



California Regional Water Resources Control Board

Central Coast Region




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Agency Secretary

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Arnold Schwarzenegger
Governor

TO: Board Members, Central Coast Regional Water Quality Control Board

FROM: Roger W. Briggs 

DATE: January 18, 2006

SUBJECT: ENFORCEMENT ACTIONS REGARDING LOS OSOS ON-SITE DISPOSAL SYSTEMS

My staff is in the process of preparing draft Cease and Desist Orders (CDOs) for residents who are discharging from septic tanks within the prohibition adopted for Los Osos/Baywood Park in Resolution 83-13. Resolution 83-13 amended the Basin Plan to prohibit discharges from on-site disposal (septic) systems in Los Osos and Baywood Park. We will notice hearings for you to consider the evidence in support of and against the CDOs. After hearing the evidence, you will decide whether to issue the CDOs and on what terms.

You recently issued Administrative Civil Liability Order R3-2005-0137 for \$6,567,000 against the Los Osos Community Service District (CSD) for violations of Time Schedule Order 00-131 and the prohibition.

As you know, the Administrative Procedure Act requires the Board to separate prosecutorial and adjudicative functions in "prosecutorial" matters.¹ The action imposing Administrative Civil Liability (ACL) was clearly prosecutorial. CDOs, on the other hand, are not clearly prosecutorial. They are more similar to civil injunctive actions than criminal prosecutions. I expect that the CDOs will require the discharger to take corrective actions and impose a time schedule to comply with existing law (in this case, the Basin Plan prohibition), but CDOs do not impose monetary penalties. Further board action would be required for penalties to attach. Alternatively, the Attorney General can seek enforcement of a CDO by obtaining a civil injunction.

Normally, once the Board adopts a final order, there is no reason to maintain the separation of functions because the Board cannot take any further action after issuing its order. Nevertheless, we have decided to maintain the separation of functions established for Order R3-2005-0137 and apply the same separation for the CDOs. The CDOs will involve intensely controversial matters, and at least some of the proceedings will be concurrent with the CSD's petition and appeal of Order R3-2005-0137. Assigning responsibility for advising the Board Members to staff other than those who will present testimony in support of the CDOs will help assure the fairness and impartiality of the Board's proceedings and eliminate any appearance of bias. The Board members, Board staff and the dischargers named in the CDOs will invest an extensive amount of time in these proceedings, and it is important to ensure the integrity of the process.

¹ See, Chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code); Title 23, California Code of Regulations (CCR) Division 3; Chapter 1.5, sections 648, et seq., sections 801-805 of the Evidence Code; section 11513 of the Government Code.

For lack of a better term, we will refer to the staff and attorneys advocating the CDOs as the "Prosecution Team." The Board's advisors are referred to as the "Advisory Team."

The purpose of this memorandum is to confirm membership of two teams.

Board Members may not discuss any ACL- or CDO-related matters with any member of the Prosecution Team, including Ms. Okun or me, except at public meetings. "Discussions" include e-mail and other written communications. An exception exists for non-controversial procedural matters, such as hearing dates. Please contact Phil Wyels of the Office of Chief Counsel or Assistant Executive Officer Michael Thomas to determine whether a procedural matter is in controversy before discussing it with one of us. Also, please direct any questions you may have regarding Los Osos to one of them before contacting a member of the Prosecution Team. After Mr. Wyels assigns an attorney from the Office of Chief Counsel to advise the Board, you should contact that person.

The Prosecution Team and the discharger(s) named in the CDOs will be designated parties to the respective proceedings. Other interested persons may seek status as designated parties and the current list of parties will be expanded to include any other person whom the Board determines should be designated as a party to the proceedings.

The Prosecution Team will serve as the complainant in the proceedings and assume responsibility for presenting evidence to the Board regarding the CDOs. The Advisory Team will assist the Board Chair in matters such as evaluating requests for designated party status, enforcing deadlines and other limitations on written and electronic submissions and exhibits, and preparing for and conducting the proceedings. The Advisory Team will also provide advice to the Board Chair and other Board members during the hearings and in your deliberations on the evidence presented in the proceedings.

Consistent with this separation of functions, members of the Prosecution Team will be treated like any other party before the Board throughout the proceedings, and should not have any contact with Board members or members of the Advisory Team on matters relating to the proceedings, except where those contacts are consistent with the limitations on *ex parte* contacts that apply to all other parties. For purposes of this memorandum, an "*ex parte* contact" is any written or verbal communication, pertaining to discharges from septic systems within the prohibition zone, between a member of the Prosecution Team and a Board Member or a staff member of the Advisory Team, unless the communication is copied to all other parties to the proceedings (if written) or made at a proceeding open to all other parties (if verbal). Communications regarding non-controversial procedural matters are not "*ex parte* contacts" and are not restricted.

The following are the members of the Prosecution Team: myself, Harvey Packard, Sorrel Marks, Matt Thompson, and counsel Lori Okun. I will supervise the Prosecution Team staff. Phil Wyels will not be supervising Lori Okun in this matter.

Michael Thomas will serve as the Board's technical advisor. He will appoint additional staff to assist him as needed. I will not be supervising Michael Thomas or any staff assisting him. The Office of Chief Counsel will assign one or more attorneys to provide legal support to the Advisory Team. You will receive contact information once the attorneys have been assigned. Phil Wyels will be supervising those attorneys.

Any staff assigned to or who assists either team, during the proceedings or while evaluating the hearing record, should be specifically assigned to that team. This includes any managers or supervisors who, by actively directing or assisting either team on matters such as deciding what theories to argue, go beyond routine procedural matters or assignment of staff. Once assigned to either team, an individual shall not participate in communications concerning these matters that are assigned to the other team. For example, a staff member assigned to the Prosecution Team cannot participate in closed meetings with any Board Member or Advisory Team Member to discuss issues associated with the prosecution until after the Board has acted in this matter.

Ms. Okun normally advises the Board. However, because Ms. Okun's role will be to advise the Prosecution Team, she cannot provide legal advice to the Board on CDO matters, even in a public meeting. She can only provide legal argument on behalf of the Prosecution Team.

Board management will ensure that all staff that may be assigned to either team or may be involved in discussions of the proceedings on the Los Osos issue are aware of and follow these procedures.

A copy of this memorandum will be provided to dischargers named in draft CDOs.

cc: Michael Thomas, RB3 [via email only] John Robertson, RB3 [via email only]
Harvey Packard, RB3 [via email only] Sheila Soderberg, RB3 [via email only]
Sorrel Marks, RB3 [via email only] Burton Chadwick, RB3 [via email only]
Matt Thompson, RB3 [via email only] Michael A.M. Lauffer, OCC [via email only]
Chris Adair, RB3 [via email only] Philip G. Wyels, OCC [via email only]
Eric Gobler, RB3 [via email only] Lori T. Okun, OCC [via email only]

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