State Water Resources Control Board

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DATE: April 19, 2006

SUBJECT: RESPONSE TO LEGAL ISSUES IN LOS OSOS COMMUNITY SERVICE DISTRICT COMMENTS AND RESPONSE TO LEGAL ISSUES REGARDING CEQA

This memorandum responds to legal issues raised in the Los Osos Community Services District (CSD) April 4, 2006 comments on the draft cease and desist orders (CDOs)[1] and to David Duggan's comments that issuance of the proposed CDOs would violate the California Environmental Quality Act (CEQA).

The CSD's comments consist of scattershot objections that are unsupported by the facts or by any citation to legal authority. The CSD suggests that the CDOs are motivated by bias or some other unspecified, unproven improper motive. The intent of Prosecution Staff in issuing the CDOs is two-fold. First, the CDOs are intended to ensure the community builds a community-wide system by January 2010. In the alternative, if the community fails to build a treatment system, the CDOs will put the dischargers on notice that they must develop an alternative way to comply with the septic tank discharge prohibition and require them to implement the alternative within a reasonable time. Second, the CDOs are intended to provide a measure of environmental protection from these illegal discharges pending full compliance with the Basin Plan prohibition, and allow restoration of the groundwater basin to begin.

[1] Some of those comments were also submitted by individual homeowners who returned a form letter apparently prepared by the CSD's attorneys.

The italicized page numbers refer to the CSD's arguments and page numbers of its April 4, 2006 letter.

I. Issuing CDOs in This Instance Is Appropriate and Legal

Issuance of CDOs to individuals (pp. 2-3). The CSD argues that CDOs are not available for individuals due to a lack of precedent, but then admits to such precedent in the Eagle Lakes matter. The CSD is incorrect that no penalties could arise from the Eagle Lakes CDOs; as documented by Rob Shipe, the Lahontan Water Board imposed administrative civil liability for violations of the CDOs. The Central Coast Regional Water Quality Control Board (Central Water Board, Water Board, or Board) can also consider seeking civil injunctions requiring all dischargers to stop discharging, instead of seeking administrative civil liability. (Ca. Wat. Code §13331.) The Lahontan orders required individual homeowners to submit plans for ceasing all discharges within 45 days after notification that the Eagle Lakes CSD failed to meet any proposed milestone for construction of a treatment plant; and to cease all discharges within 165 days after notice. The dischargers in Los Osos have far more notice than that. Prosecution Staff does not know why the Lahontan Water Board decided not to require interim measures while the plant was being constructed, but there may have been no reason to do so since a plant was built in that case. The Central Coast Water Board has also issued CDOs to individuals in Los Osos in the past. Even if no regional water board had ever issued a CDO to an individual, the statute clearly allows it, as the CSD concedes. Ironically, the CSD's counsel argued at a hearing on April 3, 2006, that the Central Coast Water Board has no enforcement jurisdiction over it, but is limited to taking enforcement against each individual discharger.[2] The CSD's counsel also argued at the January 5, 2006, hearing on Order No. R3-2005-0137 (administrative civil liability against the CSD) that the Water Board should issue CDOs or CAOs to the individual homeowners.[3]

Impleader (p. 3). The CSD purports to "implead" the County. No such procedure is available. Only the Water Board has authority to designate parties to this hearing. The County did not request designated party status. Even if impleader were available, it would be inappropriate because the CSD provided no notice to the County.

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[2] Prosecution Staff is in the process of obtaining a transcript and will submit it when received. CSD's counsel argued that since TSO 00-131 was based on the Tri-W project, and the Tri-W project is now "off the table," TSO 00-131 has no further effect.

[3] Jan. 5, 2006 transcript, p. 79, lines 8-20.

Water Code Section 13360[4] *(p. 3).* The CDOs' pumping requirement does not violate section 13360 because, as the CSD notes, the dischargers may propose an alternative. The only difference between pumping and other alternatives is that pumping is pre-approved. Any other alternative requires further approval to ensure that the alternative will provide equivalent water quality protection and that appropriate conditions, such as monitoring or operational requirements, are imposed to protect water quality. Compliance requirements that allow the discharger to substitute equivalent alternatives do not violate section 13360. Essentially, the pumping requirement is a treatment standard that the dischargers can meet either by pumping, or by implementing an alternative technology that will achieve an equivalent pollutant load reduction. The pumping requirements are also similar to flow restrictions, which do not violate section 13360. (Order No. WQ 78-8.)

