Now, what's interesting about this, this
18 is a letter, this is from your files, and you can
19 see your administrative record file. This is
20 document 16. This is a letter in February 7th,
21 '003 from the State Water Resources Control Board
22 saying, we're going to extend your loan.

23 You might recall that the County had
24 this loan from the State Water Resources Control
25 Board before the District was formed. And the

1 District negotiated with the State Water Resources
2 Control Board to transfer that loan over to the
3 District. This is the letter saying, February
4 7th, the loan is extended.

5 At that point in time it was incumbent
6 upon this Board and your staff to extend 00-131,
7 predicated on the State Water Resources Control
8 Board loan commitment. They changed, you should
9 have changed.

10 Next slide. This is a letter from Bruce
11 Buel, and if I can go to the next -- this is
12 document, you can see the document number, this is
13 document 17; if I can go to 18, please. This is
14 the second page.

15 This is Mr. Buel to the Regional Water
16 Quality Control Board regarding time schedule
17 order 00-131. The time schedule is out of date
18 due to delays beyond the reasonable control of the
19 District and should be modified at the appropriate
20 time.

21 Next document, please. This is Mr. --
22 the February 2003 Regional Water Quality Control
23 Board Staff report. Know what's interesting about
24 that? That's your waste discharge requirements.
25 And these folks are trying to tell you to fine

1 them back to 2002. That's your staff report.

2 Not only that, this is a staff report to
3 a matter that was litigated. We didn't have a
4 discharge permit for a year and a half later as a
5 result of the CalCities litigation that challenged
6 your waste discharge permit.

7 Most important thing is page 20. And if
8 you take a look at page 20, and it's this
9 paragraph right here. This is in response to Mr.
10 Buel's request for an extension. The time
11 schedule order enforces the CSD's obligation to
12 proceed with design and construction of the
13 system. The Regional Board will make a
14 determination regarding the time schedule order
15 compliance at a separate proceeding.

16 The District's expectation, and what Mr.
17 Briggs is telling you, is that hey, we are not --
18 there's no way they can comply with this. There's
19 no way. It's an impossibility.

20 We're going to come back and we're going
21 to amend TSO-00-131 so it's reality-based and not
22 myth-based. Not based on some idea, well, if they
23 do this one, then we won't fine you; if they do
24 this one. That's not the purpose of time schedule
25 orders. It's to set out milestones for project

1 completion, realistic ones.

2 Then if they don't meet the realistic
3 ones, then you fine them. It's not this mythical
4 thing of pushing these things out in the future
5 and say, well, you don't meet these hypothetical
6 future ones, then we're going to fine you. It's
7 backwards, absolutely backwards.

8 Now, and it's backwards for a lot of
9 reasons. But, from that point on it became
10 impossible for the Los Osos Community Services
11 District to ever comply with 00-131. It was never
12 going to happen.

13 The construction was supposed to occur a
14 year before this. And it was litigation. But to
15 put a governmental agency in a spot of saying this
16 continual threat, this continual hammer with
17 nothing in front of them to achieve except for a
18 threat if you don't achieve something, we're going
19 to come back and fine you. And that's the
20 position they put you in here today.

21 Furthermore, I'm going to read to you, I
22 usually don't do this, some Civil Code sections
23 regarding enforcing impossibilities. This is
24 Civil Code section 3526, responsible for
25 unavoidable occurrences: No man is responsible

1 for that which no man can control."

2 3531, impossibilities: The law never
3 requires an impossibility." From that point on we
4 were in an -- it was impossible for us to comply
5 with the timelines.

6 Those timelines in 00-131 should have
7 been amended. It is the application of 00-131
8 that upsets us the most.

9 Now, on October 2005 the Regional Water
10 Quality Control Board initiates an ACL complaint
11 charging allegations are a violation of 00-131.
12 Now, we know that at that time, now we know that
13 that complaint was directed at the discharges of
14 Vista del Oro, BayRidge and the fire department.
15 And that the violation of the prohibition zone
16 discharges of 8313 from these three discharges.

17 We know that the fines under 00-131 that
18 staff is trying to enforce aren't related to
19 BayRidge, Vista del Oro; they're related to the
20 District's failure to build a wastewater treatment
21 project, if you recall, that's the \$10,000 per-day
22 fine based on the \$70 million wastewater treatment
23 project. It's not designed, it's not predicated
24 on cleaning up BayRidge, Vista del Oro and the
25 fire department. In fact, the District had

1 previously submitted such a document that would
2 have accomplished that.

3 And now we're talking about let's, well,
4 we can sell Tri-W and we can get these millions of
5 dollars, and we can -- I don't even want to go
6 into the next one -- we can sell Broderson and get
7 these millions of dollars.

8 The prohibition zone bought those
9 properties. It wasn't Vista del Oro that bought
10 those properties. Those are folks that don't live
11 in Vista del Oro, those are folks that don't have,
12 are not illegally discharging under 8313, they
13 don't live in BayRidge. They are provided service
14 through the fire department, but their fire
15 department only has a minuscule septic tank. And
16 they service areas much broader than the
17 prohibition zone. So just a non-starter.

18 And then you say, well, we have this
19 settlement from the Regional Water Quality Control
20 Board -- I mean, it's not the settlement, this SRF
21 funding. Again, its root-source is the
22 prohibition zone. That is the return of
23 assessment District money. It is not this panoply
24 of spend it where we want, spend it where you can.

25 Even to the extent that you object to

1 the District's expenditure of that money, doesn't
2 make it available to you. That is between the
3 District, the State Water Resources Control Board
4 and its assessment District. You're not in that
5 mix. You're just not in that mix. For the
6 discharges of BayRidge, Vista del Oro and the fire
7 department.

8 What you have that's in that mix is
9 those fundings. You have in that mix the
10 availability with certain compliance requirements
11 of raising fees and charges within BayRidge or the
12 fire department if that's really what you think is
13 in the best interests, understanding that paradigm
14 that I showed you at the very beginning of this
15 presentation.

16 This is slide number 9, again, please.
17 There. Can the District raise fees in BayRidge to
18 put in some type of hybrid sewer system if that's
19 really what you're interested in? Yes. Let me
20 say this, most likely yes. But it's so litigious
21 that I would say most likely yes.

22 Vista del Oro. Do they have the ability
23 to raise fire taxes? Yeah, if you want them to
24 raise fire taxes, I would suggest to you that from
25 fire department there may be much simpler ways of

1 addressing that issue because that septic tank
2 only provides septage effluent for the fire
3 department. It's not even residential; it's a
4 fire department. My guess is there's much more
5 economical ways than having a hybrid system up
6 there.

7 This deserves a time schedule; this
8 deserves a clean up and abatement order or a cease
9 and desist order. It deserves the community, and
10 these folks in these various zones, an opportunity
11 to address it just like you've done in the past.

12 Next slide, please. I think it's 21.
13 Here's some of the questions from the Board. If
14 the Board agrees to impose a fine against the CSD,
15 could the CSD use SRF funds to pay it? Your
16 staff: No. Backed up by Anne Hartridge. This is
17 slide 21.

18 Los Osos Community Services District's
19 response, not quite as lengthy, but the same
20 thing. Payment of fines is not an eligible cost
21 under the SRF loan contracts.

22 It goes right back to this. This SRF
23 money is prohibition zone money; it's assessment
24 District money.

25 Next slide, please. This is slide 22.

1 What are CSD's options for paying potential ACL
2 fine? Can they increase the assessment? Would an
3 increase in the assessment have to go before the
4 voters? Regional Water Quality Control Board
5 prosecution team's response: Yes. Our response:
6 Yes.

7 And if you take a look and you note down
8 at the bottom of this slide 21 (sic), we also add
9 this, what we've been talking about here today:
10 Vacant parcels within the prohibition zone are not
11 violating RWQCB order 8313, and the owners of
12 those vacant parcels would also vote on an
13 increase in the assessment.

14 In other words, when you start thinking
15 about using prohibition zone money, understand
16 this, you are using money from folks that aren't
17 violating 8313.

18 Next slide, please. This is the
19 prohibition zone. And the reason why I wanted
20 this slide up here is because it shows you within
21 these parameters, this is slide 23, the vacant
22 properties that aren't discharging to the
23 underlying groundwater basin. And they are
24 significant.

