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BEFORE THE STATE WATER RESOURCES CONTROL BOARD

IN RE: The Matter of Discharges of Waste from Individual or Community Sewage Disposal System in Los Osos/Baywood Park Prohibition Zone (CCRWQCB) Resolution Plan No. 83-13, Basin Plan p. IV-67)	**CEASE AND DESIST ORDER NO. R3-2006-1000 through 1049.** **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF APPEAL**

INTRODUCTION

Petitioners challenge the entire enforcement action taken by the RWQCB against individual property owners in the Los Osos/Baywood Park Prohibition Zone, beginning in January 2006, through the December 14, and 15, 2006 hearings at which the RWQCB issued numerous Cease and Desist Orders ("CDOs") to those unwilling to "agree" to a Cleanup and Abatement Order ("CAO"). The history of the RWQCB's enforcement process against Petitioners is a long and arduous one.

In 1983, the RWQCB adopted Resolution 83-13 which states:

> "Failure to comply with any of the compliance dates established by Resolution 83-13 will prompt a Regional Board hearing at the earliest possible date to consider adoption of an immediate prohibition of discharge from additional individual and community sewage disposal systems". (Emphasis added.)

A copy of Resolution 83-13 is attached as an exhibit to the Writ of Mandate pleadings

filed on December 7, 2006[1]. After the authorized additional 1,150 housing units were built, the moratorium in the prohibition zone went into effect. To Petitioners' knowledge, all of the targeted individuals' homes were built before 1988 and are not any of the additional units subject to Resolution 83-13.

Now that the Water Board seeks to enforce Resolution 83-13 against these individuals, Petitioners submit the enforcement of Resolution 83-13 is now ripe for review. However, the RWQCB has refused, in every step of this long history, to hear arguments or challenges to the legality of Resolution 83-13 or the Water Basin Plan. In their Notice of Continued Hearing to January 22, 2007, the Prosecution Team went as far as stating that "the validity of the discharge prohibition... is not an issue that is before the Regional Water Board in these proceedings; nor is it susceptible to collateral challenge through these proceedings, or in any petition for review of these proceedings." Clearly, the RWQCB and its Prosecution Team have no authority to limit the challenges of these proceedings on appeal, and such statement was made to induce Petitioners not to delve into the legal validity of the RWQCB's acts.

Assembly Bill 2701, introduced February 24, 2006 and signed into law on September 20, 2006, gave the County of San Luis Obispo control over this project. A copy of the bill is attached as an exhibit to the Writ pleadings filed on December 7, 2006 (part of Exhibit 5). However, instead of waiting for the vote and for the County to proceed with the community wastewater collection system, the RWQCB intends to proceed with abusive, random enforcement procedures by issuance of the CDOs against individuals.

Now over 20 years later, in January, 2006, the Water Board randomly selected 45 homeowners, including Petitioners, to be the subject of cease and desist orders and required that they pump out their septic tanks every two months and cease using their septic tanks by January 1, 2010 or 60 days after the availability of a community sewer system, whichever was sooner. After it was brought to the attention of the RWQCB that not only will bimonthly septic tank pumping interfere with the aerobic process of a septic tank, it will also cause air pollution

[1]The entire set of pleadings and supporting exhibits filed in the Writ of Mandamus proceedings have been included herein and attached as a part of Exhibit 5.

problems, the RWQCB proceeded undeterred with its hearings to recommend enforcement actions against the individuals. In fact, the RWQCB bombastically stated,

> "The Prosecution Team simply makes a recommendation. The RWQCB itself decides what action to take after considering all evidence and comments. The prosecution team's revised recommendation does not change the scope of the April 28 hearing. Any inference that there have been any 'conclusions' in this case would be a disservice to the residents of Los Osos who may be subject to the proposed enforcement actions at the hearing . . . the Board **may still** in disregard of the prosecuting staff's latest recommendation, order periodic pumping as originally proposed." (Attached hereto as Exhibit "B", entitled *Information letter - The Scope of the April 28 Hearing is Unchanged. Posted April 27, 1986)*

At the April hearing, a motion for dismissal was brought before the RWQCB claiming that *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. 04CF00535 (Jan 18, 2006) required disqualification of the prosecuting attorney for the RWQCB. Although there had been days of hearings, this disqualification objection resulted in the Prosecution Team's requests for continuations of the May 11 and 12 hearings, which request was posted May 5, 2006 . On August 4, 2006, the RWQCB Chairman issued his Preliminary Notice of Ruling which is attached as Exhibit 1 to this appeal. This Ruling required the Prosecution Team to again present its entire case from the beginning and required all the previous evidence and testimony prepared or presented by the Prosecution Team to the Board be stricken from the record, with all replacement documentation to be submitted and available for public review not later than September 8, 2006. The Ruling also required designated parties to be allowed, not less than 30 days, to submit responses to the Prosecution Team's allegations and recommendations by 5:00 p.m. on Friday, October 13, 2006 and stated there would be a more detailed procedural order issued in August of 2006.

