

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN LUIS OBISPO

PROHIBITION ZONE LEGAL DEFENSE FUND aka CITIZENS FOR CLEAN WATER; ALAN MARTYN; JACQUELINE MARTYN;; RHIAN GULASSA; JOHN DERGARABEDIAN; JAN DERGARABEDIAN; CINTHEA T. COLEMAN; LAURIE MCCOMBS; ANTOINETTE GRAY PAYNE; BRUCE PAYNE; EDWIN I. INGAN; JUNE Q. INGAN; CLINT KOCH; ANN CALHOUN; CHRISTOPHER ALLEBE; E.E. ALLEBE; CHARLES E. WILKERSON; NORMA WILKERSON; CDO RECIPIENTS #1040; JULIE G. MILLER; LAWRENCE KLEIGER; WILLIAM MOYLAN and BEVERLEY DE WITT-MOYLAN.

Case No.: CV 070472

RULING AND ORDER DENYING  
PETITION FOR PEREMPTORY WRIT  
OF MANDATE

## Petitioners.

## REGIONAL WATER QUALITY CONTROL BOARD, CENTRAL COAST REGION: and DOES 1-50, inclusive

## Respondent

## I. INTRODUCTION

This case places the Central Coast Regional Water Quality Control Board, a regulatory agency entrusted with protecting local water resources, at odds with approximately 18 families who live in the so-called “Prohibition Zone,” an area of Los Osos where the long-standing use of septic systems has severely contaminated groundwater supplies. The events giving rise to the litigation can be traced to the exploding growth in the Los Osos area during the latter part of the 20th century, and the corresponding, alarming increase in contamination from septic systems.

Efforts by local agencies over the past 25 years to build a sewage treatment plant in Los Osos have until recently come to no avail. Frustrated over local resistance to the treatment plant solution, the Regional Board at some point decided to issue Cease and Desist Orders ("CDOs") to a group of 45 randomly-selected residents who were allegedly using their septic systems in the Prohibition Zone. In a nutshell, the CDOs require selected residents to cease discharging from their septic systems once a treatment plant is finished. In the meantime, these residents must maintain their septic systems by periodic pumping and inspections.

The residents who did not eventually settle their matters with the Regional Board filed suit to invalidate the CDOs on multiple grounds. They argue that the procedures surrounding their CDO hearings violated "due process" requirements and that supporting evidence of individual septic tank pollution was lacking. They urge that the Regional Board misused the administrative process, while attempting to coerce them into signing settlement agreements. They claim that the procedures utilized by the Regional Board were designed to pressure them into voting for an assessment district, to threaten them with criminal prosecution, and to intimidate them with the prospect of losing their homes.

The Court appreciates the mix of emotion, surprise, and helplessness experienced by Petitioners upon receipt of their CDOs. Nonetheless, the evidence belies their legal claims, which the Court finds are exaggerated. Having reviewed the record of the proceedings, the Court does not come away with the notion of a local government agency run amuck. To the contrary, the Court's overall impression of the hearings is

that the Regional Board went out of its way to provide due process of law, allowing affected residents a reasonable opportunity to speak their minds and to present exculpatory evidence.

Although the Court recognizes that legitimate debate exists whether it has been worth the time, effort, and overall cost (in manpower resources, money, and local community anxiety) to undertake individual enforcement actions against select residents of the Los Osos community, the Court concludes that the actions of the Regional Board did not violate due process. Further, the CDOs issued by the Regional Board are supported by substantial evidence, and they are not otherwise deficient.

## **II. STATEMENT OF FACTS AND PROCEDURAL HISTORY**

The coastal communities of Los Osos and Baywood Park are located just south of the City of Morro Bay. Between 1950 and 1980, the population increased dramatically, leading to several problems, including commensurate levels of wastewater being discharge from private septic systems. Over time, the shallow Los Osos groundwater quality has become increasingly degraded due to rising effluent discharges from individual on-site wastewater disposal systems. Multiple reports and studies have identified and quantified the increasing seriousness of this problem, amounting to a legitimate public health hazard. Administrative Record ("AR") 000439 and 000447.<sup>1</sup>

Among other things, studies have shown "a high incidence of occurrence of infantile [disease] in communities utilizing drinking water supplies with excess nitrate concentrations. AR000376. Sewage effluent contributes approximately 91% of the nitrogen to groundwater. In other words, sewage effluent contributes at least 707,000 pounds per year of nitrates. AR 000451. Further, many studies document the potential public health threat due to the high groundwater table, which causes septic system failures and surfacing of effluent. AR 000452.

<sup>1</sup> The approximately 14,000-page AR has been supplied by the Regional Board on DVDs for the Court and the parties.

1 Water supply within the Los Osos basin is entirely from groundwater, being  
2 supplied by municipal and private water companies. Groundwater degradation has been  
3 detected in the upper reaches of this basin. Over time, more degradation and  
4 contamination is likely to occur in the lower groundwater due to mixing with the upper  
5 groundwater.

