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CENTRAL COAST WATER BOARD
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RE: *Comments and Evidence for April 28, 2006, Central Coast RWQCB Hearing*

Dear Mr. Thomas and Members of the Board:

On or about February 23, 2006, the Central Coast Regional Water Quality Control Board ("RWQCB") granted the Los Osos Community Services District ("CSD") Designated Party status for purposes of the Cease and Desist Order ("CDO") Hearing(s) to be held on March 23, 2006. At the time the CSD submitted its request for Designated Party status, we noted that we were unable to submit *all* comments and evidence at that time, but instead submitted a summary of the comments and evidence and requested leave to supplement that summary by March 1, 2006 (the submission date for comments and evidence offered by the original Designated Parties). Thereafter, the RWQCB continued the Hearing to April 28, 2006, and the due date for these comments to April 5, 2006.

This letter represents the CSD's formal comments, which comments will be explained in full at the Hearing(s) by the CSD, the CSD's witnesses and experts, and counsel for the CSD. In addition, please find attached as Exhibits A and B to this letter a list of the documentary evidence that the CSD wishes to submit in support of these comments and a list of witnesses whom the CSD may call to

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testify at the Hearing(s). The comments are divided into three parts. The first part addresses substantive legal hurdles to the issuance of CDOs pursuant to this process. The second part analyzes the manner in which the Hearing process has been handled by the RWQCB and the procedural and substantive violations of controlling law that have arisen because of the nature of the process, concluding that the procedural and substantive defects in this process violate the constitutional rights of the individuals targeted for prosecution, the other residents and businesses of Los Osos and San Luis Obispo County, and the CSD. The final part summarizes the documentary scientific evidence offered and the fact that, when all relevant scientific evidence is considered, there is no sufficient basis on which the RWQCB may issue the CDOs.

In sum, it is the CSD's position that the RWQCB lacks the proper foundation to issue the CDOs and has conducted the prosecution in violation of both California law and the Constitutions of the United States and the State of California. In light of the evidence in the record, the issuance of any CDOs will be subject to judicial review and invalidation. The CSD therefore formally requests that the RWQCB dismiss these prosecutions or, at the very least, continue them until the statutory and constitutional violations have been cured. In the event the RWQCB insists on moving forward with the prosecutions at this time, the CSD offers the following comments.

I. The Legality of this Process is Severely Compromised in Light of Previous Actions by the State and Regional Boards

A. This Action against Individual Property Owners is Unprecedented

We note that in researching the State Water Resources Control Board ("SWRBC") and each Regional Water Quality Control Board in the State, we have seen ***only one previous use of CDOs against individuals***. That involved a situation in Lassen County remarkably similar to the situation here. In what is called, by the North Lahontan Watersheds Division of the Lahontan RWQCB, the "Eagle Lake CDOs," the Lahontan Board did issue CDOs against 900 parcels. But those CDOs merely required that sewers be built and that parcel owners hook up to the sewers when they were completed. There were no penalties arising directly from the CDOs. Instead, when some residents did not hook up to the Eagle Lake sewer systems, they were sent Notices of Violation, which led to Clean-Up and Abatement Orders and, in the case of 2 persons who still held out, Administrative Civil Liability hearings. Here, contrary to what was done in Eagle Lake and contrary to the general policy of the SWRCB, the RWQCB is threatening to punish private citizens from the start through the use of CDOs.

This causes some incredulity, as the SWRCB's own Enforcement Policy states that CDOs regularly involve "extensive capital improvements" and may "include restrictions on... connections to community sewer systems." Taking the entire Policy with regard to CDOs, it is clear that the SWRCB does not anticipate using CDOs as an enforcement tool against private citizens. Citizens are not responsible for holding discharge permits and they have no control over sewage or stormwater collection and treatment. Indeed, the San Luis Obispo County government currently retains control over individual septic systems (and the planning and permitting thereof), and the CSD is currently in the process of implementing an environmentally-sound sewage and stormwater system for the Los Osos area. Accordingly, the CSD hereby moves to implead the County of San Luis Obispo as a Designated Party to these proceedings. Given the County's role in the permitting of and planning for septic systems, the County is indispensable both as to the prosecution and defense of the proposed CDOs.

B. Mandating the Manner of Compliance with the CDOs Violates the Porter-Cologne Act

As a primary matter, the RWQCB, through the CDO process, is not only requiring the individual property owners targeted for prosecution, but is ***specifying the manner of compliance***. Of course, the Porter-Cologne Act specifically forbids the RWQCB and other Water Boards from issuing such mandates. According to Water Code § 13360 no "waste discharge requirement or other order of a regional board or the state board . . . shall specify the design, location, type of construction, or particular manner" of compliance with the Boards' requirements or orders. (Cal. Water Code § 13360(a)). While the RWQCB may contend that the CDOs allow Los Osos residents to propose alternative means of compliance, in light of the relative lack of technical sophistication of those residents, the RWQCB's proposed Order is a *de facto* prescription of the manner of compliance, and thus violative of the Porter-Cologne Act. For this reason, the CDOs should not be issued, as they will not stand scrutiny by the courts.