The RWQCB's more detailed procedural order did not issue in August, 2006. It was purportedly posted on the RWQCB's web page on November 21, 2006. The Prosecution Team failed to submit all of their replacement documentation by September 8, 2006, as their case was not submitted until October 4, 2006. So, once again, the RWQCB continued the April hearings until November 2, 2006 and November 9, 2006 by Order that issued on September 7, 2006 and posted on September 12, 2006. Thereafter, the Prosecution Team failed to meet their deadline for submission of documents and evidence, and the RWQCB further continued the November

hearings to December by posting an order dated October 16, 2006, advising those individually prosecuted to submit their documents no later than November 15, 2006. The posting was purportedly on the website on October 16, 2006, but the mailed notice sent to some but not all Petitioners did not arrive in time to afford 30 days to submit documents. A copy of both orders are attached as exhibits to the Writ pleadings filed by Petitioners on November 28, 2006 (part of Exhibit 5).

In anticipation of the newly rescheduled December 14, and 15, 2006 hearings, numerous Petitioners sent requests for a continuance for a variety of reasons. Petitioners' various correspondences requesting continuances were attached as exhibits to the Writ pleadings filed on December 7, 2006, and are incorporated herein by reference. The RWQCB denied each and every request for a continuance by Petitioners.

On or about September 19, 2006, some of Petitioners asked for the deposition of Roger Briggs, the principal architect of the orders under which the recipients were being prosecuted and whom the Prosecution Team had admitted was an indispensable party to the suit in their May 4, 2006 request for a continuance of the April hearing. The Prosecution Team's request for a continuance is attached as an exhibit to the Writ pleadings filed on November 28, 2006.

Although the Staff Prosecution Team was willing to allow a deposition for a limited time on limited issues on October 4 to the designated party who requested it, the RWQCB claimed it was a voluntary appearance not requiring formal notice and thereafter claimed that Mr. Briggs need not comply with the 'untimely request for production of documents requesting "Any and all documents that you signed or authored which will be offered as evidence to support the issuance of the proposed cease and desist orders in the Matter of Dischargers Waste from Individual Community Sewage Disposal Systems in the Los Osos/Baywood Park Prohibition Zone (RWQCB Resolution No. 83-13 Basin Plan IV-67)".

On October 4, 2006, Roger Briggs was personally served with a formal request for deposition testimony and documents (attached as an exhibit to the original Writ pleadings filed on November 28, 2006). Prosecution Staff requested ex parte that the RWQCB quash the subpoenas and deposition notice, which resulted in the issuance of the RWQCB Notice of Chairman's Ruling Regarding Subpoena Documents Submitted on October 4, 2006, quashing

all subpoena documents and denying Petitioners the right to depose Mr. Briggs. These documents were also attached as exhibits to the original Writ pleadings filed on November 28, 2006 and have been included herein as part of Exhibit 5.

In anticipation of the December hearings, the RWQCB posted several different notices advising that those CDO recipients who agree to settle on Prosecution Staff terms will be relieved from attending the December hearing. In a posting purportedly dated November 21, 2006, the RWQCB issued its long-awaited order of procedural guidelines of how the December 14, and 15, 2006 hearings would progress, a copy of which was filed as an exhibit to the Writ pleadings filed on December 4, 2006. These guidelines were substantially different from the earlier procedural guidelines. Copies of both have been included herein and attached as part of Exhibit 6. Although the first paragraph of the order indicates that those persons settling do not need to appear at the hearing, the document designates the first two hours of the hearing to be devoted to a public hearing for the RWQCB to exercise its discretion to approve, reject, or seek stipulations by the Prosecution Team *and settling designated parties* for revisions to any proposed settlement agreement agreed to by the Prosecution Team.

Apparently, the RWQCB intended that the Petitioners stay home while they, themselves, worked out the details of the settlement agreement with the Prosecution Team. Further, in order to be granted the opportunity to speak during the two hours designated for discussion on the proposed settlement agreement, Petitioners were first required to agree to the settlement. Thus, Petitioners had to agree to settle before they were allowed to take part in any of the settlement negotiations. The RWQCB takes the position that the hours of negotiation attempting to reach a settlement with the prosecution team is virtually meaningless as the RWQCB can modify, reject or approve any settlement reached and that process will be in public, as opposed to closed settlement sessions. Petitioners submit that this is an unheard of process to reach a settlement.

The November 21, 2006 order of procedural guidelines further sets forth a process by which each and every property owner (unless married - in which the same time must be divided between the spouses) is allowed 10 minutes to cross-examine the Prosecution Team and 15 minutes to present their case and evidence. Furthermore, no individual can have anyone make the appearance for them, absent a power of attorney or representation by an attorney. That is,

each individual owner must present their own case in the intimidating process belatedly outlined by the RWQCB. The parties were even prohibited from acting together in presenting their evidence as the order outlines a subhearing for each and every property owner, after which each CDO issued. Thus, the subsequent subhearing evidence was not incorporated or considered in the prior hearings before the CDO issued.

When the Prosecution Team failed to meet its deadline for submission of its case, the RWQCB issued a Revised Notice of Public Hearing, setting the new hearing dates for December 14, and 15, 2006. The Notice required the Prosecution Team's rebuttals to proposed cease and desist orders to be filed and posted no later than December 1, 2006. Again, the Prosecution Team failed to meet this deadline, and untimely submitted, apparently sometime after 5:00 p.m. on Friday December 1 and additional documents on December 4, their rebuttals of the Petitioners case. The Prosecution Team failed to mail the required documents, and none of Petitioners have received a copy to date. Furthermore, the Prosecution Team added to their submission into evidence yet another document signed by Mr. Briggs as additional documentation to include in the case which had not otherwise been produced, which was not only submitted almost three months after the Prosecution Team's original deadline for submitting evidence, but which Petitioners had no chance to object to, and no opportunity to confront Mr. Briggs about. A copy of this document was attached as an exhibit to the Writ pleadings filed on December 7, 2006.

