To: Michael Thomas, Assistant Executive Director
Regional Water Quality Control Board
895 Aerovista Place, Ste. 101
San Luis Obispo, CA 93401

From: [redacted]

July 20, 2006

Rebut to Prosecution Counsel, Reed Sato

Part 1
(A) Must the prosecution's case, as resented orally on April 28, 2006, be stricken entirely or to some lesser degree?

Mr. Sato spent a great deal of time addressing Quintero (Raul Quintero v City of Santa Ana et al, Superior Ct. 01CC01326). He argues both that prior counsel [Ms. Okun] did not need to recuse herself and that Quintero does not apply. He states, "The mere appearance of bias does not require a new hearing in such a case." Mr. Sato goes into great detail, in fact, as to why Quintero does not apply.

It would seem as though Mr. Sato only quoted the portions of Quintero that were self-serving. I request the Board to review Quintero in its entirety. Mr. Sato does correctly identify that Quintero deals with an issue of ongoing employment, but that is where Mr. Sato's correctness ends.

In Quintero, the court states, "We find there was a clear appearance of bias and unfairness at the administrative hearing and reverse and remand on that basis. In making this ruling the court explores the role of the Deputy City Attorney Hugh Halford. The court finds that attorney Halford acted as counsel for the Santa Ana Personnel Board and represented defendants before that same board.

In the case at hand, Ms. Okun has served as counsel to your board, and then proceeded to act as prosecution to present before your board. In Quintero, the court held, citing *Nightlife Partners, Ltd. V. City of Beverly Hills (200) 108 Cal.App.4th 81 (Nightlife),* the court affirmed a decision that the plaintiff's proceeding before the defendant's administrative hearing officer was unfair and had violated due process, thus warranting a new hearing. Further, they stated, "due process in an administrative hearing also demands an *appearance* of fairness and the absence of even a *probability* of outside influence on the adjudication."

The court goes on to cite California's Administrative Procedure Act (Gov. Code §§ 11340-11529)(APA). They state one important APA principle, to eliminate "even a probability of outside influence on the administrative hearings," require that "the *prosecutory* . . . aspects of administrative matters must be adequately separated from the adjudicatory function."

Finally, the court goes on to state, "This is enough to show the probability of actual bias. It would only be natural for the Board members, who have looked to Halford for advice and guidance, to give more credence to his arguments when deciding plaintiff's case. Whether or not they actually did is irrelevant; the appearance of unfairness is sufficient to invalidate the hearing. (*Nightlife, supra*, 108 Cal.App.4th at p. 94.)

All of Mr. Sato's arguments aside, I believe Quintero strikes directly at the heart of the case at hand. Ms. Okun *had* to recuse herself from this case. If she had to recuse, it follows that the entire prosecution case would have to leave with her.

Mr. Sato argues "Because the Prosecution Team voluntarily changed counsel, it believes that any matter that it previously presented to the Water Board through its former counsel can and should be retained as part of the administrative record for these proceedings." He then goes on to argue (for nearly two pages) that Ms. Okun's presentation should be allowed to stay.

At the end of that argument, he states that even if a Quintero objection were upheld that does not mean Ms. Okun's presentation has to be removed. He argues that the remedy is another hearing before your same board. Also, he contends Ms. Okun's presentation was adequately presented. He therefore concludes that there is no need to re-present Ms. Okun's case. But his logic is severely flawed. It is circular. And it seems he (again) misses the point of Quintero entirely.

As I stated above, due to Quintero Ms. Okun had no other choice than to recuse herself. She is entangled in the prosecution's arguments like a Gordian knot. Her influence cannot be undone. It would logically follow then that all of the evidence she presented would have to be expunged as well. Mr. Sato has no other choice than to start over at square one. Mr. Sato's argument that he may simply step into Ms. Okun's shoes and assume her presentation is both preposterous and insulting. The remedy in Quintero was indeed a new hearing as Mr. Sato states. Not a new attorney reading a transcript into the record of the prior hearing. A new hearing with a new attorney. Unfortunately Mr. Sato's arguments lie directly at the heart of our contention that there is an undue influence between Ms. Okun and your Board. For him to boldly state this is not so, but even if you think it is, he should still be able to simple step into the shoes of the prosecutor (whom we have now established had undue influence with your Board) and "assume" her entire presentation is unconscionable.

THE PROSECUTION NEEDS TO BEGIN OVER, STARTING AT SQUARE ONE. PERIOD.

(B) <u>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?</u>

Similar to Mr. Sato, we wish to reserve our rights to introduce rebuttal documents to information presented during the general hearings and/or individual hearings by any of the designated parties.

(C) <u>If the prosecution is allowed to supplement the written materials that is has introduced, should designated parties be entitle to submit additional written materials?</u>

Mr. Sato answers "yes" to this question, and then adds another sentence. He states if the Prosecution Team merely re-presents evidence already submitted, there should not be any **additional** opportunity to respond.

I need to point out, none of the 45 individuals have had an opportunity to respond. If we have not had an opportunity to respond, we could not then be granted **additional** opportunities to respond.

My point here is that notwithstanding whether or not Mr. Sato is required to start over, we all need to be afforded our rights to respond to the prosecution's arguments.

(D) <u>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?</u>

Again, it appears as though Mr. Sato has missed the point of Quintero, and of your questions as well. Quintero sent the case back for a new hearing. We have systematically pointed out why the Prosecution Team also needs to present a new hearing. A new hearing is just what is says it is. A *new* hearing. The mere *appearance* of bias in Quintero caused the Appellate Court to reverse and remand. Now Mr. Sato wants your Board to believe that if you actually were to *require* the Prosecution Team to present a new case due to bias that there would be no further bias on the State's part in denying the CSD their right to present new evidence. This is the same CSD that your Board has declared is an inseparable part of Los Osos – that they represent the people and we represent them.

