State Water Resources Control Board

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Central Coast Water Board

FROM: Lori T. Okun
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OFFICE OF CHIEF COUNSEL

DATE: May 4, 2006

SUBJECT: REQUEST FOR CONTINUANCE OF MAY 11-12, 2006 HEARING ON LOS OSOS CEASE AND DESIST ORDERS R3-2006-1000 THROUGH -1049

After the Central Coast Regional Water Quality Control Board (Central Coast Water Board) addressed all other procedural matters at the Los Osos Cease and Desist Orders, counsel for the Los Osos Community Services District (District) objected to Roger Briggs' and my participation on the Prosecution Team in this matter. The objection was in the form of a motion to dismiss all of the proposed CDOs, citing *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810 and *Morongo Band of Mission Indians v. State Water Resources Control Board,* Sacramento County Superior Court Case No. 04CS00535 (Jan. 18, 2006).[1]

Request for Continuance to Seek New Prosecution Counsel

The Prosecution Team and the Central Coast Water Board have complied with all applicable requirements of the Administrative Procedure Act. (Gov. Code §§ 11425.10-11425.40, 11430.10-11430.80.) As I argued at the hearing, the appropriate response to a *Quintero* objection, where the Chair is inclined to sustain such an objection, is not to dismiss the matter but to continue it so that the Prosecution Team can secure new counsel.

The Chair denied the District's motion to dismiss. The Prosecution Team agrees with the Chair's ruling that *Quintero* does not require disqualification of the prosecuting attorney under the circumstances presented in this case. There is no legal or practical necessity for me to serve as the prosecuting attorney in this matter, however, and Prosecution Team has decided to seek substitute counsel.

[1] The *Morongo* decision was a Sacramento Superior Court decision that is currently on appeal. (See, *Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal.App.4th 819, 830 -831 [unpublished trial court ruling cannot be cited as persuasive authority].)

Substitution of counsel will help avoid unnecessary litigation of the due process issue, and help ensure expeditious resolution of the merits of these proceedings. If a court were to agree with the District's position, a rehearing before the Central Coast Water Board with new prosecution counsel would be necessary. The rehearing would come only after days of wasted "first-round" hearings before the Central Coast Water Board, countless hours of wasted staff time, and several years of litigation. The Prosecution Team is requesting this continuance so the Central Coast Water Board can avoid this outcome. We have also consulted with State Water Board counsel involved in the *Morongo* case, and believe it would be better for the California Water Boards to avoid litigating this issue simultaneously in both cases.

The State Water Board has recently established a new Office of Enforcement. One of the Office of Enforcement's functions will be to serve as the prosecutor in complex enforcement actions before the regional water quality control boards. The new Chief of the Office of Enforcement will start work on May 8, 2006, and, consistent with his function, may be available to take over the prosecution of Los Osos matters. Otherwise, the Prosecution Team will request the Chief Counsel to appoint a different attorney who does not currently advise the Central Coast Water Board.

Because substitute counsel has not yet been selected, and should not be selected until after we have an opportunity to consult with the new Chief of the Office of Enforcement, there will not be sufficient time for counsel to prepare before the hearing scheduled for May 11-12, and a continuance will be necessary to allow the Prosecution Team to participate effectively.

The Prosecution Team regrets any inconvenience this continuance will cause to the Central Coast Water Board members or the public. Had the Prosecution Team learned of the objection earlier, we could have secured new counsel well in advance of the April 28 hearing and avoided this delay. Unfortunately, the District's decision not to make its motion until after the start of the hearing eliminated this option. This is particularly regrettable since the Prosecution Team described my role when it issued the draft CDOs on January 27, 2006 and the Chair granted the District's request for designated party status on February 15, 2006, well in advance of the hearing date.

Objection Regarding Roger Briggs

The District also objected to Mr. Briggs' participation on the Prosecution Team. Mr. Briggs is a witness in this matter. The *Quintero* case, relied on by the District, involved disqualification of a prosecuting attorney, and does not address the issue when a witness may be disqualified. As Mr. Briggs testified last week, he has been working on Los Osos septic system problems periodically since the early 1980s. The District called Mr. Briggs as a witness. As a result, several designated parties cross-examined him. These or other designated parties might also call him as a witness during the individual hearings. Mr. Briggs might also be a necessary witness for the Prosecution Team's rebuttal or for its case in the individual hearings. Removing him from the hearing process is not legally required and, due to his unique role as a witness in this case, it is not possible.

cc: Mr. Roger Briggs [via email only]
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Los Osos Designated Parties and
Interested Persons Lists