Although the RWQCB's Revised Notice of Public Hearing required the Prosecution Staff to submit all objections by December 1, 2006, again the Prosecution Staff failed to meet the RWQCB's deadline and submitted their evidence objections by posting on December 4, 2006.[2] Ironically, these objections included objections against any introduction of evidence by Petitioners for allegedly failing to submit timely copies of evidence to the RWQCB. The RWQCB has never submitted copies of any evidence or documents to any of Petitioners nor

[2]Proof that the Prosecution Team's untimely submission is evidenced by attachment to the Writ pleadings, in the last pages of Exhibit "E" of the Dec. of Shaunna Sullivan filed 12/4/2006, which reflects that as of 12/3/2006 the Prosecution Team Staff's Evidence Objections, which are now posted, were not part of the record as of 12/3/2006.

served any of the proposed recipients with any notice (when they bother to serve by mail) affording the additional five days for mailing, which is normally required pursuant to *Code of Civil Procedure* section 1013.

In anticipation of the originally scheduled April hearings, Petitioners submitted a list of 847 documents which they intended to rely on as support at the hearings. The Prosecution Team's objections to Petitioners documents were belatedly posted on the RWQCB website on December 4, 2006, and were never served upon any of Petitioners. On December 8, 2006, the RWQCB sustained the huge majority of the Prosecution Team's objections in its Chairman's Order Regarding Prosecution Team's Objections to Evidence for Hearings on December 14 and 15, 2006.

On November 18, 2006, Petitioners filed a *Petition for Writ of Mandamus*, in the Superior Court of San Luis Obispo County, Case No. CV 060992. Petitioners sought a continuance of the hearings scheduled for December 14, and 15, 2006, until they had been afforded due process and equal protection rights, and the opportunity to depose Mr. Briggs. Petitioners supplemented their original pleadings with a *First Amended Petition for Writ of Mandamus* filed on November 28, 2006, *Supplemental Memorandum of Points and Authorities* filed on December 7, 2006, and *Second Supplemental Memorandum of Points and Authorities* filed on December 11, 2006. The entire set of pleadings submitted to the court in relation to the November 18, 2006 *Petition for Writ of Mandamus* have been included herein and attached as part of Exhibit packet 5.

While recognizing that there may have been due process, equal protection, and 6th Amendment issues present, the court declined to continue the scheduled hearings, and dismissed the Petition without prejudice, so that Petitioners could re-submit their complaints after the hearings were held if the RWQCB issued CDOs after considering the issues presented to the court.

On December 1, 2006, less than 10 days from the date of the hearings, the Prosecution Team recommended a new and different cease and desist order be issued against Petitioners and the other randomly selected, targeted individuals. The new order was never mailed to Petitioners for an opportunity to view it before the hearings, and again, Petitioners were forced to rely upon the frequently-corrupted RWQCB website for the latest updated information. A copy of the new

proposed cease and desist order was attached as an exhibit to the Writ pleadings filed on December 7, 2006 (part of Exhibit 5).

The December 1, 2006 CDO finally references Assembly Bill 2701, reflecting that it is the County that will be controlling the community wastewater treatment system, not individuals. The Prosecution Team makes the false statement in their untimely and still unserved rebuttal dated December 1, 2006 that:

> "The modified CDO makes clear that so long as the community wastewater system contemplated by AB 2701 is moving forward, the respondent is not required to cease use of the septic system for the Respondent's site. (see, ¶ A.1) There is no requirement in the modified CDO that the community wastewater system be completed by a particular date. That was the intent of the proposed CDO but the Prosecution Team believes the modified CDO is clear in that regard".

This proposed CDO was again modified on December 14 and 15 at the hearings, but the new order, although different from what had previously been proposed and served, still required the unattainable. The CDO, which after issuance can be enforced criminally or civilly against Petitioners by the RWQCB, requires that Petitioners move from their homes by 2011 if a community system, which none of Petitioners can compel, is not completed. Although a vote could take place on or before July, 2008, there is no way for Petitioners to ensure that the County will have exercised their due diligence to select and approve the project as is required under Assembly Bill 2701 by July, 2008. Furthermore, if the vote fails, or if the County chooses not to proceed as they have discretion to refuse under AB 2701, the CDO does in fact have a completion date of January 1, 2011.

The RWQCB posted a Proposed Modified Settlement Agreement dated December 6, 2006. The proposed agreement stated, "we will add language to make clear that there is no required minimum penalty which must be imposed in the event that there is an action taken to enforce the terms of the settlement agreement." This December 6, 2006 Proposed Modified Settlement Agreement is the document which Petitioners were led to believe would be their settlement agreement with the RWQCB. The document specifically promised that the agreement would not allow minimum penalties by the RWQCB. Various notices regarding the Settlement Agreement advised Petitioners they need not attend the hearing if the agreements were acceptable to them.

The hearings originally scheduled for April 2006, were finally conducted on December

14, and 15, 2006. Each individual homeowner, who did not agree to the as of then unsettled settlement agreement, presented their defense against the Prosecution Team's case, and each individual was, in turn, issued a cease and desist order. Those persons not appearing at the hearings were declared to be in default and were issued CDOs.