25 The idea of saying, we're going to take

1 their money and we're going to pay for Vista del
2 Oro and we're going to pay for the fire department
3 and we're -- remember the fire department's up
4 here that serves in this area. It's inappropriate
5 to do that. These folks here have paid into that
6 prohibition -- paid the assessments that have gone
7 to buy the Tri-W site, that have gone to pay those
8 things that the SRF loan wouldn't commit to. And
9 it's those folks that are being reimbursed the
10 moneys from the SRF.

11 The only conclusion you can reach is
12 these folks are not, these folks in here cannot be
13 held responsible for Vista del Oro, BayRidge or
14 the fire department.

15 When you go in I hope that you can take
16 a worksheet with 11327 with you. Because one of
17 the questions is, whether the discharge is
18 acceptable to clean up or abatement? The answer
19 to that is yes. Vista del Oro, BayRidge and the
20 fire department are susceptible to clean up and
21 abatement. We've proven it in the past. We
22 submitted a plan. You have continually asked for
23 that through cease and desist orders, clean up and
24 abatement orders. There's nothing to believe.
25 Unless, again, your staff wants to convince you

1 that it's this, and not these discharges, that
2 you're concerned about.

3 The ability to pay. We put that
4 directly at issue. The effect on the ability to
5 continue in business, as we have pointed out, that
6 through our budgets, and we need to go back to
7 slide 9.

8 There's the ability to pay. The effect
9 on the ability to continue in business. Staff has
10 -- if BayRidge Estates, the fire department and
11 Vista del Oro are run as a business, they have
12 their separate budgets, and the ability to exact
13 \$1 million worth of fines payable immediately.
14 There's 31,000, there's 669, and there's 19,700.

15 Remember the paradigm that you are
16 operating in when you think about the Los Osos
17 Community Services District.

18 Any voluntary cleanup taken, yes. In
19 2000 we offered the original Oswald report before
20 00-131 came out, that would have sewerred these.
21 Now, staff makes this deal. Well, they haven't
22 tried it lately. Well, folks, we've spent \$25
23 million trying to do a project that's now failed,
24 and we're not here to stipulate to that.

25 But my guess is if Mr. Briggs would have

1 saw us building some type of plant to service
2 BayRidge and Vista del Oro, you would have had an
3 ACL complaint before you at that time lickety-
4 split. Because he would have said, you're
5 diverting money from the prohibition zone cleanup.
6 Understand the paradigm.

7 Prior histories of violation, you bet.
8 It goes back to 1983. And we're not here to argue
9 that 8313 isn't a good legitimate order. What
10 we're telling you, trying to convince you of is
11 that under the paradigm of the Los Osos Community
12 Services District, the paradigm of enforcing
13 orders like this on a population base that is
14 bifurcated between property owners, registered
15 voters and people that don't live in the
16 prohibition zone, is a non-starter.

17 You need to get these people in synch.
18 You need to come up with a strategy to --

19 CHAIRPERSON YOUNG: You're at the 15-
20 minute warning.

21 MR. SEITZ: Thanks. This is going to
22 work out pretty good.

23 The next one, the degree of culpability,
24 economic benefit or savings resulting from the
25 violation. I've heard of convoluted arguments on

1 how the District is saving money by spending
2 money. The District is not saving money by this,
3 in fact, we're losing money. We're losing money
4 by being here. We're losing money by not having
5 our efforts directed at trying to reach a solution
6 to this problem. We are losing money.

7 But it's not an economic benefit. This
8 money isn't drifting back into the coffers. This
9 isn't a private industry where you can say ABX
10 Corporation is operating in a prohibition zone,
11 and they're operating a terrible discharge system,
12 and because they're operating that terrible
13 discharge system, their coffers, they got more
14 money in profits, more money for their
15 shareholders. That's not how this works.

16 We're losing money. And the idea that
17 us losing money and saving money on a future
18 project is an economic benefit to the District,
19 how stretched do you have to go to make that
20 argument. Way out there. Way out there. We are
21 not saving a dime. We are spending money being
22 here. We are spending money daily. The idea that
23 we're being enriched as a result of this,
24 unfortunate term of events. It's just, to me,
25 beyond comprehension that anybody could make that

1 argument. And it should be beyond your
2 comprehension to accept it.

3 The next one, other matters as justice
4 may require. Very quickly here. State Water
5 Resources Control Board water quality enforcement
6 policy, section IV, enforcement actions, section
7 C(4). Clean up and abatement orders, CAOs are
8 adopted pursuant to the California Water Code
9 section 13304. CAOs may be used to any person who
10 has discharged or discharges waste into the waters
11 of the state in violation of any waste discharge
12 requirement or other order prohibition.

13 State Water Resources Control Board
14 water quality enforcement policy, section IV,
15 section C(7). Cease and desist orders are adopted
16 pursuant to California Water Code section 13301
17 and 13303. CDOs may be issued to dischargers
18 violating or threatening to violate WDRs or
19 prohibitions prescribed by the Regional Water
20 Quality Control Board.

21 I appreciate -- I don't think your
22 prosecution team is -- I hate to use the term,
23 evil-doers, but whatever you think, I don't think
24 that. I think that that offer of settlement was
25 genuine. That was up there. If it would be an

1 offer that said, look, we're really interested in
2 you cleaning up those three discharges that we've
3 all said that we're interested in cleaning up, and
4 came up with a time schedule where the Regional
5 Board and staff and they get together and come up
6 with a time schedule, and a methodology of getting
7 those discharges cleaned up, I think you're going
8 to find absolute cooperation between the District
9 and your staff to do it.

10 But to go back and say, clean up the
11 entire basin ignores the paradigm. Completely
12 ignores the paradigm. You need to shift that
13 paradigm with the District. You need to get the
14 entire District, the people in the white and the
15 people in the orange on the same page. You will
16 always be faced with a significant voter
17 population that has no financial interest in this
18 project.

19 Thank you.

20 CHAIRPERSON YOUNG: Thank you. You're
21 at 43, and so you've got, I think, up to what, 53.
22 Another ten minutes.

23 MR. ONSTOT: Thank you, Mr. Chair,
24 Members of the Board. As I said, my name is Steve
25 Onstot, and I'm fairly new to this. But in a past

1 life with the Department of Toxic Substances
2 Control, I'm fairly familiar with the process and
3 I do understand the difficulty that you have to go
4 through in weighing this.

5 I'm going to make three points. I'm not
6 going to repeat what Mr. Seitz said, except that
7 we specifically designed our closing arguments to
8 present you with documents, with case law, as
9 opposed to what you've seen so far from the
10 prosecution's closing, which was a PowerPoint that
11 had no exhibits attached to it, and was basically
12 interpretations of what was said.

13 A lot's been said about my first point,
14 and that's the due process argument. And when I
15 came to this case about November 17th, the first
16 thing I did is I looked at the ACL, of course.
17 And then I went to the website, the Water Board's
18 website because the first step in due process is
19 that every governmental entity is supposed to
20 follow its own rules.

21 And I did that. And I was very pleased
22 to see for December 1st and 2nd, attached to the
23 agenda, the conduct of meeting and hearing
24 procedures. One of which, item I, says that all
25 Board files, exhibits and agenda material

1 pertaining to items on this agenda are here part
2 of the record.

3 Now, that's why, when we asked for
4 documents to be brought into the record via
5 incorporation, we relied on the Water Board's
6 posted rules with regards to that, at least as
7 they were dated December 1st and 2nd of 2005.

8 Of course, the prosecution's response
9 was, well, we weren't specific enough. But as I
10 read this, it's pretty clear that Water Board
11 files on this matter are part of the record.

12 The second thing that I noticed with joy
13 was item D, that said, late submissions that
14 consist of evidence will generally be deemed
15 prejudicial unless all designated parties have had
16 time to consider the evidence before the meeting.

17 And to me, that Water Board rule,
18 adopted by this Board, was absolutely and
19 perfectly consistent with the regulation that
20 governs all of the Boards statewide, which is
21 648.4(a). It is the policy of the State and the
22 Regional Boards to discourage the introduction of
23 surprise testimony and exhibits.

24 It goes to the very fundamental concept
25 of fairness in these proceedings; a \$10 million

1 fine upon a governmental entity is at issue here,
2 and there was two months to prepare. And even
3 after December 1st when this hearing began, a
4 number of ruling changes that I think we all in
5 this room can agree, that there was surprise
6 evidence and documents that were introduced all
7 the way up until today.

8 The second point that I want to make
9 alludes to the concept of fining. Now, in
10 reviewing the transcripts from December 2nd, the
11 Chair posed a question to Mr. Seitz, saying, are
12 there any cases out there that say if you impose a
13 fine that's too onerous it's reversed, or that
14 addresses the issue.

