State Water Resources Control Board

Linda S. Adams
Secretary for
Environmental Protection

Office of Enforcement
1001 I Street, Sacramento, California 95814 ♦ (916) 341-5277
Mailing Address: P.O. Box 100, Sacramento, California 95812-0100
FAX (916) 341-5284 ♦ http://www.waterboards.ca.gov

Arnold Schwarzenegger
Governor

TO: Michael Thomas, Assistant Executive Director
Central Coast Water Board
895 Aerovista Place, Suite 101
San Luis Obispo, CA 93401

FROM: Reed Sato, Director Reed Sato
Office of Enforcement

DATE: June 19, 2006

SUBJECT: RESPONSE TO QUESTIONS REGARDING PRESENTATION OF PROSECUTION TEAM'S CASE

PROPOSED CEASE AND DESIST ORDERS, NOS. R3-2006-1000 TO R3-2006 - 1049

Part I of this memorandum responds to the Chair's procedural questions in his May 18, 2006 notice. In Part II, the Prosecution Team seeks clarification of the role afforded to the Los Osos Community Services District (CSD) in the Chair's Order of Proceedings, dated April 21, 2006. Part III of this memorandum provides information regarding Roger Briggs' availability for further proceedings and requests a list of the parties that Gail McPherson represents.

I. RESPONSE TO MAY 18, 2006 HEARING NOTICE

The Prosecution Team's case-in-chief consisted of two short presentations, one by Matt Thompson and one by Lori Okun, testimony of Sorrel Marks, and written submissions. This was followed by hours of cross-examination from all parties requesting cross-examination time, and questions from the Water Board.

As discussed below, the Prosecution Team does not believe that it is necessary to start its case over again. In the event, however, that the Water Board determines that Ms. Okun's prior involvement with the Prosecution Team will require restarting this entire proceeding, the Prosecution Team should be entitled to commence the hearing process *de novo* and, if it so desires, the Prosecution Team should be given the opportunity to present its case without regard to the manner in which its case was originally presented to the Water Board with Ms. Okun's participation as counsel.

If the Water Board determines that we must start over, the Prosecution Team does not anticipate that it would argue any different legal theories for the imposition of the proposed orders. However, if the hearing must be redone, the Prosecution Team should be free to present the same, or additional evidence --- percipient and expert --- in support of its legal

position and recommendations to the Water Board. In short, if the Prosecution Team is required to go back to square one in the presentation of its case, it should be free to re-present the case as its new counsel now sees fit. This could include recommendations for additional remedies or the imposition of administrative civil liability.[1]

A. *Must the prosecution's case, as presented orally on April 28, 2006, be stricken entirely or to some lesser degree?*

It is difficult to respond to this question without any indication of how the Los Osos Community Services District (LOCSD) or individual respondents believe they are prejudiced by the hearing process to date. The LOCSD raised a general *Quintero* objection, and some respondents expressed various concerns. None of them, however, explained specifically how they had been or would be prejudiced by any particular aspect of the hearing. The Prosecution Team will respond to any specific examples of prejudice in our reply brief. However, at this point the Prosecution Team does not believe it is necessary to strike any part of its case.

Under the particular circumstances of this proceeding, *Quintero v. City of Santa Ana* (2003) 114 Cal. App.4th 810, did not require the disqualification of Lori Okun as counsel for the prosecution team for the reasons Water Board Counsel John Richards has already stated (Transcript, Part I, pp. 122-126). In addition, *Quintero* involved an adjudicatory proceeding before a hearing board appointed for the purposes of acting as an impartial neutral decision maker reviewing a final decision that some other person or body within the agency had the initial right to make. Furthermore, *Quintero* involved the deprivation of the petitioner's fundamental vested rights in ongoing employment. In contrast, the parties here have no vested right to continue violating the Basin Plan, and the Water Board is not acting in the capacity of a neutral reviewer. The mere appearance of bias does not require a new hearing in such a case. (*See, e.g, Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 549 (a party claiming that the decision-maker was biased must show actual bias, rather than the appearance of bias, to establish a fair hearing violation; court upheld debarment over claim of unfairness where city acted as prosecutor and judge).) The court's decision in *Quintero* was based on the totality of circumstances, which led the court to conclude there was an appearance of bias and unfairness. There is no such appearance in this case.