Nothing in this case implicates the Legislature's reasons for enacting section 13360. "Section 13360 is a shield against unwarranted interference with the ingenuity of the party subject to a waste discharge requirement; it is not a sword precluding regulation of discharges of pollutants. It preserves the freedom of persons who are subject to a discharge standard to elect between available strategies to comply with that standard. That is all that it does." (*Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1438.) The CDOs clearly allow for such ingenuity by requiring the dischargers to pump twice per month or achieve an equivalent reduction in loading. Like the dischargers in *Tahoe-Sierra,* the CSD now attempts to use section 13360 as a sword to create yet another delay in a twenty-year series of delays. Even if the dischargers lack the technical sophistication to propose an alternative, there is no *de facto* violation of section 13360. In *Pacific Water Conditioning Association v. City Council of Riverside* (1977) 73 Cal.App.3d 546, the court held that section 13360 is not violated merely because all parties know there is only one way in which the discharger can comply.

Central Coast Water Board bias (pp. 4-5). The CSD claims these proceedings are flawed because they are the result of Water Board direction. The CSD misstates the record. No Board member directed staff to commence any particular type of enforcement action. The Board merely expressed its concern that without holding the individual dischargers accountable, the Central Coast Water Board will never be able to obtain compliance with the Basin Plan prohibition. These comments were the direct result of the CSD's legal position at the hearing, that is, that the Water Board cannot impose administrative civil

[4] Unless otherwise specified, all further code citations are to the Water Code.

liability on the CSD and should instead take action against individuals. (Jan. 5, 2006 transcript at 79:8-20; 412:6-9.) As Mr. Briggs stated at the January 5, 2006 hearing, staff had already decided to use CDOs as the enforcement tool. Mr. Briggs had previously told the CSD and the public as early as October 6, 2005 that the Central Coast Water Board would take individual enforcement actions if the CSD failed to build a treatment plant.

No public notice was required for this discussion between Board members, staff and the CSD. The CSD, not the Water Board, raised this issue at the ACL hearing. Moreover, contrary to the CSD's claims, the Board took no action and provided no direction other than not to take too long to prepare actions that were already pending. Staff was already working on CDOs by that point. The Board provided no direction to staff regarding its planned actions. The Board heard no evidence on the CDOs, did not deliberate, and took no decision. Neither due process nor the Bagley-Keene Open Meeting Act was implicated.

The CSD claims the Water Board has an "improper" "political" motive for these actions. The Board members commented on its past inability to obtain compliance with the Basin Plan. Board member Shallcross agreed with some of his fellow board members that individual actions are necessary to obtain compliance. There is nothing novel about this position, since the individual septic tank operators are discharging illegally. Mr. Shallcross' comment that individual enforcement action might create political will to comply with the law said nothing about any particular vote, or even any particular treatment plant or other means to comply with the Basin Plan prohibition.

State Water Board obligations (pp. 5-6). The State Water Resources Control Board (State Water Board) is not required to take over the Tri-W project. The CSD is the entity with sole authority to operate the treatment plant. The State Water Board has no obligation to construct or run a treatment plant. The requirements for administrative estoppel are discussed below (see response to the CSD's argument that the Water Board must obtain water rights to stop the discharges). This situation does not come close to satisfying the elements of estoppel.

II. The Water Board Has Not Violated Procedural or Substantive Due Process Requirements

A. Miscellaneous Claims

Section 13267 requirements (p. 6). The CSD claims these actions are improper because the Executive Officer required certain technical reports when he issued the draft CDOs. This issue is moot. The Water Board received a good response to a majority of the section 13267 requirements. The Prosecution Staff has adequate evidence of the status of every property, either by explicit responses to the section 13267 requirements or other evidence that named property owners reside in the properties in question. We acquired evidence of ownership from the County Tax Assessor's documents. Only two properties are occupied by tenants (CDOs R3-2006-1032 and R3-2006-1037). Voter registration lists provided information to identify non-owner residents. Several persons named notified us that they were former tenants, and the proposed CDOs in question were revised to remove them as named dischargers. The Prosecution Staff does not intend to take any further action to enforce the section 13267 requirements since no further action is necessary.

The CSD argues that the Fifth Amendment protects homeowners from responding to section 13267 requirements to provide information regarding violations *(p. 9)*. The CSD makes no effort whatsoever to describe the manner in which this violates the Fifth Amendment. A witness raising the Fifth Amendment in a civil matter must explain how the response to a particular question will incriminate the witness, and bears the burden of proving the privilege applies. (*Marriage of Sachs* (2002) 95 Cal.App.4th 1144; *Blackburn v. Superior Ct.* (1993) 21 Cal.App.4th 414; *Alvarez v. Sanchez* (1984) 158 Cal.App.3d 709, 712; *Savoy Club v. Board of Supervisors for the County of L.A.* (1970) 12 Cal.App.3d 1034.) The Fifth Amendment only protects against *self*-incrimination; a witness cannot refuse to incriminate someone else, such as a tenant. Any homeowners that did not invoke the Fifth Amendment would have waived it, even had the privilege applied. The CSD cannot belatedly assert this privilege on behalf of its customers. Notifying dischargers that violation of a Water Board order subjects the discharger to potential liability does not violate the Constitution. Rather, notifying dischargers of the consequences of violating an order provides "fair warning" of those consequences.