15 And Mr. Seitz, on the spot, said that he
16 didn't know of one. And there isn't one. there
17 is not one that pertains to Regional Quality
18 Control Boards or even the State Board.

19 But there is one on due process. And
20 the case is called Walsh v. Kirby. I have copies
21 for all the Board Members and the prosecution
22 team. It's not evidence. It's a case law, and
23 it's by our Supreme Court.

24 And in that case the Alcohol Beverage
25 Control Board reversed the decision -- or, excuse

1 me, the Supreme Court reversed the decision of the
2 Alcohol Beverage Control Board because the Control
3 board was only authorized pursuant to statute to
4 impose penalties to achieve compliance. Not to be
5 punitive.

6 And what the Board actually did, it was
7 in the concept of fair trade, went way beyond what
8 the statute allowed and the Supreme Court had no
9 problem finding that the Board acted beyond its
10 authority, and therefore annulled the decision.

11 The two quotes that I'll give you, and
12 again you can take this into closed session with
13 you because it is law, it's not evidence. When a
14 governmental entity vested with broad
15 administrative powers acts in an arbitrary manner
16 so as to effect capriciously the property or
17 property rights of persons subjected to its
18 administrative controls, it has denied to those
19 persons due process of law.

20 Quote number two: The foregoing
21 discloses that the section is not intended merely
22 to exact tribute for the general fund, or by the
23 imposition of insurmountable financial burdens to
24 punish or eliminate a licensee who is in default.

25 However, discretion cannot be exercised

1 so as to enlarge its own boundaries or support
2 acts requiring other legal bases. Even within
3 legal limits the power's not unbridled. It is a
4 legal discretion to be exercised in conformity
5 with the spirit of the law, and the manner to
6 subserve and not to impede or defeat the ends of
7 substantial justice.

8 It is evident that the purposes of the
9 statute are further frustrated by the imposition
10 of heavy cumulative penalties upon a retailer when
11 such penalties are used as weapons. That is a
12 violation of due process when the Legislature
13 specifically proscribes such activities.

14 The power vested by the statute is
15 indeed perverted when the department utilizes its
16 tools to do indirectly that which is directly and
17 expressly prohibited. And I will come back to
18 that in a moment.

19 CHAIRPERSON YOUNG: Mr. Onstot, which
20 statute are you referring to? It's not a Water
21 Code statute, is it?

22 MR. ONSTOT: No, no. This case is the
23 Supreme Court making rulings on due process issues
24 in the context of the Alcohol Beverage Control
25 Board.

1 CHAIRPERSON YOUNG: Right, okay.

2 MR. ONSTOT: Okay. The facts are
3 completely different, but the law is the same
4 because you also are faced now with the statute
5 that says that you can't impose punitive
6 penalties.

7 CHAIRPERSON YOUNG: Okay, let me ask you
8 a question. Is there any dollar amount that you
9 think this Board could impose that would not
10 violate due process?

11 MR. ONSTOT: No.

12 CHAIRPERSON YOUNG: So you're saying any
13 penalty would violate due process?

14 MR. ONSTOT: In this case, yes, based
15 upon the reasons Mr. Seitz stated.

16 CHAIRPERSON YOUNG: Okay, thank you.

17 MR. ONSTOT: All the monies that are
18 available are allocated or restricted to someplace
19 else. There's not the ability to pay the fines.

20 MR. SEITZ: I don't want to argue with
21 co-counsel. I believe he's correct. But when you
22 go back to those budgets, there's 31,000 -- I mean
23 if you really want to shut the business down, you
24 got to wrestle with this issue, there's roughly
25 31,000 in BayRidge, if you really want to deplete

1 the fire department -- remember what Mr. Buel
2 testified to the use of those monies. Those are
3 for emergencies.

4 If you want to take the emergency money
5 away from the fire department, you've got about
6 \$600,000. If you want to take away replacement in
7 emergency from Vista del Oro, you got 19,720. If
8 you want to take away the emergency reserves from
9 the Bay Ridge Estates, you got 31,624.

10 I submit to you that those monies are
11 much more appropriate to clean up an abatement
12 orders or cease and desist orders, to get those
13 discharges cleaned up. Not sitting around here
14 taking these monies away. And remember, that's
15 sewer, street lighting and drainage. That's just
16 not sewer that is up there in those budgets.

17 MR. ONSTOT: So my third point that I
18 got when I first looked at this case is why are we
19 here. If the purpose is to get money out of the
20 District, I think that's been foreclosed.

21 If the purpose is to achieve compliance
22 I think that's been foreclosed, too, for a number
23 of reasons. From testimony regarding the Water
24 Board Staff's unwillingness to talk and meet with
25 us starting in October. All the way to the point

1 of not commenting on some proposed amendments to
2 the time schedule order.

3 So, what is the big picture and what is
4 the objective here. And if you go through all of
5 your notes there is one thread, one thread where
6 everything makes sense. And that is staff's
7 intent to mandate construction of a wastewater
8 treatment facility at the Tri-W site.

9 If you look at all of their
10 presentation, if you look at what is in the
11 record, it all goes to that. Even my question to
12 Mr. Briggs. Because what happened was Roger
13 Briggs and Lori Okun lost the election. The next
14 day, according to that email, the ACL was on Mr.
15 Briggs' desk.

16 He testified it was in October, based
17 upon the new District Board, suspension of work,
18 huh-uh. Either he was not telling the truth then
19 or his email that I confronted him with told the
20 truth.

21 The day after the election that ACL
22 complaint came out. It was before the
23 certification of the election, before there was a
24 Board, and if you don't have a Board you can't
25 have an agenda, and if you can't have an agenda,

1 you can't have a proposed action to suspend work.

2 Now, everybody knows, especially the
3 Board Members, I'm sure, with regards to the
4 prohibition set forth in Water Code section 13360
5 that says no waste discharge requirement or other
6 order of a Regional Board shall specify the design
7 location, type of construction or particular
8 manner which compliance may be had with that
9 requirement, order or decree. And the person so
10 ordered shall be permitted to comply with the
11 order in any lawful manner.

12 Your counsel and your Executive Officer
13 have been advocating Tri-W for a long time. They
14 testified in court, they were deposed on it. That
15 is no secret.

16 But, when the law says that you can't
17 mandate something like construction of a
18 wastewater treatment plant at a particular site,
19 I'll go back and quote the Walsh case that I'll
20 give you. Last sentence.

21 CHAIRPERSON YOUNG: You have used your
22 time up. I'll give you a minute just to wrap it
23 up.

24 MR. ONSTOT: Okay.

25 CHAIRPERSON YOUNG: Thank you.

1 MR. ONSTOT: The power vested by the
2 statute is indeed perverted when the Department
3 utilizes its tools to do indirectly that which is
4 directly and expressly prohibited.

5 This proceeding, the only way it makes
6 sense is an attempt by staff to coerce
7 construction at the Tri-W site. Even Mr. Briggs'
8 last slide up there said that. He wants Tri-W.
9 You cannot use enforcement proceedings to
10 circumvent the statute in the Water Code that says
11 you cannot mandate construction or certain mode to
12 get to an end.

13 Thank you for your time.

14 CHAIRPERSON YOUNG: Okay, thank you.
15 That, then, concludes the District's closing
16 argument. And we'll go back to prosecution staff
17 for any rebuttal. And then that will conclude
18 this portion of the hearing and the Board will go
19 into closed session.

20 MR. SEITZ: Mr. Chair, --

21 CHAIRPERSON YOUNG: Yes.

22 MR. SEITZ: -- is our expectation that
23 you're going to come out of closed session with a
24 decision today? Should we stick around here?

25 CHAIRPERSON YOUNG: Well, I think you

1 should stick around.

2 MR. SEITZ: Okay.

3 CHAIRPERSON YOUNG: I don't really know
4 what's going to happen. But my sense is that
5 we'll kind of get an idea of kind of what we would
6 like to do, how we'd like to do it. We may come
7 out and finish the deliberation publicly and
8 debate certain things. So I wouldn't go anywhere.

9 MR. SEITZ: Thank you.

10 CHAIRPERSON YOUNG: Okay, are you ready?

11 MS. OKUN: Yes.

12 MR. SEITZ: Oh, I thought she said no.

13 CHAIRPERSON YOUNG: No, she's ready.

14 MR. SEITZ: Oh, -- sorry. I misheard, I
15 thought they said they had no rebuttal. They
16 weren't going to rebut.

17 MS. OKUN: The District's closing
18 argument focused entirely on the time schedule
19 order, and that was the basis of the staff
20 recommendation for the penalties, the time
21 schedule order, as opposed to the basin plan
22 violations.