The Prosecution Team decided to voluntarily substitute Reed Sato for Lori Okun as counsel at this stage of the proceedings simply to avoid unnecessary litigation of the alleged due process issue and to permit a more expeditious adjudication of the validity of the proposed cease and desist orders on their merits. The Prosecution Team did not and does not believe that the request to remove Ms. Okun was meritorious. The Prosecution Team certainly did not change counsel as a mechanism to retry or delay any aspect of this proceeding or because it felt that there was any weakness in its presentation through Ms. Okun. The Prosecution Team did not anticipate that the

[1] Under Water Code § 13350, any person discharging waste in violation of the prohibition is liable for administrative civil liability of up to $5,000 per day, or civil liability of up to $15,000 per day.

procedural question raised by Chairperson Young would follow from the Prosecution Team's change of counsel.

Because the Prosecution Team voluntarily changed counsel, it believes that any matter that it previously presented to the Water Board through its former counsel can and should be retained as part of the administrative record for these proceedings. The Prosecution Team is confident that the evidence it presented already is more than sufficient to justify the requested orders. Moreover, a careful examination of the matters that were presented directly to the Water Board by Ms. Okun demonstrates that there is no practical or legal basis for having those matters resubmitted to the Water Board by different counsel. As Chairperson Young noted during the April 28, 2006 hearing, Ms. Okun did not present testimony. (Transcript, Part II, pp. 85 – 89.) Therefore the factual information already provided by the Prosecution Team to the Water Board is unaffected by who is acting as legal counsel for the team. The Prosecution Team is prepared to proceed to the next phase of the hearings based upon the Water Board's acceptance into the record of the all of the evidence and information the Prosecution Team has presented to date in this matter.

To the extent that any portion of Ms. Okun's oral presentation might be construed as legal argument, it would be Ms. Okun's explanation of the Prosecution Team's recommendation to modify the pumping language in the proposed orders to permit additional study of the impacts prior to imposing that interim restriction. However, that explanation went to the modification of the proposed order in a manner that benefited each of the named Dischargers by reducing the cost of complying with the proposed orders. Although the LOCSD does not have due process rights in this proceeding, it also was not prejudiced by this recommendation since the LOCSD's pre-hearing brief argued that the Water Board should not impose a bi-monthly pumping requirement. It does not seem appropriate or necessary to require the same explanation resubmitted to the Water Board by new counsel.

Admittedly, Ms. Okun also provided a brief legal argument as to why the Water Board should proceed with the orders, despite the removal of the pumping requirements, and explained several facets of the legal basis of the Prosecution Team's case. Before her presentation, Ms. Okun also conducted direct examination of Sorrel Marks. Ms. Marks largely gave a narrative response that could have been presented without the direct questioning, as was the case with the bulk of the Prosecution Team's case. Similarly, a brief cross-examination of Roger Briggs could have been presented with narrative testimony. Both Ms. Marks and Mr. Briggs were testifying under oath.

The Chair sustained several of the Prosecution Team's written hearsay objections, and directed LOCSD counsel and Ms. Okun to try to resolve the rest of the objections. The dispute was resolved at the lunch break by stipulation but not discussed further on the record. (Ms. Okun and Mr. Onstot later sent confirming emails dated May 1 and 2, respectively.) Ms. Okun made 19 other procedural objections (Transcript, Part II, pp. 58, 75, 81, 84, 86, 96 (two objections), 104, 107, 110, 125, 134; Part 3, pp. 453, 457, 464, 467, 479, 496, 502). Only three of these objections were sustained; the

remaining objections were either overruled or the speaker voluntarily withdrew or clarified the question. Her remaining participation in the April 28 hearing was minimal.