6 In 1983, recognizing these ongoing public health concerns, as well as the threat of  
7 increasing environmental contamination, the Regional Board adopted Resolution 83-13,  
8 which will be discussed more fully herein. This Resolution includes findings stating  
9 that Los Osos/ Baywood Park area has high soil permeability and high groundwater. It  
10 states that the majority of lots are too small to provide adequate dispersion of individual  
11 sewage disposal system effluent, that the groundwater is seriously polluted with  
12 excessive nitrate concentrations (in violation of drinking water standards) and bacterial  
13 analyses showing very high total coliform levels (in violation of state drinking water  
14 standards). AR 006357.

15 As late as 1995, an engineering firm concluded that individual septic systems  
16 appear to be the major contributor of nitrate to shallow groundwater. AR 006361. In  
17 June 2006, expert hydrologists detected the presence of pharmaceuticals, an anti-seizure  
18 drug, antibiotics, as well as drugs used in shampoo and other toiletries, in all wells  
19 sampled in the shallow aquifer.

20 These chemicals are found only in human waste water sources. They do not occur  
21 naturally and are not used in agriculture. They are highly soluble in water and do not  
22 have a tendency to bind in soil. Their presence indicates that septic system  
23 contamination is expanding into groundwater sources with a variety of unknown  
24 chemicals causing unknown impacts. AR 006363.

25 Proposals to mitigate the groundwater contamination/public health problem in the  
26 Los Osos/Baywood Park area have, until recently, faced insurmountable political  
27 hurdles and large-scale community resistance. Although the reasons for these long-  
28 running difficulties are beyond the scope of this writ proceeding, suffice it to say that, at  
some point in 2006, the Regional Board began to contemplate individual enforcement  
actions against people owning homes or living in the Prohibition Zone.

1           The Regional Board eventually sent notices to 45 individuals stating that they  
2 were being considered for enforcement action as a consequence of their violating the  
3 discharge prohibition contained in Resolution 83-13. AR 6023-6026. Following  
4 administrative hearings, the issuance of cease and desist orders, and an unsuccessful  
5 appeal to the State Water Board by Petitioners, this writ proceeding followed.

6           On September 3 and 28, 2010, after several rounds of briefing, motions to  
7 augment the administrative record and other procedural scuffles, the writ hearing took  
8 place. Although a writ hearing typically resembles a civil law and motion hearing, and  
9 although oral argument is usually short, sometimes as brief as a few minutes and rarely  
10 lasting as long as an hour (*California Administrative Mandamus* CEB 3d ed. §14.1, p.  
11 523), the Court set no time limits. In the end, it received almost four hours of oral  
12 argument from Petitioners' counsel alone, in order to ensure that Petitioners had ample  
13 opportunity to present her case. Following a total of nearly five hours of oral argument,  
14 the matter was taken under submission.

### 15           **III. DISCUSSION OF LEGAL ISSUES**

16           In order to prove its case against each of the named Los Osos residents, the  
17 Regional Board drew upon Resolution 83-13, and also relied upon circumstantial  
18 evidence showing that each of the named residents was utilizing a septic system at their  
19 home and was therefore violating the "discharge prohibition" established by the  
20 Regional Board in 1983 through Resolution 83-13. Although Petitioners raise an  
21 assortment of subsidiary issues, the central questions presented are whether the CDOs  
22 issued to each resident are supported by substantial evidence, and whether the hearings,  
23 collectively as well as individually, complied with fundamental due process.

#### 24           **A. The Board's CDOs Are Supported by Substantial Evidence**

25           In discussing the validity of the administrative orders at issue here, the Court's  
26 review is generally limited to determining whether the Regional Board's adoption of the  
27 issuance of each CDO was "arbitrary, capricious, entirely lacking in evidentiary  
28 support, or unlawfully or procedurally unfair." *See Sherwin-Williams Co. v. South*  
*Coast Air Quality Management District* (2001) 86 Cal.App.4th 1258, 1267. This  
determination, in turn, is ordinarily limited to a review of the evidence found in the

1 administrative record. If such evidence supports the Regional Board's findings, the  
2 decisions should be affirmed. *See East Bay Mun. Utility Dist. v. Dept. of Forestry*  
3 (1996) 43 Cal.App.4th 1113, 1122-1112; *Western States Petroleum Assn. v. Superior*  
4 *Court* (1995) 9 Cal.4th 559, 564 and 573 fn. 4.<sup>2</sup>

5 Water Code section 13301 requires a "notice and hearing" prior to issuance of a  
6 cease-and-desist order. The record demonstrates that, after providing notice, the  
7 Regional Board followed the adjudicative procedures set forth under Chapter 4.5 of the  
8 APA (Gov. Code, § 11400, et seq.) and the regulations set forth at Cal. Code Regs.,  
9 Title 23, § 648, et seq. *See* Government Code section 11425.10, subdivision (a)(1)  
10 (administrative agency must provide parties with "notice and an opportunity to be  
11 heard, including the opportunity to present and rebut evidence.")