23 But, I just remind the Board that based
24 on how the complaint was drafted, if after hearing
25 the evidence the Board decides that the basin plan

1 violations are a more appropriate basis for
2 assessing an ACL order, the Board still has that
3 option.

4 Regarding whether or not we're alleging
5 basin plan-wide violations, I think we've made it
6 very clear that we're only alleging violations
7 based on the District's three discharges. All of
8 the other factors that we've discussed go to
9 culpability and go to whether the Board should
10 assess the maximum \$10,000 a day or not.

11 The District is the entity that the
12 community elected to build a treatment plant, and
13 that's relevant to the District's culpability
14 here. That's all I have to say on that.

15 In terms of the paradigm shift, I have
16 two comments on that. First, the paradigm shift
17 was recognized when the District was formed. The
18 time schedule order gave them the time they
19 requested to develop a new plan, and implement the
20 new plan, obtain funding.

21 The original cease and desist orders
22 issued to the District had a schedule in them.
23 The time schedule order lengthened that schedule
24 in order to recognize that the District was a new
25 entity, and that there was a new paradigm.

1 The second thing is that for the
2 District to come in here and suggest that this
3 Board should fix the problems with their paradigm
4 is outrageous. The community went to the Coastal
5 Commission and enlisted the Coastal Commission's
6 assistance in having the opportunity to form a
7 local entity to build the treatment plant.

8 And Mr. Seitz argued in his closing
9 argument that that was appropriate because when
10 the County had the project, the effective voters
11 were a tiny little proportion of the County.

12 It was set up in a way so that some of
13 the District is in the prohibition zone and some
14 of it's outside the prohibition zone. Maybe
15 that's the only legal way to set up a community
16 services district, but to say that this Board has
17 to fix that by expanding the prohibition zone or
18 doing anything else is outrageous, particularly
19 since, as the District well knows, if the
20 prohibition zone area is expanded, there's going
21 to be a lot of opposition to that. Because there
22 is a lot of sentiment in the community and
23 possibly at the Coastal Commission that that would
24 have growth-inducing impacts, which are
25 objectionable.

1 The cease and desist orders, as I have
2 said, are not the basis of the allegations. But
3 the District now argues that it should get new
4 cease and desist orders. And I just don't
5 understand that because there were cease and
6 desist orders that had schedules in there. The
7 District couldn't meet them, so the Board gave
8 them more time by adopting a time schedule order.

9 The enforcement policy does talk about
10 clean up and abatement orders and cease and desist
11 orders as options. But it also talks about
12 progressive enforcement which is in section D,
13 page 3 of the enforcement policy. Which says that
14 progressive enforcement is an escalating series of
15 actions that allows the efficient and effective
16 use of enforcement resources.

17 So you go from the least stringent
18 enforcement action that's likely to achieve
19 compliance. And if that doesn't work, you move to
20 the next step and to the next step. Well, what
21 the District's asking you to do is to move back
22 six years in steps, to go to cease and desist
23 orders again.

24 With respect to the 2000 project, it
25 wasn't just a project to clean up these

1 facilities. It was a project to sewer portions of
2 the community and, as Ms. Marks testified, the
3 District withdrew that. The Board never
4 considered it; the Board never rejected it.

5 Staff made some comments including that
6 it would be better to sewer a larger area. But
7 other comments on problems with that project, and
8 the District withdrew it in favor of the Tri-W
9 project.

10 There was some discussion that the cease
11 and desist orders were stale. Well, they were
12 stale because the District was already in
13 violation of the time schedules in those cease and
14 desist orders. And the Board cured that by
15 issuing a longer schedule.

16 Regarding who should pay the
17 assessments. I don't have any further comments on
18 that. I'll leave it to the discretion of the
19 Board to consider how to weigh that evidence. But
20 it still doesn't seem any different to me that
21 some people are in the prohibition zone and some
22 people are out of the prohibition zone, than it
23 would be for a county who's running a treatment
24 plant for a portion of the county, servicing only
25 a portion of the community. Except that in that

1 case it may be a much smaller portion of the
2 community.

3 The District argued that there was a
4 delay of a year and a half because of the
5 CalCities challenge to the WDRs and suggested that
6 somehow it was this Board's fault that its WDRs
7 were being challenged.

8 Well, the basis for the CalCities
9 challenge was that the WDRs included effluent
10 limits which weren't stringent enough. So, I
11 don't think that the District's suggesting that
12 the Board should have issued WDRs with more
13 stringent effluent limits, but I think that you
14 should keep that in mind when considering that
15 argument.

16 Regarding the sale of Broderson and the
17 Tri-W property, we're certainly not advocating the
18 sale of either of those properties. We don't
19 encourage the District to sell the Broderson
20 property in violation of their prop 13 grant.

21 As Mr. Onstot testified, the staff
22 does -- not testified, argued -- the staff does
23 want to see the Tri-W project built. It's the
24 only feasible project that's out there. We didn't
25 pick the Tri-W project. Wanting them to build the

1 only possible solution doesn't violate section
2 13360.

3 The Tri-W project is all that's out
4 there. It has permits. The District owns the
5 property where the project is going to be built.
6 And until December 9th it was completely 100
7 percent funded.

8 On the due process issues, I'm not sure
9 what surprise evidence Mr. Onstot was talking
10 about. We didn't introduce any evidence today.
11 We provided all the -- the last evidence we
12 provided was on December 12th, which was almost a
13 month ago. We did attempt to introduce a
14 newspaper article two days ago and the Chair
15 denied that request.

16 The conduct of this meeting was subject
17 to very extensive and specific hearing notices
18 that included hearing procedures.

19 The objections regarding incorporating
20 all exhibits I don't really understand. I think
21 Ms. Schaffner addressed that with Mr. Seitz
22 earlier today.

23 I obviously can't respond to the
24 discussion of Walsh v. Kirby, but I find it a
25 little surprising that the District would finally

1 provide legal authority for their arguments, when
2 the Chair and the Chair Staff have been requesting
3 that for over a month, particularly since the
4 District expressed some concern that we would use
5 our rebuttal to sandbag them.

6 But I'm happy that they did finally
7 provide some authority.

8 I do also have authority regarding the
9 amount of penalties being punitive. And the case
10 is called *Ojavan Investors, Inc. v. Coastal*
11 *Commission*. It's a Court of Appeal case from
12 1997.

13 It involves some violations of Coastal
14 Commission permits. And one of the violations had
15 to do with a transfer of development credit -- a
16 program for transfer of development credits, or
17 TDCs, that was intended to protect coastal
18 resources.

19 They're not called dischargers, the
20 permittees argued that the penalty, which had
21 actually been imposed by a court, not an
22 administrative agency, was punitive.

23 And the court said, we disagree in light
24 of the public interest goals of the TDC program.
25 The need for uniform compliance with the programs

1 was to further the Coastal Act's objectives to
2 protect the coast, and appellant's blatant
3 disregard of the deed restrictions.

4 The violation of the deed restrictions
5 was the basis of the penalty.

6 The court said that the penalty was an
7 acceptable amount, even though there was no
8 physical damage to the environment, and the
9 defendants made no profit.

10 The penalty in that case was \$10
11 million.

12 That's all we have to say and we thank
13 you for all your attention.

14 CHAIRPERSON YOUNG: Any Board questions
15 before we go into closed session? Okay, seeing
16 none, we will break.

17 I don't know how long we will be in, but
18 at least it's my hope that we will come out, come
19 out to here. We're going in another room. And
20 we're going to -- what's that?

21 (Pause.)

22 CHAIRPERSON YOUNG: Half hour, I think a
23 half hour. Let's just say a half hour is our
24 target. Because we can complete deliberation out
25 here if we just cover some things.

1 Okay, so a half hour is our target for
2 returning here in this room, one-half hour.

3 (Whereupon, at 7:00 p.m., the Board was
4 adjourned into closed session, to
5 reconvene at 7:30 p.m., this same
6 evening.)

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1 EVENING SESSION

2 9:05 p.m.

3 CHAIRPERSON YOUNG: All right. We have
4 come to a decision. I'm going to tell you what
5 the decision is, describe it, and then let the
6 Board Members go ahead and weigh in and say what
7 they want to say individually.

8 We have deliberated and come up with
9 written findings that I think Sheryl is going to
10 project. And then we can read through those and
11 share that with the public and the parties.