Further, the CDOs, in setting out the *manner* of compliance, cannot be exempt from the California Environmental Quality Act ("CEQA") as claimed in Finding 10 of the draft CDO provided to the public. While a CDO is, in general, not subject to CEQA because the one of many alternatives which ultimately is used to comply with the CDO is unknown at the time the CDO is issued (and CEQA review is thus proper at the time the compliance measure is undertaken), where the RWQCB is actually prescribing the method of compliance, a study of that method of compliance is necessary to satisfy CEQA and a categorical exemption is improper. (*C.f. In the Matter of the Petition of Lindsay Olive Growers*, SWRCB File No. A-823, CAO No. 92-708 of the Central Valley RWQCB (no study needed where the method of compliance not prescribed).) As such,

if the CDOs are issued without proper CEQA review, they will be subject to legal invalidation.

C. In Light of Previous Statements on the Record in the CSD's Administrative Civil Liability Hearing, The RWQCB Cannot Offer an Unbiased Forum for the Hearings

Based on comments arising out of the RWQCB's Administrative Civil Liability hearing for the CSD, it is abundantly clear that the RWQCB is *not* an unbiased, neutral arbiter. At that hearing, Chairperson Young stated the intention of the RWQCB to pursue individual enforcement actions. (*See* ACL transcript, 412:10-413:7.) Other members of the RWQCB joined Chairperson Young in stating, for the record, their opinion that individual enforcement actions needed to be taken. Board Member Shallcross went so far as to state that individual enforcement actions might *"create the political will for something to happen"* in Los Osos. (ACL transcript, 424:22-425:1.) This statement raises a near-irrebuttable presumption that Member Shallcross has already made up his mind on the result of the prosecution actions that will be the subject of the Hearing.

Worse, and far more fatal to the RWQCB's ability to hear this matter, Member Shallcross's statement evinces an improper purpose to the entire CDO process. The RWQCB tasked the Prosecution Team with bringing the CDOs, and Member Shallcross (and possibly other Members) did so in part to send a political statement to the residents of Los Osos. Prosecution, even administrative prosecution, undertaken to bend the political will of the electorate is so clearly improper that it is difficult to fathom a circumstance in which it could be deemed proper. The RWQCB's stated intent to influence the upcoming election of CSD Directors by bringing these enforcement actions against large blocks of Los Osos voters is an outright abuse of the RWQCB's power.

Finally, we note that the RWQCB tasked Mr. Briggs with bringing the individual CDO actions during the CSD Administrative Civil Liability hearing on January 5, 2006, and Mr. Briggs' prosecution team issued the CDO notices approximately three weeks later. The individual CDO actions were *not on the agenda* for that hearing, and members of the public were given neither notice that the CDO actions would be discussed nor an opportunity to be heard prior to the RWQCB instructing its Staff to move forward with the prosecutions. Because no emergency circumstances existed to force the RWQCB to act at that hearing (and even if there were, the RWQCB failed even to follow the notice requirements for emergency situations), this clearly represents a lack of due process and a ***violation of the Bagley-Keene Act***. Each individual prosecution undertaken pursuant to the instructions of that date thus violates both the constitutional due process rights of

each targeted party and California statutes enacted to prevent just such furtive actions by the government.

These comments made by the RWQCB, and they attitude they represent, have apparently found their way into use by the RWQCB staff. Recent conversations between CSD staff and RWQCB staff (and between concerned citizens and RWQCB staff) indicate that the RWQCB staff is intent on bending the political will of the Los Osos citizenry through this process. This political motivation on the part of the prosecution team and their fellow RWQCB staff members reveals an improper purpose behind these prosecutions.

It is clear, both in light of the evident bias of the supposedly neutral arbiter and in light of the legally unsupportable manner in which the prosecutions were initiated, that the prosecutions cannot continue – and if they do continue, they cannot continue in front of a panel clearly predisposed to render a decision based not on the facts of each case but on political expedience.

Should the RWQCB not recuse itself, it is the position of the CSD that the Hearing will be subject to review by both the SWRCB and the courts. A process initiated in violation of the State and United States Constitutions and the Brown Act cannot possibly be upheld as legal and binding, and a Hearing in which the purportedly neutral arbiter has demonstrated bias and a political motivation for its decision prior to the Hearing is similarly unjustifiable.

D. This Process is Fundamentally Flawed in Light of The State Water Board Refusal to Take Over the Los Osos Wastewater Project

Pursuant to the CSD's State Revolving Fund Loan contract with the SWRCB (and particularly the terms of the Installment Sales Agreement entered into by the CSD and SWRCB), the SWRCB had the right to take over the Los Osos wastewater plant project for a variety of reasons, including the CSD's inability or refusal to complete the project. In the fall of 2005, the SWRCB adamantly *refused* to do so, despite negotiations with the CSD in which the CSD warned that, due to the adoption by the citizenry of Measure B (addressed *infra*), the CSD could no longer continue the project at the downtown site.

Now the RWQCB, an arm of the SWRCB, has initiated prosecution not just of the CSD, but of individual citizens within the community. Yet the SWRCB had the power to *preclude the need for prosecutions* by way of taking over the wastewater project. It is hard to imagine a more obvious case in which a governmental entity would be ***estopped*** from prosecuting individuals than one in which that same entity was a direct and

proximate cause of the need for prosecution. Yet here we are, with the SWRCB's local arm prosecuting individuals in large part because the SWRCB failed to protect them. In light of the SWRCB's refusal to complete the wastewater plant – in the context of Measure B – it is manifestly unjust for the RWQCB to continue this prosecution.

II. The CDO Process is Replete With Procedural and Substantive Due Process Violations

Despite these overarching concerns and the very real probability that this entire process is subject to invalidation because of them, specific actions taken during the process increase the illegality of the prosecutions and the probability of invalidation.