12 Within this general framework, the Regional Board may conduct adjudicative  
13 proceedings "in a manner as the Board deems most suitable to the particular case with a  
14 view towards securing relevant information expeditiously without unnecessary delay  
15 and expense to the parties and to the Board. *See* Cal. Code Regs., tit. 23, § 648.5(a).

16 In the case of the contested CDOs, the Regional Board hearing panel framed two  
17 fundamental issues that it was being called upon to decide: 1) whether the persons  
18 named in the proposed cease-and-desist orders were discharging or threatening to  
19 discharge in violation of the basin plan prohibition; and, 2) whether the requirements of  
20 the proposed cease-and-desist orders were the appropriate remedies for the violations.

21 AR 011827.

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23       <sup>2</sup> Evidence found outside the administrative record generally is not admissible to show that an  
24 agency acted inappropriately. *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559,  
25 564 and 573, fn. 4. This Court has ruled on multiple occasions that Petitioners have not established the  
26 elements necessary to augment the AR with extra-record evidence. *See, e.g.*, Respondent's RJD Ex. A,  
27 9:25-12:28 and 11:12-13. Although Petitioners continue to assert that documents were omitted from the  
28 record, these arguments were not raised within 10 days of the Court's 2008 Ruling in a timely motion for  
reconsideration, and cannot be considered. *See* Code Civ. Proc., § 1008, subd. (e). Further, especially  
without supporting declarations, it is insufficient merely to allude to thousands of vaguely specified  
documents that appear never to have been considered by or presented to the Regional Board. *See*  
Exhibits A through D to Petitioners' Request for Judicial Notice in Support of Petition for Writ of  
Mandate. Moreover, much of the information they seek to include is already contained in the AR. *See*  
AR 005180, 006534, & 006836. With one exception discussed hereinafter, the continued efforts to  
augment the AR are ill-conceived.

1        To decide these questions, the Board allowed each Petitioner the opportunity to  
2 present limited oral and documentary evidence, and to cross-examine certain important  
3 witnesses.<sup>3</sup> Putting aside the initial hearing, which was somewhat more lengthy,  
4 involving evidence that was common to all cases, a typical hearing against an individual  
5 discharger lasted approximately 15 minutes or less, involving basic questions  
6 concerning the presence of an operating septic system on each property, and whether  
7 the individual petitioner owned the property. *See, e.g.*, AR 013070-013071 (hearing  
8 from January 22, 2007).

9        In terms of substantive evidence, at each CDO hearing (and based primarily on  
10 written documents applicable to all dischargers that were submitted by the Prosecution  
11 Team prior to the individual hearings) the Regional Board relied heavily upon  
12 Resolution 83-13, which amended the Los Osos Area Basin Plan to prohibit discharges  
13 of waste from sewage disposal systems as of November 1, 1988. Because this  
14 Resolution is central to the outcome of the case, some discussion of its history and  
15 adoption is appropriate.

16        The Basin Plan Amendment, which is set forth on page four of Resolution 83-13  
17 (AR 000395), contains an unqualified and absolute prohibition upon discharges of  
18 waste. It provides as follows:<sup>4</sup>

19        Discharges of waste from individual and community sewage disposal systems are  
20 prohibited effective November 1, 1988, in the Los Osos/Baywood Park area, and  
21 more particularly described as: “Groundwater Prohibition Zone  
22 (Legal description to be provided for area prescribed by Regional Board).

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24       <sup>3</sup> The Regional Board used the procedures set forth at Title 23, California Code of Regulations,  
25 Division 3, Chapter 1.5 (commencing with Section 647), rather than Government Code Section 11500, et  
26 seq. AR 005054, 006387, & 014272. California Code of Regulations, title 23, section 648(b) specifically  
27 excludes several portions of the Administrative Procedure Act (“APA”), including certain provisions of  
28 Chapter 4.5 and all of Chapter 5 except for Government Code section 11513. (Cal. Code Regs., tit. 23, §  
648(c).) These regulations were adopted by the State Board, which is not a party to this Petition for Writ  
of Mandate. Thus, Petitioners cannot challenge the regulations. *See* April 16, 2008 Notice of Ruling,  
2:24-25, attached as Respondent’s RJD Ex. B.

4 *See, e.g.* AR 013824 (“The Basin Plan prohibition specifies... [that]...Discharges from  
individual and community sewage disposal systems are prohibited effective November 1, 1988...”).  
Each CDO contains this language.