12 The Board has decided to find the CSD in
13 violation of the basin plan prohibition for its
14 three facilities, beginning October 1st of 1999 up
15 to September 30th of '05. This is a total of 2189
16 days.

17 The Board discussed what would an
18 appropriate dollar amount be per day. The maximum
19 would be \$15,000 for the three facilities. The
20 Board decided that \$1000 a day would be an
21 adequate number based on the record.

22 That number comes out to \$6,567,000.

23 The Board also decided to find the CSD
24 in violation of the time schedule order. However,
25 only from the date of, was it the certification --

1 MS. SCHAFFNER: When you verified --

2 CHAIRPERSON YOUNG: -- of Measure B.

3 When was Measure B certified, do we know?

4 MS. OKUN: The vote was certified by the
5 County Clerk on September 29th or 30th --

6 MS. SCHAFFNER: That's what we had,
7 yeah.

8 MR. ONSTOT: September 29th.

9 MS. SCHAFFNER: Okay, thank you.

10 CHAIRPERSON YOUNG: September 29th.

11 Okay, well, the date that we -- we intentionally
12 did not overlap these. So one has the front end
13 and then the smaller one is the time schedule
14 order violations is really the rear end of this.
15 And it's from the date of certification.

16 We computed there was about six days.

17 MS. SCHAFFNER: Yes. Although if you
18 don't want any overlap you don't want to --

19 CHAIRPERSON YOUNG: Well, does it start
20 October 1st?

21 MS. SCHAFFNER: The date of -- yes, the
22 6th --

23 CHAIRPERSON YOUNG: I didn't write down
24 the date adjustment.

25 MS. SCHAFFNER: I'll find it right here.

1 Yes, September 30th through October 6th, or six
2 days at \$10,000 per day -- seven days.

3 CHAIRPERSON YOUNG: Okay. So then I
4 think that that would be an additional seven days.

5 MS. SCHAFFNER: Actually, so if you're
6 going to assess the ACL for the discharges through
7 October 1st, we could just move that to October
8 1st and that way they would not -- the \$1000 per
9 day per facility from October 1, 1999 to September
10 30, 2005.

11 Then pick up the \$10,000 per day for the
12 violation of the TSO on October 1st. That would
13 make six days for the TSO.

14 CHAIRPERSON YOUNG: Okay, so October
15 1st, 2nd, 3rd, 4th, 5th and 6th.

16 MS. SCHAFFNER: Um-hum.

17 CHAIRPERSON YOUNG: Okay, that was the
18 six days, then, --

19 MS. SCHAFFNER: That's right.

20 CHAIRPERSON YOUNG: -- at \$10,000 a day.
21 We discussed whether to waive any of this based on
22 any kind of change of conduct of the District. We
23 just decided it's just much cleaner. We could get
24 into a whole Pandora's Box of what do you define
25 compliance and interpretation. We just want to

1 avoid that.

2 It's very simple this way. The fine
3 comes out to \$6,627,000. And that would be due --

4 MS. SCHAFFNER: Within 30 days.

5 CHAIRPERSON YOUNG: -- within 30 days.

6 Something that all of the Board
7 discussed, all Board Members did, and it's
8 something that I think was really driven home
9 somewhat by Mr. Seitz.

10 And that is what to do about the kind of
11 ongoing threats to water quality and the
12 discharges by the individual homeowners. And I
13 know Mr. Briggs, in his cover letter to the ACL to
14 the District, made comment about individual
15 enforcement actions.

16 I can only tell you, Mr. Briggs, that
17 the Board would like to hear what you have in
18 mind. They're concerned about this fine. It's
19 going to be appealed. How much of it gets paid we
20 don't know.

21 It's necessary, though, to back up the
22 Board's basin plan prohibition and the violations
23 that occurred. But, we really want to know what
24 staff has in mind for individual enforcement
25 actions. So we would like to hear from you.

1 MR. BRIGGS: As in now?

2 CHAIRPERSON YOUNG: In now, because some
3 Board Members have expressed some concern about
4 whether this penalty is enough. And so without
5 getting into the details of that, I think there's
6 a real issue as to dealing with the ongoing
7 discharges.

8 So, whatever you can tell us about what
9 staff's plans are, what the timeframe is, when the
10 Board might see something, we would like to hear
11 about it.

12 MR. BRIGGS: Okay. I've got to b a
13 little bit careful because we're talking about
14 enforcement action that's in progress, but I guess
15 that's the first status report is that it is in
16 progress.

17 And we have been working on -- we've
18 already made some assignments in terms of putting
19 together information on individual dischargers to
20 take enforcement action against individuals.

21 And we've talked about, you know, some
22 of the logistic problems of doing that. One of
23 which, of course, is just the, one of the biggest
24 bottlenecks is this process right here, the
25 hearing.

1 Even using a panel of the Regional Board
2 that would be, you know, substantial time would be
3 required. So we've talked about how to deal with
4 that.

5 And we've talked about proceeding with
6 actions against individual dischargers in phases.
7 And talked about different ways that would be
8 appropriate to, you know, how do we select the
9 first group of dischargers. And --

10 CHAIRPERSON YOUNG: By dischargers
11 you're referring to individual involved --

12 MR. BRIGGS: Individual dischargers,
13 right.

14 CHAIRPERSON YOUNG: Okay.

15 MR. BRIGGS: And, you know, I suppose I
16 could go into some more detail about the different
17 methods that we've discussed on how to do that.
18 And what we favor. But I'd rather not discuss
19 that right now.

20 CHAIRPERSON YOUNG: Well, are you going
21 to be coming back to the Board with options? Or
22 are you going to decide on an enforcement process?

23 MR. BRIGGS: Our intent was --

24 CHAIRPERSON YOUNG: I mean you could do,
25 there's a number of things that staff could

1 propose.

2 MR. BRIGGS: Um-hum.

3 CHAIRPERSON YOUNG: Are you going to
4 come back with one recommendation, or is it going
5 to be a couple of recommendations, two or three or
6 something?

7 MR. BRIGGS: Our intent was to go ahead
8 and issue an initial batch of enforcement orders
9 against individuals.

10 CHAIRPERSON YOUNG: ACLs or what?

11 MR. BRIGGS: Not necessarily ACLs. I
12 could tell you an option is clean up and abatement
13 orders that would require specific actions towards
14 actually cleaning up the basin. Such as frequent
15 pumping so that, while that's not a practical
16 solution in terms of eliminating the discharge, it
17 would be a step towards reducing the loading on
18 the basin.

19 And it would be -- it would cost
20 individual homeowners money to do that on an
21 ongoing basis, which would be different than a
22 typical ACL, which would be a one-time deal.

23 And it would be more on-target in terms
24 of money that's actually going towards reducing
25 the loading on the basin, as opposed to just a

1 penalty.

2 So I guess it's fair to say that's one
3 of our top options right now.

4 Oh, I'm sorry, we talked about the
5 benefit of a cease and desist order versus a clean
6 up or abatement order, and we actually concluded
7 the cease and desist order would be preferable.
8 Although, as I was alluding to, one of the
9 consequences of that is that that the cease and
10 desist orders come to the Board, as opposed to
11 being administratively issued.

12 But, yeah, we have decided the cease and
13 desist orders would be better.

14 CHAIRPERSON YOUNG: Would be better?

15 MR. BRIGGS: Yes.

16 CHAIRPERSON YOUNG: Okay. But you
17 haven't determined yet, or decided whether it's
18 going to be clean up and abatement orders or cease
19 and desist orders, is that what you're still --

20 MR. BRIGGS: No. We've pretty well
21 settled it, cease and desist orders would be
22 better.

23 CHAIRPERSON YOUNG: On individual
24 property owners?

25 MR. BRIGGS: Right.

1 CHAIRPERSON YOUNG: Okay. And idea how
2 many in the first group? Can you give us a range?

3 MR. BRIGGS: No, I don't think we're
4 prepared to say that yet.

5 CHAIRPERSON YOUNG: Okay. Can you tell
6 us what timeframe? How soon would the Board be
7 looking at hearing individual CDOs?

8 MR. BRIGGS: Yeah. I had hoped that it
9 actually would progress a little bit faster than
10 it has. Like I say, we've assigned some folks, in
11 terms of putting together basically a database
12 with assessor parcel numbers. And coming up with
13 the basic information we need regarding the people
14 who are responsible for the discharge.

15 But, we have been focusing on this
16 hearing, and with essentially the same people,
17 with some exceptions, same staff people.