At any rate, this issue is moot since the Water Board did not impose or seek to impose fines. As discussed above, the Prosecution Staff does not need further information pursuant to the Section 13267 requirements.

Attack on Resolution 83-13 (pp. 5-8; 15-16). The CSD challenges the CDOs by attacking Resolution 83-13. The propriety of the prohibition is beyond the scope of this hearing. The Chair's Supplemental Notice dated February 15, 2006 states:

> PLEASE BE ADVISED THAT this Supplemental Notice clarifies the Regional Water Board's expectations for testimony, other evidence, and comments regarding the Cease and Desist Orders against individual property owners in the Los Osos prohibition zone. The prohibition against discharges from sewage disposal systems became effective on November 1, 1988. The time for challenging the prohibition has long since expired. The propriety of the prohibition is not an issue in this hearing. Therefore, the Regional Water Board may exclude evidence or comments related to the propriety of the prohibition at the commencement of the hearing. Any person desiring to submit such evidence or comments will be required to explain its relevance to the issues in the hearing at that time.

The CSD does not attempt to comply with the Supplemental Notice or explain how evidence regarding the propriety of the prohibition zone is relevant. Prosecution Staff therefore moves to strike all evidence and argument regarding whether the prohibition zone was appropriate when adopted, whether it is appropriate now, or whether the prohibition zone boundaries were correctly determined.

In the event this evidence is not stricken, Prosecution Staff provides the following brief responses. Staff's technical responses address the basis for the prohibition. The fact that the prohibition has been in place for twenty years does not, as CSD suggests, make reconsideration necessary. Even if the CSD is correct that nitrate levels in groundwater are not increasing, the groundwater exceeds drinking water standards and continued septic tank loading prevents restoration of the groundwater basin. Seeps also continue to discharge human waste to Morro Bay as evidenced by the 2002 DNA study. The difference in full build-out under the current Local Coast Plan, as compared to the expected 1983 build-out, is irrelevant. Pollutant loads are unacceptable even under the existing build-out. The CSD argued at the hearing on ACL order R3-2005-0137 that groundwater nitrate levels stabilized because of the building moratorium that resulted from the septic tank prohibition. Thus, no additional build-out is supportable, whether it is estimated at 19,000 or 27,000.

The CSD also argues that the prohibition is inappropriate because the Water Board allowed construction of 1,150 new homes between 1983 and 1988.

However, at that time the County was proceeding with a community sewer to be completed in 1988.

Finally, the CSD makes the incredible argument that the Water Board should not enforce the prohibition because the First Amendment allows Los Osos residents to violate the law as long as they vote to do so. The First Amendment does no such thing. The Water Board has worked with the community for decades. The community sited, selected and commenced construction of a treatment plant – and then changed its mind and decided to start over. At this point, the community has no site for the treatment plant, it has no design, it has no financing, and it has no proposed timeline for compliance. Prosecution Staff is recommending enforcement action at this time because it appears to be the only way to obtain compliance with twenty-year-old Basin Plan requirements, whether on an individual or community-wide level.

B. Equal Protection and Due Process *(pp. 8, 11)*

The CSD did not provide authority for its claim that the proposed CDOs violate due process rights and the Equal Protection Clause, presumably because that authority does not exist.

In order to show a violation of due process rights, the dischargers would have to demonstrate that the Water Board treated them in a manner that is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (*Patel v. Penman*, 103 F.3d 868, 874 (9th Cir.1996), *cert. den.* 520 U.S. 1240 (1997).) "[S]elective enforcement of valid laws, without more, does not make [a particular enforcement] action irrational." (*Freeman v. City of Santa Ana* (9th Cir.1995) 68 F.3d 1180.)

The dischargers cannot make the required showing. The Prosecution Staff has articulated a rational basis for randomly selecting this group of homeowners: determining which properties were doing the "most" damage would be impossible and arbitrary; taking enforcement action against all violators at one time would be procedurally burdensome for both the dischargers and the Water Board; all dischargers are violating the prohibition. Taking enforcement action is apparently the only way the Water Board can protect public health and safety in this case given the community's rampant and longstanding disregard of the prohibition. Developing a priority list of homeowners eliminates the deterrent effect of individual enforcement actions because it would allow those with high numbers to disregard the prohibition and would discourage homeowners from taking voluntary compliance actions before becoming subject to an enforcement order.