A. The RWQCB Initiated This Action with A Blatant Violation of the Porter-Cologne Act Designed to Confuse and Frighten the Citizenry

By letters dated and mailed Friday, January 27, 2006, the RWQCB initiated a random, scattershot prosecution of individual property owners. In that first letter, the RWQCB illegally called for the individual owners to turn over information to the RWQCB within 5 business days of receipt of the letter or face $1000 per day fines. The request for information was purportedly made pursuant to Water Code Section 13267. But that Section deals with **technical or monitoring program reports**, not general information like the tenant reports requested by the RWQCB. Therefore, and contrary to what the RWQCB indicated in that first letter, there was no legal ground to assess or threaten to assess a $1000 per day fine pursuant to Section 13268. This was just the first step in a campaign of overbearing governmental action designed to frighten and confuse the individual property owners and make their resistance to the CDOs a mere ineffective formality.

Despite this illegality, the prosecution of innocent individuals in Los Osos continues, so it is perhaps best to address how the citizens, the CSD, and the RWQCB reached this point.

B. Resolution 83-13 and the Community of Los Osos

We begin by looking at RWQCB Resolution No. 83-13, the document under which these actions are being taken. That document, now nearly ***twenty-three (23) years old***, prohibits discharges of waste from selected individual and community sewage disposal systems effective November 1, 1988, the "Prohibition Zone" in Los Osos and Baywood Park. The parties to this action are very familiar with the Prohibition Zone, and the RWQCB Prosecution Team has indicated, by its list of submitted documents, that the

existing and historical documents describing the Prohibition Zone will be entered on the record. In the interests of time and of not being duplicative, we will refrain from a full description of the Prohibition Zone here, but reserve the right to discuss it in full at the Hearing.

For these prosecutions, the RWQCB relies almost entirely on Resolution 83-13. But that document was premised on a buildout that would result in a local population of nearly 27,000 persons. Yet Los Osos has only grown to approximately 15,000 persons and the current allowable buildout under the new regional plan results in a maximum of 19,000 persons living in the subject area. This raises *three inherent and interrelated problems*. First, Resolution 83-13 may well be based upon and set forth as guidelines scientifically indefensible positions with regard to the permissible growth in the area. If this is the case, then the Resolution cannot possibly be the basis for legally-justifiable CDOs. In the alternative, the RWQCB, in relying on Resolution 83-13 for these prosecutions, may well be relying on *outdated* science which has no practical application to the facts in the Los Osos area. As a final, it may well be that the RWQCB has initiated these prosecutions knowing that it has no scientific support for them, but has done so out of some motive other than ensuring clean groundwater. Notwithstanding these scientific infirmities in the contemporary use of Resolution 83-13, we continue to examine it and other relevant background issues.

Resolution 83-13 also permitted the construction of 1150 new housing units in the Los Osos/Baywood Park area before the discharges prohibited in that Resolution were ceased. Yet the RWQCB never explained why, if 1150 additional units were to be built, how the additional units would not negatively impact the environment. This is *nonsensical* to the extreme – first the RWQCB states that pollution is rampant, then the RWQCB states that more building will be allowed, and now the RWQCB is prosecuting both those persons who were here when Resolution 83-13 was put into place and those who were allowed to build despite what the RWQCB now states are massive problems with the groundwater. Indeed, this continued building – both within the prohibition zone and outside the zone – could only make worse the rising groundwater table problem and exacerbate the environmental hazard to portions of the community. Yet numerous recent studies show that, despite this significant increase in residential building, the pollutant levels in the aquifer have stabilized. This shows quite clearly that the scientific bases for Resolution 83-13 are factually unsupportable and that new scientific and environmental studies need to be provided before any prosecutions may go forth.

This is not the last action by the RWQCB which, in light of Resolution 83-13, caused great confusion to the residents, the County of San Luis Obispo, and more recently the

CSD. But despite often confusing and inconsistent rulings and actions by the RWQCB, the residents, the County, and the CSD have continued to work to ameliorate the environmental status of the area without placing an undue burden on the residents. In light of this cooperation, Los Osos remains one of the few areas on or near the coast that has remained affordable to persons of moderate incomes.

Recently, the residents of Los Osos became frustrated with prior CSD leadership. That leadership, apparently acting in good faith, moved forward with plans to satisfy the requirements of Resolution 83-13 and subsequent documents issued in light of the Resolution through a ponding system. The residents supported these moves, and indeed, the residents have ***never*** been opposed to the construction of *a* sewer system and sewage treatment facility in Los Osos. But in a stark betrayal of the residents of Los Osos, the former CSD leadership abandoned the resident-supported ponding alternative and moved forward with altered plans to build a traditional, mechanical, gravity sewage treatment facility at a location in the middle of Los Osos, adjacent to a school, churches and parks. The residents, exercising their constitutional and statutory rights to free speech and to recall elected officials, did recall three CSD board members who favored the in-town sewage treatment plant and adopted an initiative to prohibit the siting of such a plant in the middle of the town for economic, environmental, and public health and safety reasons. It was *immediately* after the citizens successfully exercised these constitutional and statutory rights through the electoral process that the RWQCB began to strictly enforce Resolution 83-13 – after having never enforced it against the San Luis Obispo County government or the CSD at any time in its history.