18 But, I'd like to say that March or May
19 would be possibilities.

20 CHAIRPERSON YOUNG: And does -- how many
21 Board Members have to weigh in on a CDO? Do you
22 need -- would it be the same five?

23 MR. BRIGGS: Well, a panel would be
24 three, but you need to have five voting to
25 validate or to adopt a cease and desist order.

1 CHAIRPERSON YOUNG: Okay. All right.

2 MR. BRIGGS: I believe it has to be, say
3 you only had five Members, I believe it has to be
4 unanimous.

5 MS. OKUN: Right.

6 CHAIRPERSON YOUNG: At that point, okay.
7 Mr. Jeffries, I know you had maybe some thoughts
8 on this. Did you want to weigh in at this point
9 with respect to this? You're the Vice Chair, and
10 you know, we give some direction to staff. I
11 certainly don't mind if you want to weigh in.

12 VICE CHAIRPERSON JEFFRIES: No, I don't
13 have any comments at this time. But I do want
14 this to come back as soon as possible. We talked
15 about this many years ago about doing this very
16 same thing.

17 And I'm concerned, the process that
18 we've had it's evident it's not working. So we
19 have to do something else.

20 MR. BRIGGS: That's the conclusion we
21 came to, and as I said in my transmittal letter on
22 the ACL to the District, that was our intent to go
23 that route.

24 CHAIRPERSON YOUNG: Okay.

25 MS. OKUN: If I could just add one thing

1 on the option to use cease and desist orders
2 rather than ACLs, that's due partly to the fact
3 that there are 5000 dischargers. If we issue
4 cease and desist orders, the facts are pretty much
5 all the same for all of them. Everyone will have
6 an opportunity to defend their particular order.

7 But if we do ACLs we have to consider
8 all the factors that we've done for the last three
9 days. And I think it will slow down the process
10 quite a bit.

11 A cease and desist order can order the
12 homeowner to either hook up to a treatment plant
13 within x number of years, if one exists. And if
14 one doesn't exist, to otherwise cease discharging
15 or face penalties.

16 CHAIRPERSON YOUNG: You're talking about
17 the CDOs?

18 MS. OKUN: Um-hum.

19 CHAIRPERSON YOUNG: Well, wouldn't it
20 require that they begin some periodic pumping
21 schedule?

22 MS. OKUN: Right, right. There would be
23 interim tasks.

24 CHAIRPERSON YOUNG: And, do you have any
25 idea, because I know people probably are listening

1 to this, any idea at this point from staff as to
2 what kind of periodicity with the pumping?

3 MR. BRIGGS: We've talked about possibly
4 quarterly. Also talked about monthly. And we
5 think that we would enforce that through requiring
6 submittal of receipts indicating pumping.

7 CHAIRPERSON YOUNG: Okay. All right.
8 Why don't we do this. Did you have anything else
9 to add related to that? Okay.

10 Give the Board Members an opportunity,
11 if they wish, to put any comments on the record,
12 separate and apart from the findings that we
13 discussed.

14 Who would like to go first? Dr. Press.
15 Mr. Jeffries.

16 BOARD MEMBER PRESS: I'll defer to my --

17 VICE CHAIRPERSON JEFFRIES: Well, thank
18 you. The comment I have, I'd just like to -- I
19 know the hour is late, but I want to just give you
20 something personal that I'm running down the same
21 line as the CSD.

22 And when we started this back in
23 December 1st I was introduced as the former Mayor
24 of Salinas. When I ran for the City Council in
25 1981 the issue I ran on was that I was opposed to

1 going to a regional sewer facilities. That I
2 thought the City of Salinas could upgrade their
3 facilities to a tertiary treatment plant, and it
4 would be much cheaper to the ratepayers and the
5 taxpayers of the City of Salinas.

6 Two months before I was elected the City
7 Council issued the permits to start construction.
8 And they started construction.

9 When I finally was sworn in on the City
10 Council the first thing I did was I sat down with
11 the City Attorney and the Project Attorneys. When
12 they laid out the financial responsibilities of
13 terminating those contracts and reversing the
14 contracts that we had signed in a JPA, I realized
15 it was not beneficial for the City of Salinas to
16 back out of those particular contracts because the
17 financial burden on the taxpayers and the
18 ratepayers of the City of Salinas was overwhelming
19 because of litigation.

20 Needless to say, I had to go to my
21 constituency that elected me and explain to them
22 why the financial consequences changed my mind. I
23 had enough votes to overturn that, but after doing
24 that research and doing my due diligence, I
25 realized that that was not the best way for us in

1 the City of Salinas to go.

2 So needless to say, we do have a
3 regional facilities which is working fine. We're
4 paying, been paying since 1981.

5 But I looked at that and thought of what
6 the CSD and what the citizens of that location are
7 going to go through. And I'm just wondering what
8 in the world are you really thinking about.

9 Mr. Chairman, that's all I have to say.

10 CHAIRPERSON YOUNG: Okay. Dr. Press.

11 BOARD MEMBER PRESS: I have always been
12 less interested in money than in water quality.
13 In my view we could have imposed larger fines; we
14 could have looked at a schedule of suspended fines
15 and tried to get some of the fines if we get some
16 progress.

17 But I'm not so interested in the money.
18 I'm interested in water quality, and that is why
19 we are instructing staff and urging staff to come
20 back with individual enforcement actions. Because
21 that's the only way that I can see at this moment
22 that there will be a water quality improvement in
23 anything like, remotely like a reasonable period
24 of time.

25 So, to me that's the even bigger story,

1 I think, tonight, is that movement. And I would
2 like to be on the record as strongly supporting
3 that.

4 CHAIRPERSON YOUNG: Mr. Shallcross? Mr.
5 Hayashi?

6 BOARD MEMBER SHALLCROSS: I concur with
7 Dr. Press. The one thing I wanted to address is
8 something that the CSD attorneys brought up.

9 There seemed to be an implication that
10 the -- and if you carried your argument to its,
11 actually you didn't have to take too much of a
12 leap to get there, that basically you were saying
13 that the CSD can't be fined.

14 And what that does is that basically,
15 you know, one of the attorneys was saying you
16 can't be fined, and the other was saying give us
17 cease and desist orders. Well, if you can't fine
18 them, then cease and desist orders are worthless.

19 So I just wanted to say that if we can't
20 fine someone then all of our enforcement tools are
21 out the window, if we don't have fines to back it
22 up. So I didn't buy that argument, obviously.

23 The other thing I just wanted to say is
24 I think it's probably one of the saddest things
25 that's come before the Board, just to see a

1 community like this sort of going at each other's
2 throats in a really ugly way. It hasn't been fun
3 to watch.

4 At first maybe it was sort of
5 entertaining, but, you know, the more I learned
6 about it, the more I read about it, the more I saw
7 what was going on with the community, it sort of
8 makes me sick to my stomach really. I really feel
9 sorry for the folks who are there and have to go
10 through it, no matter which side you're on. It's
11 really very sad.

12 Hopefully at some point you guys can all
13 get together and hold hands and sing kumbaya.
14 But, it doesn't look like it's going to happen
15 anytime soon.

16 Again, just to reiterate the other
17 sentiments, it looks like our enforcement
18 abilities going down the path we have been have
19 been ineffectual. For many years now we've tried
20 to work with the CSD. We tried to work with the
21 folks prior to the CSD.

22 We don't seem to be able to get
23 anywhere, and so hopefully going after the
24 individual dischargers may create the political
25 will for something to happen in a reasonable

1 amount of time.

2 CHAIRPERSON YOUNG: Mr. Hayashi.

3 BOARD MEMBER HAYASHI: Yeah, I'd like to
4 echo the same feelings from my fellow Board
5 Members. Especially, you know, something that's
6 so important as water quality and how it affects
7 each and every one of you and your community.

8 I mean when you have something that
9 that's important and you have less than 29 percent
10 of the people come out and vote, then you've
11 changed the whole direction by 15 votes. I mean,
12 where were the people that -- where was everybody
13 to vote?

14 (Audience participation.)

15 BOARD MEMBER HAYASHI: So, -- 69 percent
16 came out? Oh, I got -- okay. But, anyway, it's a
17 sad time. And I don't know what to say. I mean
18 one day things will happen, one day things will
19 change. And we just have to hope for the best.

20 So, that's all I have to say.

21 CHAIRPERSON YOUNG: All right. You
22 know, I know that there are people that are just
23 not going to understand nor agree with what the
24 Board has said or what the Board has done.