The CSD also claims these actions violate dischargers' rights to equal protection because they are selective enforcement actions. However, under both the federal and California constitutions, selective enforcement does not violate equal protection unless it is "the deliberate product of invidious discrimination based upon some improper criterion." (*People v. Superior Court of Los Angeles County*, 70 Cal.App.3d 341, 343; see also, *United States v. Kidder*, 869 F.2d 1328, 1335 (9th Cir.1989) (" 'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.' ") (quoting *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 364); *Murgia v. Municipal Court* (1975) 15 Cal.3d 286, 290.) The dischargers must show that they were selected for enforcement based on an impermissible ground such as race, religion or exercise of their constitutional rights. (*Kidder*, 869 F.2d at 1336.) Furthermore, the homeowners must show that the selective prosecution was motivated by a discriminatory purpose. (*Id.*)

In order to show that the Water Board's stated motive was a pretext for a discriminatory purpose, the homeowners must show that the Water Board's proferred rationale was objectively false, or the Water Board acted based on an improper motive. (*Patel*, *supra,* 103 F.3d at 876; *Armendariz v. Penman* (9th Cir. 1996) 75 F.3d 1311, 1327.)

Neither the CSD nor the homeowners have made any showing of pretext. Their claims that the selection of the 50 homeowners was based on their opinions about any particular treatment plant are based on unsupported, wild speculation. The Prosecution Staff has repeatedly explained how it selected this group in the staff report, FAQ document and a March 9, 2006 letter to Gregory Murphy of Burke, Williams & Sorenson that described the random process and our use of Excel. Had the selection been based on voting records (which we do not even have) or other opinions, the Prosecution Staff need not have included project supporters or the five properties that were on community systems for which the proposed CDOs were withdrawn. The CSD and homeowners have failed to show any facts that the Prosecution Staff had a discriminatory motive in choosing to prosecute them.

As the CSD concedes, Prosecution Staff intends to issue similar orders to all similarly situated dischargers. The fact that the orders are not all issued at the same time does not make these CDOs a "selective" action. (*See, e.g., Patel, supra,* at 876 (a program of systematic (i.e., not simultaneous) inspection does not violate equal protection).)

For these reasons, the due process and equal protection claims are baseless.

Dischargers' identities (pp. 9-11). Not providing a list of all named dischargers does not violate homeowners' due process rights. Since the CSD is neither a party nor a natural person, it has no due process rights of its own to assert. The Water Board responded to all requests by individuals or media for the information regarding named dischargers, except in the case of dischargers who demonstrated that disclosing their personal information would endanger them. Moreover, the CSD conducted various meetings regarding the CDOs, and named dischargers were free to self-identify. In fact, correspondence that we received made it clear that those dischargers who wanted to work on a joint defense have been able to do so.

The delay in disclosing identities of CDO recipients did not deprive anyone of due process. Prosecution Staff notified the CDO recipients that we are required to disclose their names and the location of their discharges upon request. We immediately began hearing from residents who had legitimate safety concerns over the disclosure of this information due to sensitive job status. In order to prevent the inadvertent disclosure of this information, I sent a certified letter to all residents and provided the opportunity to state any objections. Where these objections were valid, we withheld the information. Where there was no valid objection, Prosecution Staff responded to all valid Public Records Act requests for this information. The reasons for delaying disclosure are set forth in the attached February 16, 2006 letter to Abraham Hyatt of the Times Tribune.

The CSD now claims that disclosure of tenants' names violates the Fifth Amendment; that it was improper to withhold any personal information at all; that the lack of access to this information prevents preparation of a joint defense; and that a consolidated hearing is unfair. The CSD makes no attempt to provide legal authority to support these conflicting claims.

Water Board documents (pp. 11-12). The CSD falsely claims that access to Prosecution Staff documents was limited. Very few dischargers requested access. Water Board staff provided access to all dischargers upon request at our office. Documents that were available in electronic format were posted on the website. Where dischargers who failed to request copies of documents made belated complaints that they did not have access, Prosecution Staff advised that the documents are available at our office during normal business hours and that dischargers could obtain their own copies under the Public Records Act.

The CSD also concedes that it has copies of all the documents, but fails to explain why it did not make these documents available to the constituents the CSD purports to represent.

The CSD also challenges its inability to rebut the Prosecution Staff rebuttal *(p .12)*. The CSD incorrectly describes the procedure in this case. The Prosecution Staff's case was provided in the draft CDOs, staff report and list of documents on January 27, 2006. Staff provided additional information in a meeting on February 15 and in a Frequently Asked Questions document on the website. Very limited changes were made to this information in our April 5, 2006 evidence, which was resubmitted largely to comply with the hearing notice and not because any changes were needed. The changes consisted almost entirely of early responses to comments and questions we had received in the interim. Those responses were not even due until April 19, 2006. The CSD cites no authority that it should be entitled to rebut the Prosecution Staff's April 19 rebuttal or that the hearing does not provide it with adequate opportunity to do so.