C. The RWQCB Initiated Prosecution in Violation of Common Sense, Water Board Precedent, and the Citizens' Due Process Rights

The RWQCB, without warning and nearly four months after the election in which the Los Osos citizens expressed their desire to site the sewage treatment plant outside the middle of their town, initiated prosecution of individual property owners. The RWQCB did so by "randomly" choosing 50 property owners for this first enforcement effort. The RWQCB did not attempt to determine which properties, if any, *actually discharge to* the groundwater or surface water in Los Osos or which properties are the most egregious polluters. Instead, the RWQCB acted irrationally and without substantial justification in choosing property owners to be the subject of this Hearing. The random selection violates principles of due process and equal protection and cannot be the basis for a fair and equitable Hearing.

Preliminarily, as Resolution 83-13 allowed the construction of 1150 new housing units in the Los Osos/Baywood Park area while the discharges prohibited in that Resolution

continued, the targeted parties are, through this prosecution, being held accountable for the RWQCB's allowance of those new units. It is manifestly inequitable and unjust for the RWQCB to both have allowed continued building between 1983 and 1988 (at which time a moratorium went into effect) – with the attendant impacts that building has on groundwater – in the Los Osos area and then to prosecute individuals for the impact they have had on the groundwater. The approximately 950 new units must have had some impact on the groundwater – yet the RWQCB has made no effort to study that impact or to determine its effect on Resolution 83-13. We assert that this entire prosecution is barred by the legal principles of waiver, estoppel, and laches.

As stated above, the initial prosecution letters included an illegal attempt to extract private information from the individuals by threatening them with $1000 per day fines which the RWQCB had no power to assess. The private information that was demanded to *assist the RWQCB* in its prosecution of citizens is clearly subject to the constitutional privilege against self-incrimination afforded all Americans by the Fifth Amendment to the United States Constitution.

Not only did the RWQCB attempt to *fine away the Fifth Amendment*, but the potentially-massive fines instilled *fear* in the individual residents targeted for enforcement. That fear was multiplied by the manner in which the RWQCB manipulated the information available to the individuals. The RWQCB did so in ways: (1) failure to provide any list of the persons targeted for prosecution; (2) the dissemination of a list of thirty-four (34) documents supporting the RWQCB's prosecution without granting access to these documents; and (3) the approximately five-week time period in which individual citizens, acting with limited to no scientific knowledge and limited access to persons who could assist them, were required to respond to the RWQCB. In addition, the RWQCB has granted itself the period of time from April 5, 2006, when these and other comments are due, until April 19, 2006, to respond to and attempt to rebut these comments, but has not provided the CSD and other parties a similar two-week period to reply to the RWQCB's responses. Instead, the CSD and other Designated Parties only have the opportunity to respond to the comments made by interested persons.

D. The RWQCB Improperly Withheld the Identities of the Targeted Parties Until Forced to Reveal them to the Media

In failing for over a month to provide a list of the persons targeted for prosecution, the RWQCB has violated the rights of the individuals in at least two ways. First, there was, during that period (which at the time was thought to be the entire time frame for submission of comments and evidence for the Hearing) no means by which the individuals or any other persons may determine whether this procedure is actually

"random" or whether prosecution is being undertaken as a means by which to get back at the residents of Los Osos for exercising their Constitutional rights in an election. As discussed during the Administrative Civil Liability process by which the RWQCB targeted the CSD, RWQCB Executive Officer Roger Briggs began immediately to strictly enforce Resolution 83-13 and subsequent RWQCB orders because of the *results* of that election and failed to engage the newly-elected CSD Board of Directors in any constructive conversations. Only the RWQCB could know if individual citizens are also being prosecuted because of the results of the election because only the Prosecution Team knew who is being prosecuted.

In addition, the RWQCB's failure to release the identities of the persons being prosecuted created barriers between those persons, making it impossible or highly-difficult for them to jointly represent their interests. With what was thought at the time to be a mere five weeks to submit all comments and evidence on their own behalves, the individual citizens were left without a means by which to pool funds and resources and create a strong rebuttal to the RWQCB's prosecution. Due to Public Records Act requests, the identities of all of the targeted individuals finally become evident – but only after the community of Los Osos was left in the dark for over a month. All parties now have access to a partial list of targeted individuals, and have a month to collaborate in an effort to stop the RWQCB prosecution, but that one month now must be weighed against the seven months between the September 27 election and the April 28 Hearing during which the RWQCB Prosecution Team will have had the opportunity to work on their presentations. Taken in concert with the statements by the RWQCB at the CSD Administrative Liability hearing, it is evident that this process has not been designed to give the "defendant" citizens any real opportunity for success.

Not only were the interests of the targeted parties adversely affected by the month-long failure to disclose whom the RWQCB is targeting, the interests of all other residents and businesses of Los Osos were and continue to be adversely affected as well, due in part (but not in whole) to the RWQCB's unwillingness to allow those parties to be part of this Hearing. The Hearing process allowed any interested party to apply to be a Designated Party and to represent his, her, or its interests *in full* at the Hearing. But the manner in which the RWQCB withheld information made it impossible for individual citizens to know if their neighbors were being targeted – and thus to know whether their interests could be infringed upon by the CDOs. How would one know if one would encounter the effects of the CDOs – noise, traffic, odors, etc. – if one could not determine which properties might become subject to the CDOs? By withholding this vital information, the RWQCB therefore infringed not only on the due process rights of the targeted parties, but on those of every resident of Los Osos. Of course, the RWQCB's denial of Designated Party status to every single individual who applied for

such status also infringed on those persons' right to introduce evidence at this hearing – where precedents will be set for later prosecutions.