25 People will look at a situation and come

1 away from it having two different perspectives and
2 two different recollections of what happened, as
3 to what was important, what wasn't important, and
4 what should have been done.

5 It is clear to me that this community is
6 tremendously polarized. But it is a community.
7 And the community, as a whole, really is
8 responsible for what has happened and the current
9 situation that it is in.

10 I don't look at the CSD Board as the old
11 board or the new board, as being two separate
12 entities, that one bears responsibility for what's
13 happened, and the other one does not bear
14 responsibility for what has happened.

15 I can tell you one thing, that had the
16 community not put the blocks on the current
17 project that we would not be here with an ACL
18 hearing. We would not be here arguing about
19 whether the time schedule order was appropriate
20 and should have been amended. I mean all of that
21 is really not that relevant to me in my
22 decisionmaking.

23 Frankly, the previous CSD Board was
24 working feverishly to come to compliance. At
25 least they, from what I can tell, firmly were

1 trying to comply with our order. And Mr. Briggs'
2 threats of water quality enforcement, I think they
3 took that very seriously.

4 And the community decided, either
5 because of the personalities of that Board, or
6 because of other issues that they were going to
7 just get rid of them. And I can only tell you
8 that it was the most short-sighted thing to do
9 while at the same time adopting Measure B, and
10 then killing the Tri-W site.

11 Now, we don't mandate that Tri-W be
12 built. We don't mandate to any discharger that
13 they build a particular facility in any location.
14 But it was this CSD, with its previous assemblage
15 of Directors, that chose the Tri-W site. It was
16 fully permitted, fully funded, fully engineered
17 and got all of the okays that it needed to proceed
18 under state and federal law.

19 What I heard in terms of complaints
20 about it's not environmentally superior, it's not
21 aesthetically superior, I mean those may be
22 realities to some individuals. I look at them as
23 being subjective and not objective. I look at the
24 objective criteria as being whether something gets
25 funded and permitted and gets on target to be

1 built.

2 There's always going to be tradeoffs
3 with any facility like this that gets built
4 anywhere. Moving it out of town, to me, as though
5 it's clear sailing, that we can do it in four
6 years, don't worry about lawsuits, we can deal
7 with these other issues, is just, I think, the
8 same wishful thinking that went into this
9 community when it believed that the Regional Board
10 would never impose fines. That it believed that
11 we could just get the state revolving fund loan
12 modified to a new location. And we can just stop
13 the construction contracts and get them modified
14 also.

15 Unfortunately that was a lot of poor
16 advice that was given to the voters that that is
17 something they could depend on. I think the
18 electorate, some of the electorate was deceived by
19 representations that were made during that
20 election.

21 Measure B, to me, was, boy, just a
22 wonderful Trojan Horse, a nice poison pill. And
23 it became very disturbing to me that you had
24 individual Board Members that were advocating
25 positions with respect to Measure B. And then at

1 the same time, I was hearing argument that, well,
2 we can't, shouldn't look at them, what they do as
3 individuals because that's a separate right they
4 have under the First Amendment. And you should
5 only look at what the CSD does as a whole. That
6 was a little hard for me to stomach and listen to.

7 I never heard any testimony that this
8 CSD really has taken -- by this CSD, I mean the
9 current members, really bear any responsibility
10 for what has happened and the situation that
11 they're in.

12 But I've heard lots of complaints and
13 accusations that it's the State Board's fault.
14 They issued a loan that was improper. EPA didn't
15 have proper oversight. Criticisms of everybody
16 else in the world, except the CSD, itself.

17 And I didn't see anything, in fact Mr.
18 Onstot really didn't want to allow any discussion
19 into whether there was any balancing, any
20 consideration given to, you know, what if we take
21 a course of action to assume Measure B is valid,
22 stop the contracts, the construction, try to get
23 the loan changed. How do we balance that against
24 the known threats by Mr. Briggs that there would
25 be enforcement actions.

1 And in the face of State and Federal
2 water quality protection laws that are bearing
3 down on the District, nothing really happened. I
4 didn't anything that made me feel comfortable that
5 this was really kind of an informed decision,
6 other than a predetermined decision that has been
7 clear throughout that the intent, unequivocally,
8 was to stop the site at its current location --
9 stop the project at its current location, period.
10 That's essentially what has happened.

11 I agree that the individual enforcement
12 actions I think are critical. I think that they
13 have to start as soon as staff can start to
14 process things and get them moving.

15 It's quite clear to me that the folks of
16 Los Osos, in my opinion, are really not capable of
17 addressing these issues with their wastewater
18 disposal in a rational way. I don't know what's
19 going to happen. A bunch of lawsuits have been
20 settled, then replaced by an equal number of
21 lawsuits. We're just exchanging lawsuits.

22 And I don't really see any clear end to
23 this dilemma at this point because the community
24 is really so polarized. And it really is just a,
25 it's a tragedy.

1 So, having said that, Sheryl, do you
2 want to vote first, or do you want to read the
3 findings?

4 MS. SCHAFFNER: I think we need to go
5 over the findings before you vote, so that they
6 will be part of your vote.

7 CHAIRPERSON YOUNG: Okay. Fine.

8 MS. SCHAFFNER: Can we get these
9 projected?

10 This will take a few minutes, so please
11 bear with us. We only have the onscreen version.
12 What I would like to do is go through these page-
13 by-page. And I will want to just get a signal
14 from both parties, both counsel tables, when
15 you're done reading the page at hand so we can
16 move on. Just make sure everybody gets a chance
17 to go over this.

18 CHAIRPERSON YOUNG: You're not asking
19 for any concurrence. You just want to --

20 MS. SCHAFFNER: I am not.

21 CHAIRPERSON YOUNG: -- make sure that
22 they have read everything?

23 MS. SCHAFFNER: That's right, make sure
24 they understand what the vote is. And I'm not
25 sure if everybody in the audience can read it.

1 Would it be helpful for me to read the document as
2 you go?

3 (Pause.)

4 MS. SCHAFFNER: To make sure everybody
5 is following along, I'll just go ahead and read it
6 as we go.

7 These are proposed additions to the
8 Administrative Civil Liability order that everyone
9 has. Start with inserting a new finding number 3,
10 which would read as follows: The CSD has asserted
11 that no administrative liability should be imposed
12 in this matter because the failure to meet the
13 deadlines was beyond the reasonable control of the
14 CSD to avoid.

15 New number 4: The Board finds that
16 administrative liability is appropriate because a)
17 the provision in the TSO cited in paragraph --
18 actually that should say paragraph 1 above -- is a
19 discretionary opportunity for the Board to modify
20 prospective deadlines in the TSO not a basis for
21 excusing long-term -- right -- not a basis for
22 excusing long-past deadlines.

23 B: The CSD was forewarned by the
24 Executive Officer that any failure to continue on
25 a compliance track would result in recommended

1 penalties for all missed deadlines, including
2 those which the Executive Officer was willing to
3 forebear so long as the CSD was on a compliance
4 track.

5 And C: To the degree that Water Code
6 section 13327 factors might implicate equitable
7 consideration of the hurdles for compliance
8 presented by Measure B, or the loss of the state
9 revolving fund loan monies, the CSD, itself,
10 created or permitted those hurdles to come into
11 being and to continue in effect.

12 Specifically, one, with the adoption of
13 Measure B by the electorate of the CSD, a barrier
14 was created inhibiting compliance with the TSO and
15 making future compliance with that order subject
16 to subsequent CSD voter approval.

17 Two, the CSD Board of Directors and
18 employees simply represent and derive all of their
19 powers and authorities from the voters in the CSD.
20 In short, the voters are the CSD. The voters in
21 this matter exercised their ultimate authority as
22 decisionmakers for the CSD, and the passage of
23 Measure B was therefore an affirmative act of the
24 CSD. An affirmative act to halt compliance with
25 the TSO.

1 Three: Thus by approval of Measure B
2 through its initiative vote the CSD prohibited its
3 Board and Staff from taking the steps necessary to
4 comply with the TSO.

5 Four: After Measure B was passed the
6 CSD's new Board of Directors, with the new
7 majority installed by the CSD voters in the same
8 election as Measure B, chose to abandon the
9 previous Board of Directors legal efforts to
10 invalidate Measure B, thereby affirmatively taking
11 further steps to inhibit the CSD's ability to
12 comply with the TSO.