In addition to participating in the April 28, 2006 hearing, Ms. Okun submitted the following written materials: objections to designated party status for individuals (February 21, 2006), two legal memoranda responding to comments (April 19, 2006), evidentiary objections (April 27, 2006), and a request for continuance (May 4, 2006). The Prosecution Team can have its new counsel review, revise if necessary, sign and resubmit all of these documents other than the request for continuance and objection to designated party status (since these have already been ruled on), in order to remove any appearance of unfairness. If the new prosecuting counsel makes any substantive changes to the legal arguments in these documents, individual respondents should be given an opportunity to respond. Again, the Prosecution Team does not anticipate making any changes,[2] and does not believe the formality of resubmitting these materials is necessary.

If a court were to uphold a *Quintero* objection in this proceeding, the remedy would be to redo the hearing before this same board, but with a new prosecutor. *Quintero* did *not* find that the matter was irreparably tainted. The remedy in *Quintero* was a new hearing before the same public entity. (*Id.* at 818.) The remedy for unfair hearing procedures is to remand the matter to the public body for further proceedings (Cal. Code of Civ. Proc. ' 1094.5(f); *Kumar v. National Medical Enterprises, Inc.* (1990) 218 Cal.App.3d 1050, 1056). Thus, in employment appeals, the remedy for an unfair review hearing is not reinstatement (i.e., dismissal of the action to terminate the employee), but another hearing. (*English v. City of Long Beach* (1950) 35 Cal. 2d 155, 159-160.)

In this case, the Prosecution Team contends that it has adequately presented its case and need not start over. Requiring the Prosecution Team to repeat its presentation with little or no substantive changes would elevate form over substance. *Quintero* required a review of the totality of the circumstances. The totality of the circumstances here, where a new prosecuting attorney has been assigned before commencement of any of the individual hearings and before the Board hears final arguments or conducts deliberations, cures any possible appearance of material bias, unfairness or undue influence.

In the event that the Water Board does request a restart of the hearing, the Prosecution Team, subject to its rights to present new or additional evidence in support of the proposed orders, would consider the re-submission of the information contained within Ms. Okun's presentation via declarations from a member of the Prosecution Team and/or legal opinion of the new counsel, so that no further hearing time would be required to address that issue. Similarly, the Prosecution Team can

[2] One possible exception would be to update the CEQA analysis, but that would involve deleting parts of the comment responses, not adding new arguments. Since the Prosecution Team deleted the pumping requirement proposal, much of the CEQA analysis is now irrelevant; the primary response to all of the CEQA comments at this point is that the bimonthly pumping requirement has been deleted.

submit Ms. Marks' and Mr. Briggs' testimony in writing or orally. While such a procedure would erase Ms. Okun's presence from the proceedings, the Prosecution Team believes such extraordinary steps are unnecessary provided that the Water Board and the other designated parties accept as submitted the presentation of the Prosecution Team's case to date.

B. *If the prosecution is required to present its case again, should it have the opportunity to introduce additional written materials into the record before the Water Board?*

At this time, the Prosecution Team has not requested the submission of additional written materials or testimony. As discussed in the introduction, however, should the Chair require the Prosecution Team to start its case over, the Prosecution Team should be entitled to submit additional written materials, testimony or evidence, to support any aspects of its case. Regardless of the Chair's rulings on the current hearing status, the Prosecution Team reserves all rights it currently has to introduce rebuttal documents to information presented during the general or individual hearings by any of the designated parties.

C. *If the prosecution is allowed to supplement the written materials that it has introduced, should designated parties be entitled to submit additional written materials?*

Yes. If the Prosecution Team is required to recommence its case and is thereby allowed to submit additional evidence, the affected homeowners should have the opportunity to rebut any such additional evidence with their own supplemental evidence or oral testimony. If the Prosecution Team merely re-presents evidence already submitted, there should not be any additional opportunity to respond.