Those Petitioners who had agreed at some point along the long history of the enforcement action, to settle with the RWQCB pursuant to any of the several versions of the still unsettled settlement agreement were not allowed a subhearing. On December 14, 2006, the RWQCB issued a Settlement Agreement and Order, which document was mailed to each Petitioner who had agreed to settle at any point along the way. The Settlement Agreement and Order did not "make clear" that no mandatory fines would be imposed in violation of the promises made by the Prosecution Team in their previous proposed settlement agreement, which many of Petitioners had relied upon as the only benefit of settlement in their decisions to accept settlement.

The only language that referenced waiver of the mandatory fines that was in the draft agreement proposed to Petitioners was deleted after the hearing. Thereafter, on January 3, 2007, yet another "Corrected" Settlement Agreement and Order was sent to certain Petitioners who had previously agreed to settle under the very different terms of proposed settlement agreements. The "corrected" agreement added a paragraph concerning the mandatory fines, which the RWQCB claims were mistakenly omitted. The new language states, "However, the parties agree that California Water Code section 13350(e)(1)(A) does not require the Water Board to impose a required minimum penalty of $500 for each day of discharge in violation of this agreement. In the event the Water Board seeks to enforce this agreement pursuant to section 13350, the Water Board shall consider the factors set forth in California Water Code section 13327, pursuant to section 13350(f)." Rather than making clear that the mandatory fines would not be imposed, the RWQCB merely set forth the procedures available should they seek to enforce them. The RWQCB never admitted or made clear that the agreement was, in effect, a Cleanup and Abatement Order, and Petitioners were not aware of the ramifications of a CAO when they agreed to settle. Copies of each of these settlement agreements have been attached in Exhibit packet 2, and included herein by reference.

A shortage of time at the December 14, and 15 hearings prevented a few Petitioners from conducting their subhearings. The subhearings for these persons have been rescheduled for January 22, 2006. Some, but not all, of Petitioners who had previously been considered a default after failing to appear at the December hearings have also been given the opportunity to appear and present their case at the January 22, 2006 hearings. The RWQCB has stated that its intent is to then continue on with the proposed CDOs against the approximately 4500 remaining targeted Los Osos homeowners and residents.

ARGUMENT

Petitioners include residents and homeowners in Los Osos, California, who have allegedly been "randomly selected" and prosecuted as one of 45 homeowners targeted by the RWQCB for issuance of CDOs pursuant to *Water Code section 13304*. The CDOs issued against Petitioners and/or Settlement Agreement and Order which purportedly binds Petitioners are invalid and improper as violative of Petitioners' due process, equal protection, and 6th Amendment rights. In addition, issuance of the CDOs was arbitrary, capricious, and lacking in evidentiary support. Further, the CDOs have been improperly issued against Petitioners in their individual capacity, and against the owners of homes existing prior to the RWQCB's enactment of Resolution 83-13. These CDOs deprive the Petitioners and Los Osos, California residents of their rights to privacy, their property, and cause unnecessary expenses and undue burden as they capriciously and arbitrarily impose unattainable clean-up deadlines on individual residents.

I. THE DECEMBER HEARINGS WERE CONDUCTED IN VIOLATION OF PETITIONERS' DUE PROCESS AND EQUAL PROTECTION RIGHTS.

State action which classifies individuals is limited by the guarantee of equal protection and due process in the Federal Constitution and, as an independent ground which may provide additional guarantees, the State Constitution, which provides that no person may be denied equal protection of the laws (*Cal. Const.,* Article I, § 7(a)). The United States Supreme Court has held that it is necessary that "the inexorable safeguard... of a fair and open hearing be maintained in its integrity... The right to such a hearing is one of the rudiments of fair play... assured to every litigant by the Fourteenth Amendment as a minimal requirement." (See *Ohio*

Bell Tel. Co. v. Public Util. Com. of Ohio (1937) 301 U.S. 292, 304). "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." (*Lambert v. California* (1957) 355 U.S. 225, 228). In all cases, agency action must be set aside if the action failed to meet statutory, procedural, or constitutional requirements (*Citizens to Preserve Overton Park, Inc. v. Volpe* (1971) 401 U.S. 402, 413-414).

A. Petitioners' Were Not Given Proper Notice of the Hearings, Procedures, Evidence, and/or Objections Heard at the December Hearings.

"Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." (*Lambert v. California* (1957) 355 U.S. 225, 228, emphasis added). Petitioners were not properly noticed (and some have not been given any notice) of the hearings, procedures, evidence or objections heard at the December Hearings. The RWQCB's defective, untimely, and improper attempts to serve Petitioners by posing on their website, misleading and erroneous information and failure to give notice at all to certain parties is a clear violation of due process and such actions must be undone, erased and/or rendered moot.

Water Code § 1301 requires notice and a hearing before issuance of a CDO. But even where a statute is silent as to notice, due process of law requires adequate notice and opportunity to be heard. It is a fundamental right guaranteed by our constitution:

> Due process of law requires that defendants be afforded notice of proceedings involving their interests and an opportunity to be heard. Basically, this requires '. . . notice reasonably calculated, under all the circumstances, to appraise interested parties of pendency of the action and afford them opportunity to present their objections.' [*Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314, 70 S.Ct. 652, 657; and see *Mennonite Board of Missions v. Adams* (1983) 462 U.S. 791, 795-798, 103 S.Ct. 2706, 2709-2711] The Rutter Group § 5:3

Not only was notice inadequate, but there has to be enough time allowed for the parties to prepare or present their opposition to the Prosecution Team's belatedly filed documents or in accordance with the procedural guidelines mandated by the RWQCB.