The answer is perfectly clear. The Prosecution Team *must* present a new case, and the Los Osos CSD must be *allowed* to present a new case.

(E) The Chair actually had five items in his letter dated May 18, 2006. Mr. Sato responded to only four. The last item read, "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 such issues in writing for submission by June 23, 2006."

I find it insensitive, condescending and just plain rude that Mr. Sato would not even address this issue with something as simple as, "There are no objections from the Prosecution Team to this issue."

I think it just speaks again to the attitude the Prosecution Team has taken with the residents of Los Osos from the beginning of this whole CDO process. In fact, not only did Mr. Sato completely ignore the issue, he should have had a proactive statement in this section advising the 45 holders of proposed CDOs of the fact that Mr. Briggs was going to be out of the county for five or six months. Mr. Sato should have even requested a continuance for these same five or six months that Mr. Briggs will be unavailable for testimony. Instead, he chose to add this fact to the end of his letter, almost as an afterthought. Perhaps he was hoping that no one would read his letter in its entirety and this "little" manner would go unnoticed.

Part II, There is no role for the LOCSD as a separate party in the hearings related to the individual cease and desist orders.

The Board's position on this was made very clear in April in the Chairperson's "Consolidated Proceedings for All Cease and Desist Orders Hearing, April 28, 2006." In that document, it was stated,

> "Note: All of the evidence and comments presented in items 2 through 5 will be incorporated automatically into the record that will be considered for each individual Cease and Desist Order action."
>
> 4. Presentation of Evidence by Los Osos CSD[2] (Estimated time 2 hours

If "all of the evidence and comments presented" by the LOCSD "will be incorporated automatically into the record that will be considered for each individual Cease and Desist Order action", then to allow the Prosecution to redo their case without allowing the same option to the LOCSD would be an infringement on the due process rights of ALL defendants in this case.

Part III, Additional procedural matters. Once again, I am actually insulted and even appalled. Mr. Sato is now attempting to deny us all our rights to a fair

hearing and a fair process. Even after all of Mr. Sato's arguments concerning *Quintero*, he makes an argument that would blatantly help to deny our due process and serve to further bias the Board.

Allow me to explain. Mr. Briggs has been a part of the Los Osos septic system issue for 20 -- 25 years, yet Mr. Sato has the audacity to state that none of the 15 defendants nor the LOCSD have a need to call Mr. Briggs as a witness. Ms. Okun goes so far as to state, "Removing him [Briggs] from the hearing process is not legally required and, due to his unique role as a witness in this case, it is not possible."

Further, Mr. Sato goes to great lengths at the beginning of his letter to outline his position that the former Prosecution Team (lead by Ms. Okun) did a fantastic job. He argues he really doesn't even need to re-present their case. He would like to simply assume her role. Then he argues that Mr. Briggs has testified already and "it is hard to imagine that any further examination of Mr. Briggs would not be duplicative."

So which is it? Does Mr. Sato agree entirely with the previous Prosecution Team's actions, or does he thinks their actions were lacking? In other words, does he agree that Ms. Okun's case was perfect so that he could just step into her shoes, or does her case need to be re-tried from the beginning? If her case was picture perfect, than we need Mr. Briggs available for testimony as Ms. Okun stated. If her case was lacking, then we need Mr. Briggs for testimony since Mr. Sato needs to start over.

Finally Mr. Sato asks the Board to further assault our due process rights by rushing the process by requesting "the Water Board allow these respondents to complete such cross-examination [of Mr. Briggs] before mid-October."

Does Mr. Sato live in a cave, or just not care. Our entire town in turmoil. The LOCSD may go bankrupt if it's not dissolved first. It may be dissolved if it doesn't go bankrupt first. Is Mr. Sato just trying to crush our will and our town? How much more does he think we can take? Mr. Sato has already ramped up the **threats** and **intimidation** in his letter. He states, "This could include recommendations for additional remedies or the imposition of administrative civil liability." Then he defines this liability. "Under Water Code § 13350, any person discharging waste in violation of the prohibition is liable for administrative civil liability of up to $5,000 per day, or civil liability of up to $15,000 per day." So now the threat of $1,000 per day of fines originally mentioned for failure to pump out septic tanks if required has gone up to possibly **$5,000** or even **$15,000** <u>per day</u>!!!!!

Has he forgotten he is dealing with homeowners fighting for their right to use indoor plumbing? Does he think he's going after Wal-Mart or DuPont? These Draconian tactics aren't even used against convicted felons. The town is fighting

to stay together, and come up with a sustainable project. We are very close with the new Ripley proposal. The science behind the whole Prohibition Zone has **never** been proven. There is not one shred of evidence against our individual property that we are even polluting. To cause more emotional duress by accelerating this CDO process even sooner serves no purpose other than to further punish us for actions beyond our control.

Finally, I resent Mr. Sato's position that he knows whom we need to call as a witness and whom we do not need to call. Does Mr. Sato know something about the decisions your Board makes that we are not privy to? Once again, the scent of prejudice and bias seems to permeate the air. Therefore, I am requesting at this time a postponement of all of the CDO hearings for the same five to six months that Mr. Briggs will be out unavailable for testimony.

In the alternative, if Mr. Briggs is not available to testify, I request that all statements, testimony, actions and previous activities undertaken by Mr. Briggs be expunged from the record.

Sincerely,

[redacted]