13 Five: After Measure B was passed, when
14 faced with the choice of complying with Measure B
15 and being subject to a potential lawsuit by the
16 District's initiative proponents, or stop work on
17 compliance with the TSO, and be subject to
18 potential Administrative Civil Liability, the CSD,
19 through its Directors and Managers, chose the
20 latter. It chose to stop work on the project, and
21 thereby consciously chose to increase the extent
22 of the CSD's long-term noncompliance and face this
23 Administrative Civil Liability.

24 Six: On the basis of the foregoing, the
25 assessment of Administrative Civil Liabilities for

1 violation of Water Code section 13308 for the
2 period ranging from the date of certification of
3 Measure B, October 1, 2005, and the date of
4 issuance of the draft ACL, October 6, 2005, --
5 it's still one, two, three, four, five, six; it's
6 still six. I think I'm missing a -- um-hum, we're
7 missing -- is appropriate, we're missing a verb.

8 Okay, for the six days the assessment of
9 this violation is -- thus for six days at \$10,000
10 per day, the assessment for this violation is
11 \$60,000. Appropriate, thank you. Got it.

12 Renumber the interim paragraphs
13 accordingly. And then add a new paragraph, which
14 I want to make sure I've got that number correct.
15 It would be after the old paragraph 12, we'd add a
16 new paragraph:

17 The Central Coast Water Board took
18 extensive written evidence, argument and oral
19 testimony from the prosecution staff, the CSD and
20 heard the views of the interested public
21 concerning this matter.

22 Based on this record, applicable law and
23 good public policy, the Central Coast Water Board
24 finds:

25 (a) Regarding nature, extent and

1 gravity, there have been and continues to be
2 ongoing, unpermitted discharges occurring in
3 violation of the TSO, and the basin plan discharge
4 prohibition. And evidence supports the conclusion
5 that those discharges contain nitrates and
6 pathogens that are getting into groundwater and
7 threaten to migrate to drinking water supplies,
8 and potentially discharging surface waters.

9 These discharges threaten the public
10 health and the environment and violate the
11 applicable basin plan prohibitions.

12 (b) Regarding prior history of
13 violations, the CSD has been under various
14 directions, prohibitions, cease and desist orders
15 and time schedule orders since its inception to
16 address the problems addressed above, and intended
17 to be addressed to compliance with the TSO.

18 (c) Regarding economic benefit or
19 savings. I want to be clear here before I read
20 this that these are not the avoided costs of
21 building the system, because those costs are still
22 going to be incurred. Because someday there will
23 have to be a plant built. These are simply the
24 avoided costs of not building the plant in a
25 timely fashion based on the CSD's own testimony.

1 To resume reading the findings (c): The
2 CSD Board of Directors presented testimony and
3 evidence, noting that had they complied with the
4 TSO the operation and maintenance of the treatment
5 system would cost approximately \$2.5 million per
6 year, or \$208,333 per month. The TSO required
7 that the plant be built by August 30, 2004.
8 Therefore the CSD has realized, at a minimum, an
9 economic savings or benefit of \$2,708,329 dollars
10 for 13 months of avoided costs as of October 1,
11 2005.

12 (d) Regarding ability to pay, this is
13 the sole factor militating in favor of a less-
14 than-maximum liability, and is the basis for
15 assessing only \$6,627,000 instead of the
16 \$44,040,000 maximum calculated by staff.

17 The CSD has presented evidence of its
18 inability to pay any penalty of any significant
19 amount. However, pursuant to State Water
20 Resources Control Board enforcement policy, a
21 reduction is appropriate only where the discharger
22 is acting in a cooperative manner. And has the
23 ability and intent to come into compliance in a
24 reasonable period of time. That has not been
25 demonstrated.

1 The CSD has abandoned the Tri-W site
2 that was funded and permitted. It has no
3 alternative site identified, project designed,
4 engineered, funded or permitted. Thus there is no
5 evidence of an ability or current intent to come
6 into compliance in a reasonable period of time.

7 (e) Regarding other matters as justice
8 may require, it is vital to the Regional Board's
9 ability to maintain an effective water quality
10 protection program to insure the communities are
11 held to account, literally and figuratively, for
12 their conscious decisions to not do what is
13 required under state law and Regional Water Board
14 orders to protect water quality and the public
15 health and environment that depends thereon.

16 Decades of patience, cooperation,
17 assistance, prodding, pushing, and ordering by the
18 Central Coast Water Board has led to this point
19 where the CSD and its decisionmakers feels that if
20 it chooses not to, compliance is not required, and
21 without consequences.

22 A strong enforcement action is necessary
23 to clear up that misconception and deter further
24 noncompliance.

25 New Finding: The Central Coast Water

1 Board finds that the unlawful dischargers from
2 each of the three CSD-controlled facilities
3 warrant an assessment of administrative civil
4 liabilities \$1000 per day for the period of
5 October 1, 1999 to September 30, 2005, under Water
6 Code section 13350, totaling \$6,567,000.

7 New Finding: The administrative civil
8 liabilities imposed here for violation of the
9 basin plan prohibition and the Water Code section
10 13350 are based on discharges only from the CSD's
11 three facilities, and no other dischargers.

12 The next paragraph is amended from the
13 draft to reflect the new figures, which are the
14 combination of the calculation based on the
15 dischargers from the three facilities and the six
16 days of violations of the time schedule order date
17 schedules.

18 And those, it now reads: It is hereby
19 ordered, pursuant to the California Water Code
20 section 13308 and 13350 that Los Osos Community
21 Services District is assessed a total civil
22 liability of \$6,627,000 to be delivered to the
23 Central Coast Water Board at the letterhead
24 address by February 6, 2006. The check is to be
25 made payable to the State Water Resources Control

1 Board.

2 Those are the proposed amendments by the
3 Board to consider for its vote.

4 MS. OKUN: I know you didn't want
5 concurrence from us, but can I just make one
6 correction. There was a --

7 MS. SCHAFFNER: All corrections -- any
8 observations of errors would be welcome.

9 MS. OKUN: Okay. There's a recitation
10 or finding that staff's calculated maximum
11 liability was \$44,040,000. And we actually
12 revised the worksheet so the maximum liability was
13 calculated at \$32,850,000 to avoid charging under
14 both sections.

15 MS. SCHAFFNER: To avoid the overlap?

16 MS. OKUN: Right.

17 MS. SCHAFFNER: Thank you for that. I
18 simply added them together. State the figure
19 again.

20 MS. OKUN: 32,850,000.

21 MS. SCHAFFNER: Okay, thank you. Any
22 other errors that either party sees? I understand
23 you aren't agreeing with the substance of it, but
24 if there are any errors we would welcome
25 corrections.

1 VICE CHAIRPERSON JEFFRIES: Mr. Chair,
2 if you're ready for a motion.

3 CHAIRPERSON YOUNG: I think we are ready
4 for a motion.

5 BOARD MEMBER SHALLCROSS: I move the
6 adoption of the ACL, as amended, --

7 VICE CHAIRPERSON JEFFRIES: I second.

8 BOARD MEMBER SHALLCROSS: -- with the
9 findings. And with the findings.

10 CHAIRPERSON YOUNG: With the findings.

11 VICE CHAIRPERSON JEFFRIES: Yes.

12 CHAIRPERSON YOUNG: Okay.

13 All those in favor?

14 (Ayes.)

15 CHAIRPERSON YOUNG: Any opposed? Okay,
16 the motion carries unanimously.

17 This concludes the hearing, but are
18 there any housekeeping matters we need to deal
19 with at this point?

20 MR. ONSTOT: Yes, Mr. Chair. At this
21 time the CSD would move that the order be stayed
22 pending appeal. And for final confirmation, that
23 this is final Board action effective as of this
24 date.

25 MS. SCHAFFNER: I'd just, as a point of

1 law, I would note that you have 30 days to file a
2 petition with the State Board. And upon filing of
3 the petition with the State Board, your obligation
4 to pay the penalty is suspended by operation of
5 law.

6 So, we don't need to take an action for
7 that to happen. You just need to file your
8 petition.

9 MR. ONSTOT: No, I understand that.

10 MS. SCHAFFNER: Okay.

11 MR. ONSTOT: I still want to request a
12 stay if, -- you know.

13 CHAIRPERSON YOUNG: What do you guys
14 want to do? No? No, go ahead and file the
15 petition.

16 All right, that concludes everything.
17 We are done.

18 (Whereupon, at 9:50 p.m., the hearing
19 was closed.)

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CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing Central Coast Regional Water Quality Control Board Hearing; that it was thereafter transcribed into typewriting.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, nor in any way interested in outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of January, 2006.