The legal proposition that all notice must be in a reasonable time period is codified throughout all areas of the law as it springs from the U.S. and California Constitutions. It logically follows, that any changes to notice given must also be made in a reasonable time as well. (See Rutter Group § 13:122; Ca Rules of Court Rule 29(a)(2), et al.)

Even something as final as a Judgment, is rendered moot when notice is either forsaken,

defective, or has been modified. A modified notice of issues is grounds for invalidation as follows:

> "A judgment entered on defective notice of the underlying proceeding is subject to collateral attack. [See, e.g., *Marriage of Van Sickle* (1977) 68 Cal.App.3d 728, 740, 137 Cal.Rptr. 568, 575--substantial deviations between original complaint and copy served on respondent; see *Marriage of Kreiss* (1990) 224 Cal.App.3d 1033, 1039-1040, 274 Cal.Rptr. 226, 230--noncompliance with Ca Fam § 215 (mandatory service of postdissolution motions on opposing party, ¶18:25 ff.) 'is the equivalent of failure to serve summons and complaint, which renders a judgment void on its face and subject to collateral attack at any time']."

Further, when a failure to give notice, or notice is defective, results in a failure to appear, then any judgment made thereof is rendered moot:

> "Where the notice is sent to the wrong party or the wrong address, and defendant fails to appear at trial, any judgment rendered is void. [*Urethane Foam Experts, Inc. v. Latimer*, supra, 31 Cal.App.4th at 767, 37 Cal.Rptr.2d at 406--notice ineffective because mailed to party who did not receive adequate notice of its attorney's withdrawal] ."

The October 17, 2006 Notice of Chairman's Ruling Regarding Subpoena Documents Submitted October 4, 2006 was untimely and utterly failed to afford the Petitioners and residents even a modicum of due process. No notice nor opportunity to object was afforded the residents to address the Motion to Quash brought by the Prosecution Team, which was allegedly filed on October 10, 2006. The Petitioners and residents were never noticed of any hearing to allow them to oppose said Motion to Quash, nor was the motion properly served on the residents. While some residents were mailed the Motion to Quash, those privileged few actually did not receive the motion until Monday, October 16, 2006, which afforded no time to respond before the Chairman's Ruling issued on October 17, 2006. Furthermore, the ruling was only sent out by regular mail to a select few on October 18, 2006, thus insuring the residents and Petitioners were not informed of the Chairman's Ruling until well after the fact. Therefore, the RWQCB's resulting action (and specifically the Notice of Chairman's Ruling Regarding Subpoena Documents Submitted on October 4, 2006) must be rendered moot as a result of their defective notice.

On August 4, 2006, RWQCB Chairman, Jeffrey Young, issued a Preliminary Notice of

Ruling Regarding Presentation of Evidence Supporting the Issuance of Individual Cease and Desist Orders for Residents of Los Osos and Baywood Park. The Chairman stated in the Preliminary Notice served by certified mail that "By the end of August, 2006, the RWQCB Chairman will issue a more detailed Procedural Order establishing new time lines for the hearing... and addressing other procedural matters such as the time lines for the submission of documentary evidence by Designated Parties...". The Chairman failed to serve the detailed Procedural Order and it was not posted until sometime after September 7, 2006 with the inaccurate statement that the Prosecution Team's documents were posted and available for public review. Thus, such order should also be rendered moot as violative of Petitioners right to proper notice under the due process clause.

Petitioners and the randomly selected individuals, including those who were without benefit of a computer internet access, were not served or provided the written documentation from the RWQCB but were required to obtain the evidence being used against them from the website of the RWQCB or from review of the records at the RWQCB office. Unfortunately, the website which contains the documents of the RWQCB Prosecution Staff which were to be posted no later than September 8, 2006 and which eventually posted on October 4, 2006, has been corrupted and was inaccessible periodically and including times when Petitioners' submissions were due, and it is corrupted now, as Petitioners are attempting to submit their appeal to the State. Furthermore, the documents were not made available at the RWQCB offices as required. The RWQCB wrongfully takes the position that their posting of notice of their actions on their website constitutes service of notice in this adjudicatory proceeding against Petitioners and the other randomly selected individual property owners.

The Revised Notice of Public Hearing requiring the Petitioners to submit their documents by November 15, 2006 was posted in the United State Mail on October 16, 2006 to some but not all of the Petitioners and other targeted individuals. For example, while notice was mailed on October 16, 2006, posted to William R. Moylan by the U.S. Mail, the RWQCB neglected to serve his wife and co-tenant Beverley DeWitt-Moylan with any notice. Beverley DeWitt-Moylan has repeatedly requested orally and in writing notice and a right to be heard separately from her husband. Copies of portions of Beverley DeWitt-Moylan's April 28, 2006 and May

4, 2006 written requests for notice of an opportunity to be heard were attached as an exhibit to the Writ pleadings filed on November 28, 2006 (part of Exhibit packet 5). The RWQCB has repeatedly engaged in gender bias and deprivation of due process by failing and refusing to serve Beverley De Witt-Moylan and other spouses of targeted individuals.