E. The RWQCB Indicates That This "Random" Prosecution Will Continue

The RWQCB has indicated that it will continue to undertake random, scattershot selection of individuals for prosecution until all individual properties in Los Osos have received Hearings. Mr. Briggs was quoted by the San Luis Obispo Tribune as stating that the RWQCB's "intent is to get everybody, so it doesn't matter who is first." (*See* San Luis Obispo Tribune, *Septic District Could Trump Pump Plan*, Feb. 19, 2006.) Mr. Briggs further indicated that all of the residents of Los Osos would be subject to CDOs by the end of 2006. (*See id.*) The CSD believes that the environmental, scientific, and technical facts at issue in these cases will be similar if not identical. In order to avoid disparate decisions on what *should be* the same facts, the CSD has, as discussed above, introduced evidence that applies to *all* properties in Los Osos. While this evidence may assist the individual property owners in their cases, it is not site-specific and is thus, at some level, an incomplete representation of those persons' interests. This, obviously, runs counter to the due process and equal protection principles espoused by our federal and State constitutions and casts grave doubt on the legality of this Hearing.

In addition, CSD Interim General Manager Dan Bleskey and counsel for the CSD both requested information regarding the "randomness" of the prosecution. CSD counsel did so through a Public Records Act request. Mr. Bleskey did so via letter to the RWQCB asking for the algorithm used to conduct the random selection. Counsel was told that only the information on the RWQCB website and one irrelevant electronic mail communication were available for review. Mr. Bleskey received no response as of the preparation of these comments. This deliberate withholding of information indicates that this prosecution may not be "random" at all, but may be – as Member Shallcross indicated – designed to change the political will of the Los Osos residents by targeting certain individuals.

F. The RWQCB Has Reserved for Itself Fundamentally Inequitable Access to Relevant Information

The Prosecution Team assembled a list of 34 documents that support its position in this matter. While a list of documents has been disseminated and the documents have supposedly been available for review at the RWQCB offices during normal business hours, the documents themselves have not been made readily available to the individuals targeted for enforcement in a time or manner allowing them unfettered access to work on the documents on their own time. Thus, the individuals have had no

opportunity to have tested the scientific, technical, or environmental statements and conclusions contained in those documents. In essence, the individual citizens are being told to rebut scientific information without knowing the specific information they must rebut.

Conversely, the RWQCB has granted itself the privilege of receiving all comments made by the Designated Parties – as well as all of the evidence those parties can collect in their own behalves – one month before the Hearing. The Prosecution Team will therefore have access to *all* of the relevant information, while each Designated Party will only know what information he, she, or it provided. It is indisputable that this unequal access to information will result in a Hearing which is prejudiced in favor of the Prosecution Team. And, of course, the RWQCB has two weeks to respond to these and other Designated Party comments, but citizens have no opportunity to offer replies to the RWQCB responses. This again runs counter to the due process and equal protection principles espoused by our federal and State constitutions and casts further doubt on the propriety of this Hearing and of the prosecution action in general.

G. The RWQCB Has Left the Citizenry Inequitable Time to Prepare their Rebuttals to the Prosecution

Even if the individuals were to have been given all of the scientific and technical information supporting the RWQCB's position at the outset of this matter, they would have had a mere nine weeks to attempt to understand the technical aspects of it and respond to it, and would have had to do so using their own funds. Conversely, the RWQCB is a government agency with comparatively limitless resources and staff dedicated to this matter. Not only does the RWQCB far surpass the targeted individuals in resources, but it took nearly four months – following the election, at which time Mr. Briggs indicated a desire to begin enforcement – to initiate prosecution and will have another two months to perfect its presentations. The prosecution was "sprung on" unwitting individuals only after the Prosecution Team had spent at least four months fully preparing to move forward, but the individuals – lacking the resources of the State government – were expected to respond in approximately one-quarter of the time (now one-half the time). This results in a clear inequity in preparation, and should give the RWQCB pause in the manner with which it treats the parties to this action. Once again, we see a violation of the due process and equal protection principles espoused by our federal and State constitutions, leaving the legality of this process in doubt.

H. This Prosecution Amounts to Inequitable Enforcement of the Law

As stated above, this enforcement action is purportedly being undertaken on a random basis. Taking that as true, it remains inequitable and a violation of the individuals' due process and equal protection rights. The Prosecution Team has not attempted to target the most egregious violators of Resolution 83-13, instead randomly going after a cross-section of the property owners in the community. RWQCB personnel have admitted that they have no experience in dealing with a large group of targeted persons and that they are going through "on-the-job" learning. This on-the-job learning may well result in 45 members of the community facing immediate orders to begin septic pumping at a cost of thousands of dollars per year. Meanwhile, other residents will face no such order for months or years to come. Indeed, if the on-the-job learning by the RWQCB results in a shift in enforcement mentality, some residents could wind up not being subject to any order – while the targeted residents continue to face thousands of dollars in mandated costs per year.

Not only does the cost issue reflect inequitable enforcement, the fact that 45 property owners will be subject to a single hearing evinces the Prosecution Team's clear intent to treat this as a "one-size-fits-all" enforcement. It is virtually impossible for the RWQCB to consider, individually, 45 cases in a single day. When faced with the evidence submitted with these comments, the RWQCB must admit that the individualized scientific and technical evaluations necessary to impose orders on the individual parcels cannot be done in a one-day Hearing. This shows clearly that the Prosecution Team has not attempted to distinguish between individuals but will apply a single, area-wide standard to all properties subject to this enforcement action. How can this possibly be equitable, when each property has a different septic system, has different environmental factors at play, and must be treated as a stand-alone case? Once more, a violation of the due process and equal protection principles espoused by our federal and State constitutions exists to cast doubt on the legality of this enforcement process in general and this hearing in particular.