The CSD also suggests that the Water Board gave *itself* the opportunity to respond. As described elsewhere, the Prosecution Staff is a party in this case and is not communicating with members of the Water Board. The Water Board Chair's decision to afford rebuttal to the moving party was proper and consistent with common civil and administrative litigation practice.

The CSD incorrectly cites a Tribune article as quoting Roger Briggs as threatening to "get everybody" *(p.11)*. The article actually includes Mr. Briggs explanation that the intent is to get *to* all illegal dischargers so that the entire community will be treated the same.

Time to respond (p. 12). The Chair has already ruled on the requests for additional continuances. The discharges have been illegal for over twenty years. The prohibition has been widely publicized by the media and by the CSD.

The CSD criticizes "one size fits all" enforcement but provides no response to Prosecution Staff's explanation of why the same requirements should apply to all dischargers.

State Contracting requirements (pp. 13-14). The CDOs will not prevent illegal dischargers from contracting with the state. Government Code Section 4477 provides,

> No state agency shall enter into any contract for the purchase of supplies, equipment, or services from any person who is . . .

> subject to a cease and desist order not subject to review issued pursuant to Section 13301 of the Water Code for violation of . . . discharge prohibitions. . . .

The contract bar applies to contracts in excess of $25,000. (Gov. Code, § 4478.) Although the statute seems to bar contracts whenever there is a final CDO, the Attorney General concluded the bar only applies if the discharger is in violation of the cease and desist order. (55 Ops.Ca.Atty.Gen. 312 (Aug. 11, 1972).) This is because the Legislature intended to allow dischargers to enter state contracts as long as the dischargers comply with the CDO. (*Id.*) Therefore, assuming state agencies follow the Attorney General opinion, homeowners can preserve their ability to contract with the state by complying with their CDOs. Even if this were not the case, the CSD fails to explain why state contractors should be allowed to continue to violate the law. An alternative would be to allow homeowners who are state contractors to stipulate to a cleanup and abatement order containing the same requirements as the proposed CDOs, since cleanup and abatement orders do not trigger the Government Code section 4477 prohibition.

The potential use of cleanup and abatement orders (CAOs) rather than CDOs for future enforcement actions does not violate due process *(p. 14)*. The CAOs would have identical requirements and would be subject to the same administrative and judicial enforcement. The most significant differences are that the Executive Officer can issue CAOs, but only the Board itself can issue CDOs (Wat. Code, § 13323), and there are no statutory hearing requirements for CAOs. Even where due process considerations require a hearing, the Executive Officer or staff can conduct the hearings needed to support CAOs.

Finally, the CSD's attempt to compare Los Osos to Morro Bay *(pp. 14-15)* is both irrelevant and offensive. Morro Bay/Cayucos already has a treatment plant that meets full secondary treatment requirements most of the time.

III. Scientific, Technical and Environmental Analyses Support the Proposed CDOs

Section III of the CSD's comments are largely technical and Prosecution Staff has responded separately.

The CSD claims that amendments to Porter-Cologne make challenges to the prohibition timely, but declines to specify the legal basis for this argument *(p. 15)*. Prosecution Staff will respond if anyone actually makes such an argument.

The CSD argues that the CDOs impair its ability to pump and sell groundwater for agricultural reuse *(p. 18)*. The staff response to technical comments addresses the background of this issue. The CSD cites no legal authority for the preposterous claim that it needs an appropriative water right to prevent illegal discharges. Water rights refer to water in the ground, not sewage contained in a septic tank. The discharge of waste is a privilege, not a right. (Wat. Code §13263(g).) Neither the dischargers nor the CSD can obtain a vested right to a continued legal discharge, let alone an illegal one.

The CSD is essentially arguing that the prior history of illegal discharges estops the Water Board from taking enforcement action that *might* have an impact on the CSD. Estoppel only applies to prevent the government from impairing a vested right (*Shea Homes Ltd. Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1269-1270). There are no vested rights in this case. Even where a vested right exists, estoppel does not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a policy adopted to protect the public. (*Shea Homes Ltd., supra,* 110 Cal.App.4th at 1269-1270; *People ex rel. State Air Resources Bd.* v. *Wilmshurst* (1999) 68 Cal.App.4th 1332, 1347; *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 793; *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650.) The doctrine of estoppel does not prevent the Water Board from enforcing the prohibition. The prohibition was adopted to protect the public.