1 (AR 000395.) Thus, Resolution 83-13 prohibited the discharge of *any and all waste*  
2 within the Prohibition Zone effective as of November 1, 1988 (five years after its  
3 adoption), including waste from any housing units that existed at the time of, or were  
4 constructed after, the adoption of the resolution.<sup>5</sup> When the State Board approved the  
5 Regional Board's Basin Plan Amendment by Resolution 84-13, it confirmed that the  
6 purpose and effect of Resolution 83-13 was to place an absolute ban on waste  
7 discharges into the Prohibition Zone effective November 1, 1988. AR 000560.<sup>6</sup>

8 The Regional Board's 1983 Staff Report for Resolution 83-13 also contains  
9 evidence supporting the establishment of the discharge prohibition for the Prohibition  
10 Zone. (AR 000435-000547.) For example, the Staff Report states that:

11 Shallow Los Osos groundwater quality has been degrading due to sewage  
12 effluent discharges from individual and community on-site wastewater disposal  
13 systems. A number of reports and studies have been made to identify and  
14 quantify this problem.

(AR 000439.)

15 As indicated in the Brown and Caldwell Phase I report, there is evidence of  
16 human waste contamination of groundwater in the Los Osos ground water  
17 basin...This degradation is due primarily to discharges from on-site wastewater  
18 disposal systems and establishes a basis for a prohibition of discharge in the Los  
Osos/Baywood Park area.

AR 000456.

Elsewhere, Resolution 83-13 contains the following finding by the Regional  
Board:

WHEREAS, pursuant to Section 13280 of the California Water Code, the  
Regional Board finds that discharges of waste from new and existing individual

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5 Resolution 83-13 contains several other related discharge prohibitions, including one directed  
toward additional housing units, and another related to compliance timelines for the County of San Luis  
Obispo. (AR 000395.) On January 8, 1988, the Regional Board in fact implemented an immediate  
discharge prohibition on additional units pursuant to Resolution 83-13. *See* Respondent's RJD Ex. F, at  
p. 13 ("the County is hereby directed not to approve any new septic systems in the prohibition zone  
applied for after today's meeting"); Respondent's RJD Ex. G, at p. 3 ("If the Board takes no action, it will  
allow construction of new systems to continue until November 1, 1988, when the current moratorium  
would take affect.") *See also* AR 000549 ["Resolution 83-13 allows the addition of 1,150 housing units to  
the prohibition area until full prohibition commences on November 1, 1988."]

6 *See also* AR 000549 ["Resolution 83-13 allows the addition of 1,150 housing units to the  
prohibition area until full prohibition commences on November 1, 1988."]

1           disposal systems which utilize subsurface disposal in the affected area will result  
2           in violation of water quality objectives; will impair beneficial uses of water; will  
3           cause pollution, nuisance, or contamination; and will unreasonably degrade the  
4           quality of waters of the state.

5           AR 000394 (Resolution 83-13).

6           The Staff Report, in turn, refers to and relies upon studies and reports from Brown  
7           and Caldwell Consulting Engineers, the Department of Water Resources, the San Luis  
8           Obispo County Health Department, and the State Water Resource Control Board. *See*  
9           AR 00439; AR 000142-000382. The evidence supporting the Prohibition Zone is  
10          summarized in the Prosecution Team's September 8, 2006 Staff Report. AR 006357-  
11          006362.

12          In an administrative proceeding like this one, the burden of proving the charges  
13          rests upon the party making them, in this case the Regional Board. *Parker v. City of*  
14          *Fountain Valley* (1981) 127 Cal.App.3d 99, 113. "The obligation of a party to sustain  
15          the burden of proof requires the production of evidence for that purpose." *Id.* One of  
16          the central points raised by Petitioners during the administrative process was the  
17          absence of any *direct* evidence showing the discharge of waste by any individual  
18          landowner through their particular septic system. In this regard, the prosecution team  
19          conceded that it had not visited any specific CDO sites and that it had collected no site-  
20          specific data vis-à-vis any particular property. Petitioners called this "prosecution by  
21          implication."

22          Although the Regional Board did not directly prove, through sampling or test  
23          data, that any individual septic system was discharging prohibited "waste," for several  
24          reasons such direct evidence was unnecessary. First, there is considerable evidence in  
25          the record that septic systems are the primary source of the contamination threatening  
26          surface and groundwater areas within the Prohibition Zone. Second, what the  
27          prosecution team *did* prove, largely from written and oral admissions by petitioners,  
28          was that each individual property was then occupied, and that each property was then  
             operating a septic system to dispose of human waste materials. Third, the prosecution  
             team proved that, even when operated properly, septic systems are a significant source  
             of waste that is discharged to the environment.

The presence of operational septic tanks, a known source of significant pollution within the Prohibition Zone, is therefore relevant evidence (albeit circumstantial evidence) supporting the conclusion that prohibited waste discharges were occurring. Contrary to petitioners' argument, relevant circumstantial evidence is admissible in California administrative proceedings. *Jackson v. Department of Motor Vehicles* (1994) 22 Cal.App.4th 730, 741 (circumstantial evidence may properly be admitted to establish liability in administrative proceedings). See *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 548; Evid.Code, § 351. Moreover, circumstantial evidence can support a finding of "substantial evidence" in administrative proceedings. *Pereyda v. State Personnel Board* (1971) 15 Cal.App.3d 47, 50; *People v. Goldstein* (1956) 139 Cal.App.2d 146, 155. Indeed, even when contradicted by direct testimony, the finder of fact is entitled to accept persuasive circumstantial evidence to the contrary. *Hasson*, 19 Cal.3d at p. 548; *Norris v. State Personnel Bd.* (1985) 174 Cal.App.3d 393, 398-99.