Due to the Prosecution Team's failure to meet the deadline for submission of their case, the RWQCB issued a Revised Notice of Hearing setting the hearing for December 14 and 15, 2006 and requiring all documents to be submitted by Petitioners by November 15, 2006. This notice revising the deadlines for Petitioners to comply, however, the revised notice was not served on all Petitioners and in some instances, not served at all. Petitioners object to the attempted service of process on them as individuals by RWQCB posting on a website rather than actual service by mail and RWQCB's failure to notice and serve by mail all parties they seek to prosecute and issue a cease and desist order. Service was not effectuated by posting on the RWQCB website on October 16, 2006.

None of the Petitioners have agreed to accept service of process by email or by RWQCB website posting, and no justification for service of process by those means exists in the Water Code, Government Code, California Code of Regulations, or otherwise. When the RWQCB has elected to serve notices and rulings by mail, it has not served the documents on all Petitioners, or even those who have specifically requested such service in writing. The RWQCB has never submitted any documents to any of the recipients nor served any of the recipients with any notice (when they bother to serve by mail) affording the additional five days for mailing, which is normally required under *Code of Civil Procedure* section 1013.

Even more surprising is as of December 1, 2006, less than 10 days from the date of the December Hearings, the Prosecution Team recommended a new and different cease and desist order be issued against Petitioners. Of course, Petitioners were not given notice of the amended proposed CDO, much less proper and sufficient notice. Even this proposed CDO, again not properly served, was different than the CDO eventually adopted at the December hearing. Petitioners the Ingans and Anonymous Recipient #1040 should not be bound by issuance of an order they did not know would be issued when they did not make an appearance at the December hearing to object.

The notice requirements set forth in the *California Government Code* and *Water Code* are so minimal that any violation of such minimal requirements creates a large disadvantage on the part of the improperly served (or unserved) party. The notice requirements are also fairly simple, and Petitioners can think of no reason why the RWQCB has been unable or unwilling to meet such requirements. Petitioners contend that the RWQCB and Prosecution Team's documents, rulings, orders, and determinations in regards to the December Hearings were never properly served on all parties, contain no proof of service as required, remain posted online unsigned, and therefore, any rulings, decision, or other actions taken by the RWQCB relating to the December Hearings are void as violative of Petitioners right to proper notice. Petitioners submit that they should not have to rely on looking on the RWQCB website to find out what is happening in the prosecution of the case against them. Assuming arguendo that the use of CDOs and Cleanup and Abatement Orders against individuals as a means of enforcement is legal, Petitioners contend the hearings should have been rescheduled and conducted only after proper notice.

B. The RWQCB Failed To Meet Its Self-Imposed Deadlines For The Production and/or Submission of Their Arguments, Evidence, and Objections To The Detriment and Disadvantage of Petitioners.

The RWQCB Prosecution Team has strung Petitioners along for over a year in preparation for the hearings to determine issuance of proposed CDOs due to their inability to meet their self-imposed deadlines. The RWQCB has failed to meet every self-imposed deadline for the production or submission of their arguments, evidence, and objections to Petitioners' timely submitted documents to the detriment and extreme disadvantage of Petitioners.

On August 4, 2006, RWQCB Chairman, Jeffrey Young, issued a Preliminary Notice of Ruling Regarding Presentation of Evidence Supporting the Issuance of Individual Cease and Desist Orders for Residents of Los Osos and Baywood Park. This order required the RWQCB Prosecution Staff to submit documentation, proposed cease and desist orders and any documentary evidence that the Prosecution Team intends to rely on to support the issuance of individual cease and desist orders by 5:00 p.m. on September 8, 2006. The order also stated that a more detailed procedural order would be issued by August 2006. The order continued "other designated parties will be allowed, not less than 30 days, to submit and post on their website

responses to the Prosecution Team's allegations and recommendations, i.e., by 5:00 p.m. on Friday, October 13, 2006".

The RWQCB Prosecution Team was to file and post on the RWQCB website, by September 8, 2006, any documentary evidence that the Prosecution Team intends to rely on to support the issuance of individual cease and desist orders. The RWQCB Prosecution Team failed to meet the mandated requirements and all of the documents were not posted until almost a month past the deadline, on or after October 4, 2006, and even then were periodically unavailable due to corruptions on the RWQCB website.

The RWQCB was further required to submit a more detailed procedural order by August 2006. The RWQCB failed to meet their own deadline as such procedural order was purportedly posted on the RWQCB website on November 21, 2006, another month late.

The RWQCB claims that Petitioners were entitled at least 30 days to respond to the Prosecution Team's documents which were to be made publicly available, but while the documents were purportedly posted on the RWQCB website on October 16, 2006, the mailed notice sent to the select few Petitioners did not arrive in time to afford 30 days to submit documents. The RWQCB failed to provide sufficient time to respond to the documents belatedly filed and posted by the Prosecution Team, and have to date not provided justification for extending the time allotted for the Prosecution Team, while strictly holding Petitioners to the 30-day limit set forth in the Chairman's Ruling. Petitioners timely submitted their case and their objections to the Prosecution Team's case by the November 15, 2006 deadline.