D. *If the prosecution case is stricken entirely or to some lesser degree, should the Los Osos Community Services District be permitted to start its case over?*

No. The *Quintero* objection is based on the mere appearance of impropriety, which the LOCSD apparently argues deprives the individual homeowners of due process. The LOCSD has no due process rights here. (See discussion in Part II) Even if the LOCSD had such rights, they would be limited, as discussed in Part II. For the same reasons, the individual respondents' rights to due process do not entitle the homeowners to have the LOCSD redo its case for their benefit.

Legal issues aside, from a practical standpoint there is no reason for the LOCSD to redo its case. The LOCSD still has about one hour of its time left, plus (at least as of now) potentially unlimited time in the general portion of the hearing for cross-examination during the Prosecution Team's rebuttal case.

II. REQUEST TO CLARIFY ORDER RE: CONDUCT OF HEARING ON INDIVIDUAL CEASE AND DESIST ORDERS

A. THERE IS NO ROLE FOR THE LOCSD AS A SEPARATE PARTY IN THE HEARINGS RELATED TO THE INDIVIDUAL CEASE AND DESIST ORDERS

The current status of the hearing is that upon completion of the presentation of evidence by the LOCSD, the Water Board will hear testimony related to each individual cease and desist order. In essence, those individual proceedings are subhearings which will focus solely on the individual parcel(s) addressed by the specific cease and desist order. In each subhearing, the Water Board staff may present particular information on the individual parcel or otherwise rely upon the information and evidence already presented.

The Order of Proceedings ("Hearing Order") (dated April 21, 2006) suggests that the LOCSD is a designated party in the individual cease and desist orders. That status was granted by the Water Board prior to the filing of any objection by the Prosecution Team. With its status as a designated party, it appears that the LOCSD may be entitled to cross-examine the witnesses for the Prosecution Team as well as any witnesses for the individual recipients of the Cease and Desist orders during the individual cease and desist order hearings (see, Hearing Order, 5-c.). The LOCSD also appears to have the opportunity to provide rebuttal testimony related to the individual cease and desist orders. If the Prosecution Team's reading of the Order is plausible, it would provide the LOCSD, a non-respondent, with an extraordinary and unprecedented role, which has the potential to unnecessarily delay and otherwise adversely impact the orderly and prompt conduct of these proceedings.

To the extent that the Hearing Order may be so construed, the Prosecution Team requests that the Hearing Order be clarified so as to prevent, in each individual subhearing, the LOCSD or any other designated party (except the individual respondent in that subhearing) from engaging in the presentation of evidence or the cross-examination of any witness for any party during the individual subhearings.

This request is not intended to prevent the LOCSD or any other respondent from jointly presenting information or making consolidated legal arguments. The LOCSD is currently before the Water Board with the opportunity to present whatever general information it has with regard to the matter. What the Prosecution Team's request is intended to do is insure that the LOCSD, a non-respondent, and each designated party who is not subject to the specific order at issue, from cross-examining or questioning the witnesses of other respondents in an effort to elicit information that is not relevant to the particular subhearing. The Prosecution Team also requests that the Hearing Order be clarified to prevent any designated party from presenting rebuttal evidence on any matter not related to the specific property that is the subject of terms of order proposed for the individual designated party. The Prosecution Team's request is consistent with the hearing officer's observation that the LOCSD is not designated as a party to take the lead on any issue relevant to these proceedings (Transcript, Part III, p. 458, l.6-11).

If the Prosecution Team's request for clarification is granted, the individual subhearings would proceed as follows:

1. The Prosecution Team would present any additional evidence it may have regarding the individual parcel(s) and respondents subject to the specific Cease and Desist Order.

2. The respondents to the individual order would have the opportunity to cross-examine the witness or witnesses for the Prosecution Team, to the extent this cross-examination did not already take place.

3. The Prosecution Team would be entitled to redirect examination of its witnesses.

4. The individual respondent(s) could present any additional evidence in opposition to the individual Cease and Desist Order.