I. State Regulations Regarding Doing Business with Entities Subject to CDOs Make CDOs Inappropriate Enforcement Tools

Section 4477 of the California Government Code prohibits all state agencies from entering into contracts of $5000 or more for the purchase of supplies, equipment, or services from *any nongovernmental entity who is the subject of a CDO*. The RWQCB is well aware of this prohibition, as it was discussed by the RWQCB in 2004. The statute was not meant to address individual homeowners but entities in the business of stormwater

or sewage treatment – of course, as stated elsewhere in these comments, the use of CDOs against individuals is unprecedented.

In this case, use of CDOs will cause financial havoc for at least two current targeted parties whose home-based businesses depend in large part on governmental contracts – and possibly more parcel owners. The extraordinary use of CDOs to compel these parcel owners to vote in a manner consistent with the RWQCB's liking results, in these instances, in not only massive costs accruing to the property owners, but an extreme detriment to their businesses as well. This compulsion, illegal and unjustifiable on its own, is revealed as truly invidious when viewed in this context.

J. Potential Change from CDOs to CAOs

Recent phone conversations with RWQCB staff indicate that the RWQCB may, at the last minute, change the enforcement tactic at issue in the Hearing from CDOs to Clean-Up and Abatement Orders ("CAO"s). While such a change would moot some of the statutory and constitutional violations committed by the RWQCB, they would raise other violations. First, the residents would, after proceeding for nearly two months under the presumption that the CDO process would be used and they would have the opportunity to represent their interests and offer evidence on their own behalves, would face a sea change in the manner in which the Hearing would proceed and the extent to which they could advocate their interests. Second, the change in tactics at this late date would fly in the face of normal prosecutorial processes, in that the defendants would be left unprepared for the Hearing and unable to properly defend themselves. Finally, this change would yet again reveal that the RWQCB's purpose in prosecuting the residents is not the betterment of water quality but the shaping of the political will in Los Osos – an invalid prosecutorial purpose.

K. Morro Bay Has Been Given Almost a Decade to Complete a Mere Upgrade in an Existing Plant, While the RWQCB Attempts to Force Los Osos to Site and Build an Environmentally-Unfriendly Plant in Just Four Years

Recently, the RWQCB took off of its calendar an action that would force Morro Bay to upgrade its sewage treatment plant to meet all current scientific and environmental standards. That action would have given Morro Bay approximately nine and one-half years to complete its upgrades. In contrast, Los Osos – attempting to site and build a sewage treatment plant from scratch – was given just four years to do so. And when the citizens of Los Osos objected to an environmentally-unfriendly plant sited amidst churches, a park, a school, and the Morro Bay National Estuary, the RWQCB sprang

into action, assessing liability against the CSD and now attempting to bend the political will of the residents and force them to accept a scientifically-backward and geographically-unfriendly alternative that has become, somehow, the RWQCB's favorite.

This shows, once again, that the RWQCB is acting arbitrarily. It is arbitrary to grant one local government a decade for a mere upgrade while another is forced to act quickly or face punishment when attempting to start from scratch. It is also arbitrary to force the residents of Los Osos to accept an environmentally-unsound treatment plant which would disrupt their community when alternatives exist which are both environmentally-preferable and geographically-desirable. Clearly, the RWQCB has stopped acting as an advocate of the people of California and is instead acting only to further its own preferences – to the detriment of the residents of Los Osos.

III. The CDOs are Based on Faulty Scientific, Technical, and Environmental Analyses

A. Changes in the Porter-Cologne Act Make Scientific Challenges to Resolution 83-13 Proper at This Time

On a point both scientific and legal, we note that the Porter-Cologne Act was amended after 1983 but before the Hearing on the CDOs. That amendment changed, among other things, the time at which the public could challenge certain actions of the Water Boards, State and Regional. At the time Resolution 83-13 was adopted, no challenge was allowed until actual enforcement took place. Since no enforcement occurred, the public was not able to challenge the evidence relied upon for the Resolution. Now, over 20 years later, the Porter-Cologne Act has been altered to require near-immediate challenge to acts like the Resolution. To the extent that the Prosecution Team argues that the evidence underpinning Resolution 83-13 cannot now be challenged, that argument lacks any compelling authority and must be discarded. The bases for Resolution 83-13 are properly subject to challenge at this time, under the theory that a change in the law cannot be used to rob persons of their due process rights. We intend to assert this theory at the Hearing and on appeal if necessary.

B. The Prohibition Zone Was Never Intended to be a Scientifically-Precise Discharge Remediation Area

At the time Resolution 83-13 was adopted, it was recognized that the Prohibition Zone (from which all targeted parties were selected) was not a scientifically precise area of discharge/pollution, but the RWQCB Staff's best professional estimate based solely

upon information available at that time. To restate, *no actual scientific evidence supports the current prosecutions*, just a "best guess" from 1983. In addition, the RWQCB has recognized that the Prohibition Zone was established in large part to encourage *government entities* to develop a solution to the groundwater problem and to seek funding toward that end – which funding would only be available if the RWQCB acted. While individual dischargers were mentioned in Resolution 83-13, the best evidence available from that period leads to the unassailable conclusion that its focus was the County (and later the CSD), not the individual properties. In addition, the best evidence available from that period leads to the strong presumption that the boundary line of the prohibition zone is not a scientifically-accurate boundary and that the RWQCB must prove that some real distinction exists between parcels within the zone and those without prior to enforcement against those properties within.