Based upon the record evidence before it, the Regional Board was entitled to conclude that septic system discharges are illegal in the Prohibition Zone whether or not the systems are operating properly or working as designed. Based upon Resolution 83-13, the supporting studies and staff testimony, sufficient evidence supports the Regional Board's conclusion that a violation was occurring because a particular petitioner resided within the Prohibition Zone discharge area, and that he or she was utilizing an individual sewage disposal system.<sup>7</sup>

With respect to compliance deadlines, the CDOs contain various options depending upon actions taken by the County of San Luis Obispo directed toward building a community sewage treatment system. Because the County of San Luis Obispo has approved the benefits assessment for a Los Osos community sewer system, the CDOs require Petitioners to “cease all discharges from Septic Systems by *the later of January 1, 2011 or two years following written notice* by the Executive Officer” that

<sup>7</sup> Petitioners claim that the Regional Board “has not revealed how the randomly selected recipients were selected although many requests have been made for that information.” (Opening Brief, 30:28.) However, the Regional Board indeed did describe in a staff report how the CDO recipients were selected. See AR 006354, at footnote 1.

1 a “material cessation of the work” on the community sewer system has occurred. *See*  
2 AR 013827, at para. 3, italics added. The Executive Officer has not provided such  
3 notice. Thus, the CDOs provide *at least* two additional years starting from January 1,  
4 2011, before cessation of discharges could possibly be required.

5 “All discharges of waste into waters of the state are privileges, not rights.” Water  
6 Code, § 13263 (g). Given that the Regional Board has prohibited all discharges into the  
7 Prohibition Zone since November 1, 1988, the two year CDO compliance schedule  
8 (plus the time that has already passed since the CDOs were adopted) is reasonable.  
9 Simply stated, our local regulatory officials responsible for the maintenance of public  
10 health and welfare do not need to sit helplessly by while recognized, cumulatively-  
11 serious sources of pollution remain unregulated and unaddressed.

12 With respect to enforcement options, the CDOs at issue here require Petitioners  
13 periodically to test and pump their septic systems. Such a requirement imposes little  
14 more than normal maintenance obligations and cannot be considered onerous. The  
15 CDOs impose ***no fines whatsoever***, as Petitioners recognize. *See* Petitioners’ Opening  
16 Brief, at 10:15-17. Rather, the CDOs provide that “failure to comply with provisions of  
17 this order *may subject* the discharger to further enforcement action...” *See* AR 013829  
18 (emphasis added).

19 Before assessing civil liability, however, the Regional Board would have to hold  
20 another series of administrative hearings. Wat. Code, §§ 13350, subd. (e) and 13323.  
21 **If** such hearings were ever to occur, the Regional Board would have discretion whether  
22 to impose penalties (and in what amount). Further, Water Code section 13327 would  
23 require the Regional Board to consider such factors as the discharger’s degree of  
24 culpability, ability to pay, and other matters as justice may require. Of course, no such  
25 discretion has yet been exercised, and it would require another series of administrative  
26 hearings before the Regional Board would be able to do so. Moreover, **if** any  
27 administrative civil liability were imposed, it would then be subject to State Board  
28 review and Superior Court review. Water Code §§ 13320 & 13330. Contrary to  
Petitioners’ assertions, the CDOs contain a reasonable enforcement methodology that is  
designed to bring about compliance.

1           As stated, this Court's review is limited to determining whether there is  
2 "substantial evidence" supporting the Regional Board's decisions to issue cease-and-  
3 desist orders to Petitioners. *Young v. Gannon* (2002) 97 Cal.App.4th 209, 225  
4 (Substantial evidence means "evidence of ponderable legal significance...reasonable in  
5 nature, credible, and of solid value.") A thorough review of the administrative record,  
6 together with the video recordings of the enforcement hearings, shows that there is  
7 indeed substantial evidence supporting: 1) the establishment of the discharge  
8 prohibition; 2) violations of the discharge prohibition by named individuals; and, 3) a  
9 reasonable plan for bringing about compliance. That is all the law requires.<sup>8</sup>

10           **B. The Board's CDO Hearings Complied with Due Process**

11           The U.S. and California Supreme Courts have held that, while the form of due  
12 process varies "as the particular situation demands," it requires a "reasonable  
13 opportunity to be heard." *Gilbert v. Homar* (1976) 520 U.S. 924, 930; *Jonathan Neil &*  
14 *Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 936. Given the issues, procedures,  
15 compliance deadlines, remedies and evidence discussed above, the Board afforded  
16 Petitioners both reasonable notice and a reasonable opportunity to be heard. However,  
17 some particular issues raised by petitioners deserve further elaboration.