Further, the CSD cannot even establish the elements of an estoppel claim. For estoppel to be established, the following elements must be present: (a) A representation or concealment of materials facts; (b) Made with knowledge, actual or virtual, of the facts; (c) To a party ignorant, actual or permissibly, of the truth; (d) With the intention, actual or virtual, that the latter act upon it; and (e) The party must have been induced to act upon it (*Domarad v. Fisher & Burke, Inc.* (1969) 270 Cal.App.2d 543.) The CSD has always been well aware of the prohibition and the fact that the discharges are illegal. The CSD cannot prove ignorance or reliance; indeed, the CSD stopped the Tri-W project with full knowledge of the facts.

IV. The Water Board Is Not Required to Prepare a CEQA Document for the CDOs

The CSD and David Duggan claim that the Water Board must prepare environmental documents under the California Environmental Quality Act

(CEQA) before adopting the CDOs.[5] They claim the following impacts require CEQA analysis due to unusual circumstances that preclude the application of CEQA categorical exemptions: impacts of removal of groundwater from the basin; potential tank failure and nitrate pollution they claim is associated with over-pumping; and potential traffic, air, ambient noise and aesthetic impacts of increased truck traffic. The CSD cites odors and spillage from pumping, and road degradation impacts of "massive" traffic increases. None of these claims are supported by the record or applicable law.

First, CEQA challenges based on the prohibition or its impacts are time-barred. The Board complied with CEQA when it adopted the prohibition in 1983. The 1983 action prohibited all septic tank discharges. Any claim that CEQA requires environmental study of the impacts of complying with the prohibition should have been raised in 1983. The "project" in question is the adoption of the prohibition, not issuance of CDOs to enforce it. (*Pacific Water Conditioners, supra,* 73 Cal.App.3d at 555.)[6]

Second, as explained below, the CDOs are exempt from CEQA under four categorical exemptions. When a project is categorically exempt, CEQA provides an exception to the exemptions where there is substantial evidence that significant adverse impacts will result from unusual circumstances. The commenters have not shown that the so-called "exception to the exemptions" applies. As discussed in Water Board staff's technical responses, the record does not include any evidence that pumping will result in seawater intrusion or other adverse impacts, but there is substantial evidence of beneficial impacts, including restoration of groundwater quality and reducing impacts of flooding and surfacing septage. There is no evidence that pumping will cause tank failure or nitrate pollution; rather, the more frequent pumping will reduce nitrate loading. It is unclear what aesthetic impacts Mr. Duggan is concerned about, but the record includes substantial evidence that the project will improve aesthetics because septage will be less likely to surface or seep to Morro Bay. Mr. Duggan claims

[5] This section also responds to CEQA comments regarding Order R3-2006-1029. The comment letter hypothesizes about "black-smoke belching" diesel trucks, and airborne "sludge, slime and scum" from tank pump-outs. As discussed below, these claims do not require preparation of an EIR.

[6] "Ordinarily, as here, all environmental consequences flow from the original order promulgating requirements, and a subsequent cease and desist order will have no environmental effects beyond those resulting from the original order. It would be nonsensical to permit promulgation of requirements without preparation of any EIR [because the underlying order in that case was also exempt] but to require preparation of an EIR as a prerequisite to issuance of an order which does no more than command compliance with the original order. Moreover, by definition it would be ridiculous to make preparation of an EIR a prerequisite to issuance of such a cease and desist order." (*Id.* at 555-556.)

that the CDOs would "create a health hazard for infants, children, and seniors as well as the middle adult population," but provides no evidence to support this claim. The potential for significant noise impacts is based on pure speculation. Mr. Duggan and the CSD claim that economic impacts implicate CEQA, these claims are merely speculation.[7]

No commenter has provided substantial evidence of significant adverse traffic or air quality impacts from increased truck traffic. Even if every septic tank operator in the entire prohibition zone pumped his or her septic tank every two months, the increase in truck traffic would be one additional truck trip every 22 minutes. Trucks for this purpose typically hold up to 5000 gallons. Septic tank capacity is typically 1000, 1200, or 1500 gallons. We assume each truck can hold the contents of three tanks. This extremely conservative calculation is based on a worst-case scenario. It assumes the trucks will each operate 10 hours per day, six days per week, that the Water Board will issue orders to every property within the prohibition zone, that every septic tank holds 1500-2000 gallons, and that every property with a septic system will use bimonthly pumping to comply with the CDOs.[8] Even under this scenario, the truck traffic increase is negligible (about a tenth of a percent) for Los Osos Valley Road. Each truck would travel down Los Osos Valley Road, but would not travel up and down every street in Los Osos; the trips up and down the residential streets would be far fewer (one trip every two months for each three houses on a street with 52 homes, would mean two trucks per week).