C. The RWQCB Has Provided No Evidence as to Violations by Any Individual Property Owner or Individual Septic System

With regard to actual scientific evidence provided by the RWQCB in support of its contention that each septic tank has violated Resolution 83-13, we note a complete absence of such evidence. Indeed, even the list of evidence submitted upon by the Prosecution Team reveals that the RWQCB is relying on dated studies rather than the most recent information available. Those dated reports, taken in light of the information we are submitting, simply cannot be the basis for a single CDO.

Worse, it is clear that the RWQCB has failed utterly and completely to develop any scientific evidence with regard to individual properties. In the more than 20 years since Resolution 83-13 was adopted, the RWQCB never collected site-specific or property-specific information, but now seeks to prosecute based not on the required site-specific information but as an *en masse* prosecution with the presumption that the Prosecution Team's evidence applies equally to every property targeted for prosecution. Without actually studying the individual properties, the RWQCB must somehow plan to prosecute by implication. This runs counter to the Prosecution Team's claim that the purpose of the CDOs is the actual protection of groundwater and instead serves to support the idea that Member Shallcross's politically-motivated rationale for prosecution is driving this Hearing.

D. The RWQCB Has Never Investigated the Septic Tanks in Use in Los Osos and Addressed by this Hearing

The septic tanks currently in use in Los Osos/Baywood Park are approved septic systems, most of which were placed in use prior to Resolution 83-13. At no time has the

RWQCB, the County of San Luis Obispo, or the CSD ever inspected the septic systems to determine whether they are faulty or whether they are working as they are *designed to work* and leaching liquids into leach fields in the upper aquifer for additional natural treatment. If the septic systems are working *as designed and permitted*, then they cannot be the subject of an enforcement hearing. Yet the RWQCB initiated this action without determining whether the septic systems are working as designed and permitted by the County and without determining whether the environmental characteristics – depth of aquifer, proximity of leach field to streams, proximity of leach field to other leach fields, etc. – of any *individual parcel* lead to the need to revoke the permit for that parcel's septic system and to require pumping.

In addition, because each parcel is located at varying depths to the groundwater and because each parcel is unique in its proximity to other leach fields and to streams, the scientific analysis of each parcel is necessarily unique. Yet the RWQCB has undertaken no individual analyses of parcels, instead relying on blanket studies – which studies are, as stated above, both outdated and inherently insufficient to support the CDOs. Nor has the San Luis Obispo County government provided to the CSD any requested data regarding failing septic tanks – even after the submission of requests under the Public Records Act. Thus, we have no alternative but to presume that every tank is operating as designed and permitted – and that there is no basis for these prosecutions.

E. The CDO-Mandated Pumping and other RWQCB Pumping Will Combine to Degrade the Environment and Harm the Interests of the CSD and the Residents

Pumping in accordance with the CDO-mandated schedule will interfere with the designed treatment train of the septic systems. Specifically, such pumping will purge the tanks of the naturally-occurring biological entities that provide the first step in the septic treatment process. Doing so will cause any waste leached out of the septic tanks into the leach fields to be treated at less than the level anticipated by the primary treatment process. This, in turn, will cause the leachfields to be unable to properly treat any waste that reaches them, degrading the aquifer to a greater extent than it would be if the permitted and technologically-sound septic systems were allowed to function as designed.

In addition, the pumping will cause a massive increase in truck traffic on the roads into and out of Los Osos. This will cause air pollution, the degradation of those roads, and the general disruption of the Los Osos community by way of the odors and spillage associated with frequent septic pumping. Of course, there will also be the attendant nitrate pollution commonly associated with over-pumping of septic systems. The

RWQCB has provided no analysis of these environmental effects of the mandated pumping – indeed, the RWQCB appears to be taking nothing into account except its desire to fine the residents into compliance with the RWQCB's political wishes.

Finally, the RWQCB's plan to pump 26 million gallons of water from the Los Osos area will result in significant environmental and economic effects which have not been studied but which will clearly harm Los Osos. With respect to the environment, the RWQCB's pumping plan will drain water from the upper aquifer, allowing a greater level of salt water intrusion, a fresh water shortage, and the overall degradation of the water system in the Los Osos area. Current studies indicate that the groundwater basin in Los Osos is in overdraft and saltwater intrusion is occurring. This pumping will only continue that overdraft and intrusion.

On the economic front, the RWQCB is essentially stripping from the CSD the ability to pump and sell the groundwater in its proprietary region. Specifically, the CSD currently plans to drill wells for the pumping and use of groundwater in the region. Even if the water is non-potable, it may be used for irrigation in the area, which would result in its return to the aquifer. Whether potable or not, the water is a source of income for the CSD – a source that the RWQCB will be stripping away while at the same time fining the CSD. Because the RWQCB has no water rights in the affected basins, this proposed pumping clearly requires the RWQCB to obtain an appropriative right from existing pumpers and rights-holders. The RWQCB has not done so and its likelihood of success in seeking such rights is minimal. This issue is complex and its ramifications affect the due process rights and water rights of the CSD. Thus, while we raise the issue in brief here, we also reserve our right to discuss it, in full, at the Hearing.

In sum, it is clear that the RWQCB – through the CDOs and through its related plans – will significantly degrade the environment in the Los Osos area. We are aware of no analysis undertaken by the RWQCB to comply with the CEQA requirements for these actions. Due to the substantial degradation of the environment caused by the cumulative effects of these pumping programs, they must be analyzed prior to implementation. Failure to do so renders them subject to legal challenge.