5. The Prosecution Team would be entitled to cross-examine the witness or witnesses for the individual respondent(s).

6. The individual respondent(s) would be entitled to redirect examination of the respondent's witnesses.

7. Rebuttal testimony, if any, could then be offered along the same procedural lines.

In summary, in each subhearing, no one other than the Prosecution Team or the individual respondent should be permitted to offer evidence or cross-examine witnesses.

B. ARGUMENT

1. Neither the LOCSD Nor Any Other Individual Respondent Has a Legitimate Basis for Cross-examining Any Witness Presented on Behalf of Any Individual Recipient of the Cease and Desist Order.

   For each of the subhearings on the individual cease and desist orders, the sole issue is whether that specific respondent is discharging in a manner that violates the septic discharge prohibition for Los Osos/Baywood Park in Chapter 4, Section VIII.D.3.i and Appendix A-30 of the Basin Plan ("Prohibition"), and what action the Water Board should take in response to any such violation. Therefore, the only evidence that is necessary or relevant must address that issue.

   The responsibility for presenting any evidence supporting a respondent's contention or defense lies solely with that respondent and no other third party, including other persons who have received separate individual cease and desist orders. No other persons have any standing to present evidence or to cross-

examine another respondent about that respondent's individualized order. To the extent that such procedures would be appropriate, they should take place during the general hearing process. For example, if Order NO. R3-2006-1001, for whatever reason should not have been issued based on a specific fact affecting that parcel, it would have no adjudicatory impact on whether the Order R3-2006-1050 (dealing with an entirely different parcel) should be issued. This is not a case where there are multiple respondents who are being jointly charged to undertake a common activity such as an environmental contamination cleanup or a similar activity in which the inability of the prosecution to hold one defendant liable may have a direct impact on the costs imposed on the remaining defendants or where that are cross claims between the various respondents. The individual respondents are not adverse to one another in the proceedings regarding the individual cease and desist orders and therefore have no standing to question or cross-examine each other's witnesses.

The clarification sought by the Prosecution Team is consistent with the LOCSD's stated purpose for participating as a designated party --- to advocate on behalf of individual property owners. As an advocate of the property owners, the LOCSD cannot present evidence on their behalf through the general hearing process and also cross-examine those same property owners in the individual hearings. Since the LOCSD claims to have the same interests as the individual property owners, it cannot assume a different guise to place the Prosecution Team at a procedural disadvantage.[3]

2. The Role of Cross-Examination is Limited in Administrative Hearings, and is Particularly Limited in the LOCSD's Case.

The right to cross-examination in administrative hearings is not unlimited. *(Mohilef v. Janovici* (1996) 51 Cal.App.4th 267.)[4] " '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' [Citation.] Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. [Citations.] More precisely, identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens

[3] If LOCSD or other respondents were permitted to cross-examine other respondents, they are likely to ask leading questions and therefore countervene the prohibition against propounding leading questions to one's own witness.

[4] " 'Lawyers and judges have a systematic tendency to overestimate the benefits of trial-type procedures and to underestimate the costs of those procedures.' " (*Mohilef* at 288, citing 2 Davis & Pierce, Administrative Law Treatise (3d ed. 1994) ' 9.5, p. 61.)

that the additional or substitute procedural requirement would entail." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334-335; *see also, Machado v. State Water Resources Control Board* (2001) 90 Cal.App.4th 720, 725-726.)

Applying the *Mathews v. Eldridge* factors, *Mohilef* concluded that due process does not require unlimited cross-examination, where such cross-examination is unlikely to elicit additional facts or uncover the truth, would encourage parties to retain counsel or not testify at all, and would impose an administrative burden on the agency hearing the case. (*Mohilef* at 299-302; *see also, Marvin Lieblein, Inc. v. Shewry* (2006) 137 Cal.App.4th 700 [due process did not mandate cross-examination or presentation of live testimony at the hearing].) This rule is particularly apt in the CDO subhearings, where both the LOCSD and the homeowners will already have been afforded significant procedural formalities, including opportunities for extensive cross-examination, the ability to issue subpoenas and the swearing-in of witnesses.