On October 16, 2006, Michael Thomas, RWQCB Assistant Executive Officer, issued a Revised Notice of Public Hearing, in which the Prosecution Team was required to submit their objections to Petitioners' case by 5:00 p.m. on Friday, December 1, 2006. Again, the Prosecution Team failed to meet this deadline, and while the RWQCB website claims that such documents were posted on that date, as of 5:00 p.m. on December 1, 2006, no such documentation existed. On December 4, 2006, in violation of Michael Thomas' Revised Notice of Public Hearing (which was issued because of the Prosecution Team's previous violation of Chairman Young's Preliminary Notice of Ruling) the Prosecution Team was allowed to submit additional documents in support of their case. Ironically, these documents included objections

against any introduction of evidence by Petitioners for allegedly failing to submit timely copies of evidence to the RWQCB.

The RWQCB has failed to meet every self-imposed deadline for the production or submission of their arguments, evidence, and objections to Petitioners' timely submitted documents to the detriment and extreme disadvantage of Petitioners. As a result, Petitioners were afforded less time to prepare, compile and submit their defense documents than the Prosecution Team had. Although utterly needless to say, Petitioners contend that had they failed to meet their deadline for submission of defense documents, late submission would not have been allowed by the RWQCB.

C. The RWQCB Wrongfully Denied Multiple Legitimate Requests For A Continuance in Violation of Petitioners' Equal Protection Rights.

Although the RWQCB claims to exercise their authority to issue continuances when reasonable circumstances make a continuance proper, the RWQCB improperly denied each and every request for a continuance of the December hearings. In the November 21, 2006 order, Petitioners were advised that:

> "If any party encounters actual circumstances that prevent the party from attending the scheduled hearing, it is the party's responsibility to contact the RWQCB as soon as possible to seek a continuance and provide substantial justification of prejudice to the party as a result of the party's absence from the hearing. If a party is unable to attend the requested continuance, the RWQCB will consider the request before proceeding with the hearing regarding whether or not to adopt a proposed cease and desist order for the absent party. There is no guarantee that the RWQCB will grant a continuance. If a party does not attend the hearing, and does not receive a continuance, the party will be in default and will be deemed to have waived their right to testify at the hearing".

Numerous Petitioners submitted correspondence to the RWQCB requesting continuances. This includes requests for continuances by the Mortaras, an 88 year old man and his 80 year old wife, who are in failing health and have pleaded with the RWQCB to grant them a continuance, and the Colins, another elderly couple, 84 and 80 years old, who are in very poor health and likewise requested a continuance. To date Petitioners are not aware of a single continuance being granted. The RWQCB's only response has been, "The Chairman has denied your request. Please note that the RWQCB can make its decision regarding proposed cease and desist orders based on the written record therefore, attendance at the December 14-15 hearing is your choice." Petitioners' correspondence requesting continuances were attached as Exhibits to the Writ

pleadings filed on December 7, 2006, and are incorporated herein by reference).

D. The RWQCB Wrongfully Refused To Admit The Large Majority Of Petitioners' Evidence And Documents Into Evidence.

Petitioners timely submitted their arguments, evidence, documents, and objections to the RWQCB's proposed issuance of the CDOs on October 12, 2006, by a letter from the CSD's attorney, Gregory M. Murphy. The Prosecution Team submitted their rebuttal evidence and objections three days after the deadline for submitting such documents had expired. Regardless, the RWQCB issued an order sustaining the bulk of the objections set forth in the untimely Prosecution Staff Evidence Objections. A copy of the order was attached as Exhibit "2" to the Writ pleadings filed on December 11, 2006. This order basically gutted the Petitioners' request for evidence and documents, and as many as 600 of the 847 requested documents were thrown out and made unavailable for reliance by Petitioners in creating a defense to the CDOs. Not surprisingly, every single document submitted by the Prosecution Team for reliance was duly admitted to the record by the RWQCB.

The RWQCB's substantial lenience shown toward the Prosecution Team for their failure to meet deadlines, requests for admission of evidence, and objections to Petitioners' defense documents, on the one hand, and the RWQCB's strict refusal to grant continuances, allow evidence by Petitioners, and take into account the numerous valid objections made by Petitioners, on the other hand, is evidence that the CDOs were preordained, and of the RWQCB's continued bias and inability to conduct a fair hearing.

II. THE DECEMBER HEARINGS WERE CONDUCTED IN VIOLATION OF PETITIONERS' 6TH AMENDMENT RIGHT TO CONFRONT THEIR ACCUSER.

A. Roger Briggs Is a Necessary Witness and Petitioners' Inability to Depose Him is a Violation of Their 6th Amendment Rights.

Petitioners contend that Roger Briggs (hereinafter "Briggs") is the principal architect of the orders under which Petitioners have been prosecuted, and a critical witness whom they have the right to depose. Briggs is the Executive Officer of the RWQCB and is responsible for the alleged research, reasoning, and actual issuance of the orders to be enforced by CDOs and the Approved Settlement Agreement. The enforcement action for issuance of CDOs is directly related to the creation of the Prohibition Zone's claims of violation of Resolution 83-13 and

other orders and requirements of the RWQCB signed or issued by Briggs. The Water Basin Plan directed by Briggs and the accusations set forth in writing in Briggs' numerous directives have been introduced into evidence against Petitioners without affording Petitioners any opportunity to question the author of those orders and Water Basin Plan. Briggs is the only person who can give evidence on the central issues concerning the issuance of the CDOs and Adopted Settlement Agreement, and thus, his testimony by deposition is absolutely critical to the defense of the Petitioners. Therefore, Petitioners are entitled to question Briggs concerning this enforcement action, including questions pertaining to the adoption of the Basin Plan Prohibition which is being enforced by way of the CDOs.