F. Studies – Including Studies Authorized by the Federal EPA and the SWRCB – Conclude that the RWQCB's Preferred Sewage System is Not the Best or Only Method for Ameliorating the Groundwater in Los Osos

The documentary evidence submitted in support of the CSD's comments on this matter reveals that there is, at best, no consensus as to the best method of ensuring the safety of the groundwater in a region like Los Osos/Baywood Park. Indeed, the SWRCB's own

report – prepared by the Center for Environmental and Water Resources Engineering at the University of California, Davis – indicates that a wide variety of treatment systems are available to address groundwater issues like those in the Los Osos area. Yet the CDOs require by implication the construction of a garden-variety, outdated, and highly-expensive sewage treatment facility. Clearly, the RWQCB is relying on outdated science in this process.

Further, the Environmental Protection Agency's "Handbook for Watershed Managers" containing frequently asked questions about atmospheric deposition (which is prevalent in Los Osos due to years of NO_3 emissions from the Morro Bay power plant), reveals that the RWQCB is proceeding pursuant to antiquated scientific theories. As Resolution 83-13 has previously been shown to be based on antiquated science of questionable validity, it is perhaps unsurprising that the RWQCB would proceed based on uncertain evidence. But if the RWQCB's real interests in these prosecutions lie in improving the environment and not in scoring political victories, the science underlying the prosecutions needs to be substantively reviewed and revised for accuracy.

These two studies are just the tip of the iceberg with regard to the scientific and environmental problems inherent in these prosecutions. The RWQCB's failure to perform any studies in preparation for these prosecutions – in particular, studies of the effect of the Morro Bay power plant's emissions on the Los Osos area – render these prosecutions indefensible. In addition to the two studies cited above, the CSD is providing additional documentation to prove that the RWQCB is moving forward based on outdated science and on antiquated staff estimates with no basis in reality – and which were made solely for the purpose of securing funding. The documentary evidence speaks for itself, so we will not waste the RWQCB's time by summarizing each study or argument here. Instead, we present the evidence and reserve the right to comment on it and to have witnesses explain it at the Hearing.

IV. <u>Documentary Evidence</u>

The scientific arguments raised above are supported by the weight of evidence. Attached as Exhibit "A" is a list of the documentary evidence we are submitting with these comments. To the extent that the RWQCB may receive the evidence into the record by reference pursuant to 23 C.C.R. § 648.3 (governing incorporation by reference or "IBR"), we note the RWQCB's ability to do so and have made reference in Exhibit "A" to the documentation already in the custody or control of the RWQCB. To the extent that documentary evidence is being presented as new evidence, electronic copies of that evidence are being provided on a series of DVDs for the RWQCB's review. Due to the number of documents submitted and the size of the various studies, it was

deemed inappropriate to send electronic versions of the documents via electronic mail. Therefore, to comply with the RWQCB's requirements regarding documentary evidence, one set of DVDs has been provided for each person to whom evidence must be submitted. You will note that a code/identifier appears on the documentary evidence list. This is an internal reference which helps CSD staff quickly find the documents. Should the RWQCB need copies of any documents incorporated by reference, please do not hesitate to contact our staff and request the document(s) by name and code number.

The documentary evidence submitted supports both the CSD's technical/scientific arguments as outlined above and the CSD's assertions that this process fundamentally violates the constitutional rights of the targeted parties, the other residents of Los Osos, and the CSD itself. We reserve the right to explain in full any and all of these documents at the Hearing and to have witnesses refer to them in presenting their testimony.

V. Witnesses

In addition and as a courtesy to the RWQCB, we submit as Exhibit "B" a list of percipient and expert witnesses. The CSD reserves the right to call as witnesses at the April 28 Hearing any and all of the witnesses named on this Witness List to testify on behalf of the CSD on matters within their knowledge and/or expertise. The CSD also reserves the right to call additional witnesses when and if necessary. Finally, the CSD reserves the right to cross-examine witnesses called by the prosecution team and witnesses called by the individual targeted parties.

VI. Summary of Comments

The summary of scientific evidence provided herein casts grave doubt on the RWQCB's proposed CDOs as well the Prosecution Team's intentions in pursuing the CDOs. The due process and equal protection arguments, which we reserve the right to supplement by argument and by legal briefs at the time of the Hearing, cast further doubt on the intentions of the Prosecution Team. Indeed, we view the process by which the RWQCB has called this Hearing to evince an intent to have the individual property owners arrive not as equals fully prepared to argue their cause but as confused and unsophisticated parties unable to rebut the RWQCB's evidence – evidence they will have scant-to-no chance to view prior to the Hearing. While the CSD has supplemented the record as best we can, we find that this entire proceeding is violative of the rights of the individuals involved as well as the rights of the CSD and the remaining residents and property owners of Los Osos. In addition, to the extent this Hearing implicates the

RWQCB's intent to pump water from the basin, this procedure has ignored the water rights of existing pumpers both within the prohibition zone and throughout the basin, including but not limited to the CSD.

We look forward to the Hearing and to an opportunity to fully and fairly be heard and rebut the Prosecution Team's misguided efforts. To contact either of us, or if you have any questions, we can be reached at: (805) 528-9370; or you may fax us at: (805) 528-9377. In addition, any updates should be sent to both of us by electronic mail at lisaschicker@charter.net and danbleskey@losososcsd.org.

Sincerely,

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cc: John Richards, Senior Staff Counsel, SWRCB, Office of Chief Counsel
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