18           First, throughout these proceedings, Petitioners' counsel has urged that a review  
19 of the video recordings of the enforcement hearings occurring on December 14 and 15,  
20 2006, and January 22 and May 10, 2007, would show evidence resembling a "kangaroo  
21 setting." However, the documentary and video evidence does not sustain these  
22 assertions.

23           Despite its earlier ruling that all video recordings would be excluded as extra-  
24 record evidence, the Court has, *sua sponte*, reconsidered this ruling. Upon reflection,  
25 contemporaneous video recordings are, if not part of the record, certainly admissible

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27           <sup>8</sup> Although Petitioners claim that the Regional Board lacks authority to issue CDOs to  
28 individuals, this is belied by a plain reading of the Water Code, which states that "the board may issue an  
order to cease and desist and direct that those *persons* not complying with the requirements or discharge  
prohibitions" comply with them. (Wat. Code, § 13301, italics added.) "Person" means *any person, firm,*  
association, organization, partnership, business trust, corporation, limited liability company, or  
company." (Wat. Code, § 19, italics added.)

1 extra-record evidence for several purposes relevant to this proceeding. *See Western*  
2 States, 9 Cal.4th at 580 fn. 5 (court may admit extra-record evidence relevant to the  
3 accuracy of the administrative record, procedural unfairness, and agency misconduct);  
4 *see Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, § 23.55, pp.*  
5 *967-968.*

6 Petitioners allege that the record is incomplete and that the Regional Board denied  
7 them due process of law. Video recordings of the actual proceedings certainly provide,  
8 at the very least, a confirmation of what evidence was considered and how the hearings  
9 were conducted, as well as important demeanor evidence giving significant context to  
10 the hearing process. *Western States, 9 Cal.4th at 580 fn. 5.*

11 What the videos demonstrate to the Court is that the hearings were conducted by  
12 the Regional Board with dignity, civility and forbearance. In what was occasionally a  
13 rude and sometimes hostile audience, Regional Board members repeatedly assured  
14 recipients of CDOs that all they had to do was to periodically pump and inspect their  
15 septic tanks until a community-wide solution was realized.

16 To claim, as petitioners do, that they were subjected to the "full weight of the  
17 regulations for performing an essential activity, using the toilet, without recourse,  
18 believing that they could lose their homes" mischaracterizes what transpired. Even after  
19 a brief consultation with counsel (many of whom it appears were available to residents  
20 on an ongoing basis during the administrative proceedings), it should have become clear  
21 that the likely consequences of an adverse enforcement order were far less onerous than  
22 the loss of a home or criminal prosecution.

24 Chairman Young in particular did his best to assure procedural fairness, and to  
25 require both sides to abide by the established procedures. Throughout, he demonstrated  
26 extraordinary patience and skill as the lead hearing officer. In short, the video  
27 recordings show the citizens' government at work; they do not show an abuse of power  
28 or procedural irregularities.

Second, Petitioners claim that it was unreasonable, and violative of due process,  
to be confined to 15 minutes apiece for their individual presentations. Once again,

1 however, the video recordings belie any procedural unfairness with respect to time  
2 limits. In addition to allowing petitioner's 15 minutes for their own presentation,  
3 Petitioners were afforded additional time to present "common evidence and testimony"  
4 at the beginning of the hearing process, and they were given additional time (15  
5 minutes) to cross-examine the prosecution team witnesses. Yet Petitioners devoted  
6 much of their time to "political" issues (e.g., support for a regional treatment system, or  
7 whether it made sense to issue CDOs to individual dischargers) rather than issues  
8 focusing on liability for site-specific septic waste discharges.

9 The Regional Board was allowed under its governing rules and regulations to  
10 craft a common sense approach in terms of how it conducted the CDO hearings. To do  
11 so, it established the order of presentation of evidence, took all testimony under oath,  
12 and, as stated, allowed cross-examination of witnesses. (AR 006382-006388.) It  
13 complied with the requirements of Government Code section 11425.10, subdivision  
14 (a)(1) and Cal. Code Regs., tit. 23, § 648.5(a). It allowed parties to submit written  
15 argument before the hearings (AR 006384-006386), and allowed them to incorporate  
16 the written testimony of others by reference. The record confirms that Petitioners took  
17 full advantage of this option. *See, e.g.*, AR Index 005057-005469. The procedures  
18 adopted do not violate due process of law.

19 Third, Petitioners claim that the proceedings were irreparably "tainted" by the  
20 participation of Prosecution Team counsel Lori Okun. *See Morongo Band of Mission*  
21 *Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731 and *Quintero v.*  
22 *City of Santa Ana* (2003) 114 Cal.App.4th 810. In *Morongo*, however, the Supreme  
23 Court rejected the rationale that Regional Board members will automatically give  
24 greater weight to the prosecuting attorney's "arguments by virtue of the fact she also  
25 acted as their legal adviser, albeit in an unrelated matter." (*Id.*, at p. 741.) Instead, the  
26 Court held that:

27 the presumption of impartiality can be overcome only by specific evidence is  
28 demonstrating actual bias or a particular combination of circumstances creating  
an unacceptable risk of bias.

