Writer's Direct Dial:
(213) 236--2830
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Via facsimile (805) 543-0397 and electronic mail
Michael Thomas, Assistant Executive Director
Central Coast Water Board
895 Aerovista Place Suite 101
San Luis Obispo, CA 93401

Re: *Response to Initial Briefs Concerning Proposed CDO's/Los Osos and Baywood Park Residents*

Dear Mr. Thomas:

The undersigned represents the Los Osos Community Services District ("District"), a Designated Party in the above referenced matter. This letter is a response to the initial briefs that were filed by June 23, 2006 pursuant to Michael Thomas' May 18, 2006 letter memorializing the briefing schedule on due process issues ordered by Chairman Young during the status conference on May 11, 2006.

Argument

Arguments Concerning the Role of the Los Osos Community Services District in Individual Hearings Are Unresponsive and Unrelated to Any of the Solicited Questions

Mr. Thomas' letter requests responses to five questions, addressing five issues. The Chairman states in the May 18, 2006 letter that his request for briefs on how to proceed, "must be limited to the following issues:"

> 1) Must the prosecution's case, as presented orally on April 28, 2006, be stricken entirely or to some lesser degree?
>
> 2) 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?
>
> 3) If the prosecution is allowed to supplement the written materials it has introduced, should designated parties be able to submit additional written materials?
>
> 4) 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?

5) Designated parties with personal issues such as childcare and health, that they would like the Water Board Chairman to consider when setting the order of presentation of the individual Cease and Desist Orders, should put those issues in writing for submission by June 23, 2006.

The Prosecution Team's brief of June 19, 2006 included issues outside the scope of Mr. Thomas' request. The memorandum first addressed the five questions in Part I, but in Part II the Prosecution Team argues for a limited role of the District in the prosecution of the individual cases. The Prosecution Team seeks to restrict the role of the District during individual hearings and prevent both the introduction of evidence during these hearings and an ability to cross-examine witnesses. This issue is outside the scope of this request. If the Board is concerned with issues regarding the specific role of the District in individual cases, a solicitation of input on this procedural matter should be offered.

The District does not waive the ability to later argue that their presence is necessary and appropriate in individual hearings. The District does not intend to intervene or impede the proper disposition of the individual cases, but argues that the District's participation is appropriate as a designated party. That role arises from the need to participate where issues and evidence may relate to the common defense during the individual hearings. It is only appropriate that the District retain the ability to introduce evidence and cross examine witnesses in this capacity.

Assuming Arguendo that Only the Appearance of Bias is Present With Respect to the Board, the Cited Authority is Distinguishable

The Prosecution's June 19, 2006 brief also includes the statement on page two that: "The mere appearance of bias does not require a new hearing in such a case." As authority for this proposition the Prosecution cites, *Southern Cal. Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, 549. However, the Prosecution overstates the authority and applicability of the case. Some facts are similar to the present case: the defendant possessed a due process right and the defendant faced prosecution in an administrative proceeding by a city that was both the adjudicator and the prosecutor. Nevertheless, the case can be distinguished from the one at bar on a number of grounds. The first is the implication of bias in that case did not concern the people adjudicating and prosecuting the case, but that bias might be inferred because the defendant had filed a lawsuit against the City, who was both the prosecutor and adjudicator. *Underground Contractors, Inc. v. City of San Diego* at 541. The case can also be distinguished on the role of the implication of bias in the case which was not reviewable because it had not been brought up at the administrative hearing. The Appellate Court in *Underground Contractors* could not base its decision on these implications of bias because the defendant did not raise the issue during the administrative process and thus the issue may not be raised in later judicial

proceedings. *Underground Contractors, Inc. v. City of San Diego* at 549. At most, any statements made by the court in this case were unessential dicta.

Fairness and the Desire to Accommodate Personal Issues Should Compel the Board to Refrain From Disadvantaging Early Parties

Several parties targeted in the Cease and Desist Orders have argued important fairness concerns regarding the format of the proceedings. The first relates to the inherent unfairness of being an early party to present in the proceedings. The process the Board has adopted is to allow the individual property owner to present a short case lasting only fifteen minutes during which they may incorporate into their own case the testimony of previous property owners that the individual was present to witness. At the conclusion of this fifteen minute hearing, the Board will then make a finding concerning that individual property owner. As an example of this unfairness, consider the following inequity: The first property owner will have fifteen minutes of testimony before a final decision is made. The forty-fifth presenter will have the ability to incorporate six hundred and seventy five minutes of testimony by reference. No case should be decided until all are heard.

Another issue property owners have highlighted is the disincentive to come forward in the expression of real personal issues if going earlier in the proceedings prevents the incorporation of prior evidence and testimony. The large number of defendants has resulted in the Board placing a premium on the efficient disposition of the proceedings. If property owners are limited to a fifteen minute presentation on account of their status as one of many individual defendants being simultaneously prosecuted, it is only fair to allow them to incorporate the testimony of those they are being forced to share the Board's time with. It is contrary to notions of fairness and justice to ask those with "personal concerns," such as healthcare conditions and childcare, to assume the most disadvantageous order in the proceedings and accept this as an accommodation. These letters demonstrate the damages that the ability to incorporate the testimony of previous and subsequent presenters and a plea for the procedures to be modified to accommodate legitimate personal problems. Changing the order of presentations is not an accommodation if such a change disadvantages those requesting it.

Fairness and the Desire to Accommodate Personal Issues Should Compel the Board to Not Require Physical Presence to Incorporate Testimony

The Board's current policy is that individual property owners must be present during the presentation of other cases in order to incorporate the testimony and

evidence into their own cases. Property owners may not be able to attend other hearings due to any number of reasons. The Board has expressed a willingness to accommodate "personal issues" like health issues and childcare. The requirement of being present to incorporate testimony from another property owner's case inherently disadvantages those who are less able to attend every hearing. People with time and flexibility issues will have the success of a favorable disposition of their case diminished alongside those people with physical limitations that restrict their ability to participate in days of proceedings. The forty five people in this initial round of hearings have had their cases connected to others and restricted in time in the interest of Board efficiency. That interest should not unnecessarily strike against them when it creates unwieldy requirements that could be accommodated for. The requirement to be present is incompatible with a Board that is interested in accommodating personal issues and should be abandoned.

Fairness and the Desire to Accommodate Personal Issues Should Compel the Board to Adopt a Policy That Allows Property Owners to Incorporate Other Testimony *After* All Cases Have Been Presented

The Board's current procedure is to require that the individual property owners must request to incorporate testimony from other cases *during* their presentation. Several property owners have indicated in response to Chairman Thomas' fifth question regarding consideration of personal issues such as health and childcare that they are unable to attend every presentation. These residents still desire an ability to incorporate the testimony of other witnesses and request that the Board find accommodations to facilitate that end in the interest of justice. Any such accommodation should include a reasonable amount of time following the presentation of all the cases to allow individual property owners to review the proceedings and make a request to incorporate such information into their own case.

CONCLUSION

For all the foregoing reasons and the previous response submitted, the instant CDO actions should be dismissed, senior staff should be barred from prosecuting future enforcement actions before this RWQCB, the RWQCB members who have participated thus far in the instant proceedings should permanently recuse themselves from current and future adjudication of enforcement actions involving septic systems in Los Osos

and procedures should be amended to fairly accommodate personal issues.

Very truly yours,

BURKE, WILLIAMS & SORENSEN, LLP

STEPHEN R. ONSTOT

SRO:jdp