A. The CDOs are Categorically Exempt From CEQA

Whether or not the CDOs are "projects" as defined by CEQA, they are categorically exempt. In this case, four separate categorical exemptions apply. The CDOs are exempt from CEQA because the septic systems are existing facilities and because these are exempt regulatory actions. Where a project is exempt, CEQA does not require analysis of environmental impacts. Once the exemption applies, the lead agency need not prepare an initial study, negative declaration or environmental impact report. As Mr. Duggan concedes, "the

[7] Even if there was evidence, economic and social impacts are not considered impacts for CEQA purposes unless the economic or social changes will themselves cause physical changes to the environment. (Cal. Code of Regs., tit. 14, § 15064, subd. (e).) Alternatively, if a physical change to the environment will occur, the economic or social consequences of the physical impact may be considered in determining whether the physical change is significant. (*Id.*) The mere fact that a cost is involved in complying with a government regulation is not enough. (*Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 799.)

[8] See attached calculation sheet prepared by Roger Briggs and Sorrel Marks.

C.D.O's. will allow for operations past previously set deadlines ordered by the R.W.Q.C.B. as to the compliance dates of resolutions passed by the R.W.Q.C.B."

The existing facility exemption applies to "the operation, repair, [or] *maintenance* ... of existing public or private structures, [or] facilities, ... involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." (Cal. Code of Regs., tit. 14, § 15301. The CEQA regulations are also referred to as CEQA Guidelines.) The requirement to pump out or retrofit septic tanks, or to stop using them, does not allow for the expansion of their use.

The enforcement action exemption applies to "actions by regulatory agencies to ... enforcement of a law, general rule, standard, or objective, administered or adopted by the regulatory agency. Such actions include, but are not limited to, the following ... The adoption of an administrative decision or order ... enforcing the general rule, standard, or objective." (Cal. Code of Regs., tit., § 15321, subd. (a).) The CDOs enforce the Basin Plan prohibition, as well as the requirements to impose a time schedule where immediate compliance is not practicable. (Wat. Code, § 13301; Cal. Code of Regs., tit. 23,§ 2245.) For the same reasons, the CDOs are also except under Guidelines Sections 15307 and 15308. (*Pacific Water Conditioners, supra,* 73 Cal.App.3d at 557 (referring to sections 15107 and 15108, the predecessors to the current sections).)

Under the exception to the exemptions, an exempt project must prepare a CEQA document (negative declaration or environmental impact report) when there is substantial evidence that a project will have a significant adverse environmental impact due to unusual circumstances. (Cal. Code of Regs., tit. 14, § 15300.2, subds. (b), (c).) The person challenging the exemption has the burden of proving that the exception applies. (*Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1259, 89 Cal.Rptr.2d 233.) The challenger must produce substantial evidence that the project has the potential for a substantial adverse environmental impact. (*City of Pasadena v. State of Ca.* (1993) 14 Cal.App.4th 810, 824-825; *Association for Protection etc. Values v. City of Ukiah*, (1991) 2 Cal.App.4th 720, 728 (*"Ukiah"*); *Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1172-1175.)[9]

[9] Several courts have held that the "fair argument" test applies to the substantial impact prong of the exception. (*See, Fairbank, supra* at 1259.) Even if that test applies, the substantial evidence test applies to the "unusual circumstances" prong. (*See, Bloom v. McGurk* (1994) 26 Cal.App.4th 1307, 1315; *Ukiah, supra,* 2 Cal.App.4th at 736.)

B. The Exception Does Not Apply Here

Mr. Duggan cites one of three exceptions to the exemptions,[10] which provides, "A categorical exemption (shall not) be used for an (activity) where there is a reasonable possibility that the activity (will) have a significant effect on the environment due to unusual circumstances." (Cal. Code of Regs., tit. 14, § 15300.2, subd. (c).)

Mr. Duggan claims "there is a reasonable inference that this action could potentially cause harm to septic systems (facilities) such as septic system failure as well as there 'will' be an increase in seawater intrusion, overdraft of the water basin and the loss of tens of millions of gallons of water from the Los Osos Water Basin." The CSD makes similarly speculative claims. This is insufficient to warrant CEQA review. An "expert's opinion which says nothing more than 'it is reasonable to assume' that something 'potentially ... may occur'" does not constitute the substantial evidence necessary for an exception to apply. (*Apartment Assn. of Greater LA, supra,* at 1176.) " 'Substantial evidence' is defined in the CEQA guidelines to include 'expert opinion supported by facts.' It does not include '[a]rgument, speculation, unsubstantiated opinion or narrative.' (*Id.,* citing CEQA Guidelines § 15064, subd. (f)(5).)[11] Even if Mr. Duggan

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[10] The other two do not apply.