(Id.)<sup>9</sup>

Petitioners have made no such showing in this case. To the contrary, the Regional Board separated its prosecutorial functions from its adjudicative functions, and it prohibited ex parte contacts during the CDO proceedings. Gov. Code, §§ 11425.10, subd. (a)(4) & 11430.10 et seq.; see also Regional Board's January 18, 2006 Memorandum at AR 005008-005010. There is no evidence, in the record or elsewhere, that the Regional Board violated these rules of conduct.

There is an additional problem with petitioners' arguments concerning "taint." Ms. Okin recused herself early in the proceedings, and the prosecution began its case anew. AR 006112-006114; 006348; 006349-006379; 011605, 011912, & 013046. The appropriate remedy for a "tainted" hearing is a new hearing, which was granted by the Regional Board in an abundance of caution. *See Quintero*, at p. 818 ("ordering a new hearing"); *Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1056 (unfair hearing "requires a remand for further proceedings")<sup>10</sup>

Fourth, Petitioners claim that the “unavailability of [Regional Board Executive Officer] Roger Briggs to testify or to be cross-examined during the hearings when CDOs issued, renders the orders invalid.” Petitioners’ Opening Brief, 25:20-21. In support of this claim, Petitioners cite *Manufactured Home Communities, Inc. v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705. However, the Court held in *Manufactured Home Communities* that, “where a board makes a decision based on a party’s testimony, the adversary is entitled to question his or her opponent.” 167 Cal. App. 4th at 712. Here, it does not appear that Executive Officer Briggs provided significant testimony upon which the Regional Board relied. Moreover, several Petitioners were afforded the opportunity to take the deposition of Briggs and

<sup>9</sup> The Supreme Court in *Morongo* disapproved of *Quintero's* suggestion of “the existence of a per se rule barring agency attorneys from simultaneously exercising advisory and prosecutorial functions, even in unrelated proceedings.” *Morongo*, at p. 740, fn 2.

<sup>10</sup> Although Petitioners contend that the Regional Board improperly entered into settlement agreements, referred to as “clean-up and abatement orders” or “CAOs,” (See, e.g., Opening Brief, 1:11, 11:25, & 27:17-21), Petitioners have “no standing to challenge the validity of settlements entered into by parties who are strangers to this lawsuit” and that “at this juncture, the petitioners have not established standing to challenge the validity of settlement agreements where the petitioners are not a party.” (See Respondent’s RJN Ex. A, 9:2-10.) None of these Petitioners received a CAO, nor do they claim to have.

1 Petitioners have not shown how his absence reasonably could have prejudiced the  
2 proceedings.<sup>11</sup>

3                   **C. Miscellaneous Contentions**

4 Petitioners argue that the Regional Board showed leniency toward the Prosecution  
5 Team, and bias against Petitioners. Although they allege that the Regional Board  
6 refused to grant Petitioners' requests for continuances, the record shows that Petitioners  
7 were granted continuances on at least three occasions. *See AR 005051, 006399, &*  
8 *013179.*

9 Petitioners also claim that the Regional Board failed to consider all of their  
10 evidence, and refused to take into account Petitioners' objections (Petitioners' Opening  
11 Brief, 30:14-19), offering three specific examples. First, Petitioners claim that the  
12 Regional Board excluded "as many as 600 of the 847 documents" presented by  
13 Petitioners, but allowed "every single document submitted by the Prosecution Team."  
14 *See Petitioners' Opening Brief, 30:9-13.* However, in its December 8, 2006 Order, the  
15 Regional Board explained in detail the basis of its ruling on each of the 847 documents.  
16 AR 011544-011547. Petitioners have not addressed the propriety of any particular  
17 ruling, or explained how such a ruling might have adversely affected their interests. It  
18 is difficult for the Court to attribute much credence to such a generalized objection.

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21  
22                   <sup>11</sup> There is an additional significant barrier to many of the claims raised in this Court. Before  
23 seeking judicial review, a party must exhaust its administrative remedies by petitioning the State Water  
24 Resources Control Board ("State Board") for review of the claims the party made against the Regional  
25 Board. Water Code, § 13320; *Hampson v. Superior Court* (1977) 67 Cal.App.3d 472, 484-485 (failure to  
26 seek timely State Board review constitutes failure to exhaust administrative remedies.) A party's failure  
27 to do so precludes any judicial attack on the challenged conduct. *Metcalf v. County of Los Angeles*  
28 (1994) 24 Cal.2d 267, 269; *Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal.App.4th  
577, 589. Petitioners seek judicial review of several issues they did not raise to the Regional Board  
before the CDOs were adopted and/or did not raise in their administrative petitions to the State Board  
under Water Code section 13320. Petitioners claim that the Regional Board violated: (a) Government  
Code section 11400-11529 and California Code of Regulations, title 23, section 647-648.8, et seq., and  
649.6 (Opening Brief, 11:24-12:13); (b) the Bagley-Keene Act codified as Government Code section  
11121.5 et seq. (Opening Brief, 7:23-24); and (c) Water Code section 13241 (Opening Brief, 23:10-11).  
However, Petitioners' administrative petitions to the State Board do not contain these allegations. (AR  
013482-013498 [Various petitioners], AR 013839-013852 [the Wilkersons], & AR 013905-013913  
[William Moylan & Beverley DeWitt-Moylan].) Thus, these claims are barred.