Moreover, *no* interest of the LOCSD will be affected and the private interest is low for the individual respondents - - - they are merely being ordered to undertake minimal septic tank repairs that they should be doing anyway, and to cease violating the basin prohibition and the law. This action does not impose penalties. The requirement to provide a plan to cease violating a Basin Plan provision that took effect in 1988 implicates a low interest, even if there is a relatively high cost to comply with the law. The risk of an erroneous decision by the Water Board is low due to the extensive opportunities that the LOCSD, as well as the general public, had and will continue to have during the general part of the hearing to submit evidence, legal argument and testimony. The propriety of the prohibition is not at issue in this case, merely the existence of an illegal discharge; the risk of site-specific errors on this issue is minimal. Finally, the government interest in enforcing Porter-Cologne is high. (*Machado* at 727.) *Machado* weighed this interest against the need to issue an immediate cleanup and abatement order to protect the environment. There is less immediacy here, but the same considerations of fiscal and administrative burdens apply. Based on the *Mathews v. Eldridge* factors, the LOCSD's participation in the individual subhearings is not required, and the due process rights of the homeowners do not require allowing the LOCSD to participate so extensively.

Where the right to cross-examination exists at all, it is based on the questioning party's right to due process. The LOCSD has no due process rights here because it will not be subject to any deprivation of property; it is merely an interested third person that was afforded designated party status to help the Board and other parties. The Chair explained his reasoning for designating the LOCSD as a party as follows: "The reason why I gave them designated party status was because I thought they have some legitimate and important issues that they could put before the Board for consideration, and probably have the most wherewithal to do that, to make a presentation. And that they could most efficiently cobble that information together and make a presentation that most of the individuals would have the benefit of simply incorporating by reference."

(Transcript, Part I, p. 78, 1.18 – p. 79, 1.2.) The LOCSD can meet that objective in the general part of the hearing.

Conclusion to Part II

Consistent with the overall posture of the case, the LOCSD should be limited to the presentation of the evidence common to all the respondents and not as a third party entitled to cross-examine those property owners. Similarly, other respondents must be limited to the presentation of evidence regarding their specific parcels and not be permitted to participate in the presentation or questioning of information related to cease and desist orders separate and apart from their own. There is no prejudice to the LOCSD or any other designated party from this clarification since questions regarding Water Board information applicable or common to all parcels subject to the proposed orders should already have been addressed in the cross-examination of Water Board staff on April 28, 2006.

In summary, during the subhearing process a respondent to one individual cease and desist order has no standing to challenge or address the factual underpinnings of any other cease and desist order, and there is no basis to allow cross-examination or any other similar questioning of witnesses presented in response to the other cease and desist orders. The Prosecution Team requests a clarification of the hearing order to explicitly state that limitation. That clarification will promote the orderly and prompt conduct of the hearing and prevent unnecessary and potentially time-consuming cross-examination, and thereby will aid every party's efforts to have an efficient yet fair presentation of the relevant factual information to the Water Board.

III. ADDITIONAL PROCEDURAL MATTERS

Roger Briggs will be out of the country for five or six months, starting in mid-October 2006. He has already been called as a direct witness by the LOCSD and cross-examined by all parties requesting that opportunity. There is no basis for any additional examination of Mr. Briggs as he has provided as much material and relevant information as is required to support the requested orders. It is hard to imagine that any further examination of Mr. Briggs would not be duplicative. If, however, the Chair intends to allow individual respondent(s) to call him as part of their case-in-chief or to cross-examine him further, the Prosecution Team requests that the Water Board allow these respondents to complete such cross-examination before mid-October.

Finally, the Chair requested at least twice that Gail McPherson provide a list of the parties she represents. The Prosecution Team has never seen any such list, and requests a copy. If Ms. McPherson is unable to provide such a list under penalty of perjury, the Prosecution Team requests that she not be permitted to act as a representative of those parties before the Water Board.