[11] CEQA Guidelines § 15064 provides, in pertinent part:

> (d) In evaluating the significance of the environmental effect of a project, the Lead Agency shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable indirect physical changes in the environment which may be caused by the project.
>
> (1) A direct physical change in the environment is a physical change in the environment which is caused by and immediately related to the project. Examples of direct physical changes in the environment are the dust, noise, and traffic of heavy equipment that would result from construction of a sewage treatment plant and possible odors from operation of the plant.
>
> (2) An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. . . .
>
> (3) An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. *A change which is speculative or unlikely to occur is not reasonably foreseeable. ....*
>
> (f) ... (4) The existence of public controversy over the environmental effects of a project will not require preparation of an EIR if there is no substantial evidence before the agency that the project may have a significant effect on the environment.
>
> (5) *Argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous, or evidence that is not credible, shall not constitute substantial*

qualifies as an expert witness, his argument is insufficient to avoid the categorical exemptions.

The petitioner in *Magan v. County of Kings* (2002) 105 Cal.App.4th 468 made a similar argument when the County adopted a requirement to phase out land application of sewage sludge. The court ruled:

> Let us get this straight: We have a party whose business it is to dump sewage sludge generated in Southern California on agricultural property located in the San Joaquin Valley. His complaint is that the board of supervisors violated environmental laws when it took regulatory action phasing out and ultimately prohibiting this practice. Astoundingly, he alleges there was a reasonable possibility that the board's decision to prohibit the spread of sewage sludge would have an adverse environmental impact. He reasons that, among other things, not spreading sewage sludge degrades agricultural land. We, like the trial court, do not buy it. Judgment [in favor of County] affirmed.

Septic tank failure is not part of the "project" or a reasonably foreseeable consequence of the project. Failing systems would have to be retrofitted. As Prosecution Staff explains elsewhere, there is no evidence that discontinuation of discharging polluted water to the upper aquifer will contribute to seawater intrusion or have any adverse impacts at all. There is substantial evidence of beneficial impacts, including restoration of groundwater quality and reducing impacts of flooding and surfacing septage. More frequent pumping would reduce nitrate loads, not increase them. The traffic impacts from increased pumping frequency have not been shown to be substantial.

Mr. Duggan points out that Porter-Cologne requires the Water Board to assist recipients of CDOs in finding funding so they can achieve compliance to include low interest loans and grants. (Wat. Code § 13301.1.) It is unclear how this requirement implicates CEQA. Water Board staff will provide information and assistance regarding grant funding if we discover any; however, we are not aware of any available grant funding that would assist in complying with the CDOs.

> *evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion support by facts.* (6) Evidence of economic and social impacts that do not contribute to or are not caused by physical changes in the environment is not substantial evidence that the project may have a significant effect on the environment. [Emphasis added.]

Mr. Duggan suggests the Water Board issue an enforcement action to the County in lieu of individual enforcement actions. This alternative would have the County issue the permit for the treatment plant or some other alternative, and provide the funding and revenue collection. Unless the County is discharging waste, however, the Water Board lacks jurisdiction to require the County to do anything other than provide reports under Water Code section 13225. In addition, representatives of the County and of San Luis Obispo Local Agency Formation Commission have advised us that the County has no jurisdiction to operate a treatment plant or assess taxes to pay for one unless the CSD is dissolved or divests itself of its wastewater jurisdiction.

Mr. Duggan also suggests that individual homeowners could agree to maintain their septic systems voluntarily instead of becoming subject to enforcement actions. Nothing in the CDOs prevents any person from doing so. The Executive Officer will consider issuing stipulated cleanup and abatement orders in lieu of cease and desist orders for dischargers who propose terms that are consistent with those in whatever CDOs the Board decides to adopt. Mr. Duggan's proposal also has nothing to do with CEQA requirements, which are based on the permitting and enforcement jurisdiction of lead and responsible agencies.

Impact of Section 13360 (CSD, p. 3). The CSD claims that no categorical exemption applies because the CDOs specify the manner of compliance, citing *Lindsay Olive Growers,* Order No. WQ 93-17. That order did not say the categorical exemption was inapplicable whenever a method of compliance is specified. The State Water Board merely stated that it was unknown what the project would be, so it was impossible to consider whether the project would have an environmental impact. The State Water Board noted that the discharger would have to consider CEQA's application when a cleanup alternative was selected. The application of the exception to the exemptions was not before the State Water Board.

V. Conclusion

For the reasons set forth above and in the responses to technical comments, the objections to issuance of the CDOs lack merit. As two of CSD's own attorneys have pointed out, individual enforcement action is the only way to solve the water quality problems in Los Osos.

Prosecution Staff recommends the Board adopt the proposed orders. After hearing the evidence at the hearing, Prosecution Staff recommends that the

Board modify the CEQA findings to add references to CEQA Guidelines sections 15307 and 15308 as a basis for the exemption. Although the Water Board need not make findings about the non-applicability of the exception to the exemption (*Ukiah, supra,* 2 Cal.App.4th at 732), the Board's exemption analysis should be clear from the record.

Attachments

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