1       Second, Petitioners argue that “on April 9, 2007, the RWQCB issued a Protective  
2 Order prohibiting further discovery.” Petitioners’ Opening Brief, 30:12-14. However,  
3 the record shows that the Protective Order was issued in order to stop Petitioners from  
4 issuing or requesting belated deposition subpoenas of Regional Board staff. The  
5 Regional Board concluded that Petitioners had attempted “to use inappropriate demands  
6 for discovery to obstruct Central Coast Board proceedings in this matter.” AR 013629-  
7 013631. Moreover, the deadline for the submission of written evidence was November  
8 15, 2006, and the evidentiary hearings took place on December 14 and 15, 2006, and  
9 January 22, 2007, long before Petitioners’ tardy discovery efforts. The Regional Board  
10 did not act improperly in this regard.<sup>12</sup>

11      Third, Petitioners’ challenge the validity of Resolution 83-13, which was  
12 referenced on multiple occasions during the CDO hearings, and which served as  
13 important evidence for the prosecution team. *See* AR 006377 & 014287 (Doc. Num. 1,  
14 Submitted by Prosecution Staff, “*Water Quality Control Plan, Central Coast Basin,*  
15 including Resolution 83-13”); *see also* Respondent’s RJD Ex. I, at p. 3-11. The Court  
16 has already addressed the evidentiary importance of Resolution 83-13. With respect to  
17 a facial challenge, however, this Resolution was adopted 25 years ago. It is far too late  
18 now to bring a facial challenge to the legality of this Resolution. *See* Respondent’s RJD  
19 Ex. B, 2:22-23.

20      Fourth, Petitioners have provided scant support for their Public Records Act cause  
21 of action. Ordinarily, the Court is not even required to consider points not supported  
22 by citation to authorities or the record. *Kim v. Sumitomo* (1993) 17 Cal.App.4th 974,  
23 979. In any event, the Regional Board complied with all applicable Public Records Act  
24 requirements. See Gov. Code, §§ 6250 et seq.; AR 014312-014344. The Regional  
25 Board responded to Petitioners’ requests by informing them that the requested  
26 documents were available at the Regional Board (e.g., AR 014317), by requesting

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27  
28      <sup>12</sup> The Regional Board adopted the last two CDOs on May 10, 2007, during a meeting that  
considered the subpanel hearing held on January 22, 2007. (AR 013806.)

1 clarification of ambiguous requests (e.g., AR 014343), or by determining that the  
2 requested documents were privileged (e.g., AR 014340). Further, many of the  
3 requested documents were exempt from disclosure under various provisions of the  
4 Government Code. See, e.g., Gov. Code, § 6254(k). The Regional Board's responses  
5 contain the full list of applicable privileges.

6 Fifth, Petitioners claim that continued CDO enforcement is contrary to the intent  
7 of Assembly Bill 2701, as codified in Government Code section 25825.5. Petitioners'  
8 Opening Brief, 13:5-14:8. However, this Court previously struck from the Petition all  
9 allegations relating to AB 2701, ruling that "Government Code §25825.5 has no impact  
10 on the Regional Board." *See* Respondent's RJN Ex. A, at 9:12-13.)

11 Finally, it must be said that the Court has attempted to address each of the  
12 important issues raised by Petitioners. Given the exhaustive list presented, it simply has  
13 not been possible to discuss each and every concern. Suffice it to say that all of  
14 Petitioners' other contentions have been considered and determined to lack merit  
15 sufficient to overturn the CDOs.

#### 16 IV. CONCLUSION

17 This lawsuit is not the proper forum in which to debate whether, in the final  
18 analysis, it has been worthwhile bringing enforcement actions against individual  
19 residents of Los Osos. However, having reviewed the administrative record, as well as  
20 all relevant, admissible extra-record evidence, the Court concludes that the Cease and  
21 Desist Orders issued by the Regional Board are supported by substantial evidence, and  
22 that the hearings were conducted in the manner required by law. Accordingly, the  
23 petition for a peremptory writ of mandate is DENIED. It is so ORDERED. Counsel for  
24 respondents shall prepare the Judgment.

25  
26 DATED: December 28, 2010

27 \_\_\_\_\_\s\  
28 CHARLES S. CRANDALL  
Judge of the Superior Court