According to your office, per a State Water Resources Control Board order dated May 4, 2006:

> "Mr. Briggs is a witness in this matter. . . he has been working on Los Osos septic system problems periodically since the early 1980s. The District called Mr. Briggs as a witness. . . 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, is not possible**." (*SWRCB Request for Continuance of May 11-12, 2006 Hearing on Los osos Cease and Desist Orders R3-2006-1000 through 1049*).

Briggs was unavailable to provide testimony prior to and cross-examination testimony during the adjudicatory hearings against Petitioners. Petitioners were forced to submit to the RWQCB's actions, findings, rulings, and determinations at the December Hearings without the benefit of Briggs' testimony, presence, and cross-examination. By your own admission, such a refusal by the RWQCB to allow Petitioners the right to confront and cross-examine witnesses such as Briggs, whose written orders and actions have been used to prosecute them, is not possible without violating the constitutionally guaranteed rights of Petitioners and those persons similarly situated.

B. Parties Appearing "In Pro Per" Have the Authority to Subpoena Witnesses and Testimony.

The RWQCB misinterpreted the applicable statute in determining that any subpoenas issued by parties appearing *in pro per* (i.e. representing themselves) were inherently defective. The relevant statute, which the RWQCB quoted in its decision, states:

> "Subpoenas and subpoenas duces tecum **shall** be issued by the

> agency or presiding officer **at the request of a party**, or by the attorney of record for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure."

Government Code § 11450.20(a) (emphasis added).

In addition, *Government Code* § 11190 provides,

> "Any party to any departmental hearing has the right to the attendance of witnesses in its behalf at the hearing or upon deposition upon making requests to the Board to the head of the Department, designating the persons sought to be subpoenaed and depositing with the officer before whom the hearing is to be had, the necessary fees and mileage."

Clearly, the *Government Code* grants agencies the authority to issue subpoenas at the request of the parties themselves. In addition, the use of the term "shall" is directive rather than discretionary. Thus, a proper interpretation of the statute would serve to *direct* the agency to issue the subpoena at the proper request of any party.

The RWQCB's interpretation of the statute was negligent and/or made in bad faith. The subsequent decision denied Petitioners their right to confront their accuser, and placed them in a very difficult position for the upcoming hearing.

The Petitioners timely noticed and served Briggs for a Deposition. However, Briggs has left on a 6 month vacation and the RWQCB has attempting to prosecute these CDOs without allowing the residents to depose him or otherwise face their accuser, obtain the alleged evidence upon which the CDOs are supposedly based, or avail themselves of rights afforded them by law and the State and Federal Constitutions. The Subpoena, Subpoena Duces Tecum, Notice of Taking Deposition, and Petition for Order to Take Deposition of Roger Briggs were properly noticed, served and submitted by Petitioners, and thus, the RWQCB had no authority to deny their requests. The RWQCB's order quashing the subpoena documents was improper and violative of Petitioners' rights, including their 6th Amendment, due process, and equal protection rights, as well as *Government Code* § 11190.

C. Petitioners' Subpoena Documents Were Timely, Reasonable, Related and Highly Relevant to the Proposed Issuance of CDOs.

The RWQCB wrongly denied the Petition for Order to Take Deposition of Roger Briggs for being untimely and unreasonable. The RWQCB stated that Briggs was unavailable for deposition due to his being on sabbatical between mid-October 2006 and mid-April 2007. The

RWQCB is incorrect in asserting that Petitioners were given notice and timely made aware of the upcoming absence of Briggs.

After learning that Briggs would be unavailable for testimony at the December Hearings, some of Petitioners and others requested the opportunity to question and take deposition testimony from Briggs concerning documents he authored or signed and which would be utilized by the Prosecution Team to support issuance of the CDOs against Petitioners. After Petitioners and others sought his deposition, a few targeted homeowners and were advised by the RWQCB Prosecution Staff to let others know that a subpoena or notice of deposition would not be required and that Briggs would be voluntarily made available. Thereafter, the RWQCB Prosecution Staff required any deposition testimony to be conducted on October 4, 2006 between 9:00 a.m. and 3:00 p.m., BEFORE they had posted and made available for public review, the documents they intended to utilize at the hearings for the prosecution against Petitioners, and provided that no inquiry was made to Briggs concerning the adoption of the Basin Plan Prohibition which is being enforced by way of the CDOs. The RWQCB had prohibited any "questions pertaining to the adoption of the Basin Plan Prohibition whish is being enforced by way of the proposed cease and desist orders" and refused to allow Briggs to produce any documents requested by the few Petitioners present.

On October 4, 2006, certain individuals appearing in pro per and on behalf of themselves alone began to conduct a deposition of Briggs. The deposition was not concluded and the individuals requested the deposition be continued for reasons including that the documents the RWQCB intended to be utilized in the prosecution against them were not yet available. On October 4, 2006, Petitioners caused to be personally served on Roger Briggs a Notice of Taking Deposition, a Subpoena for Deposition, an Administrative Subpoena, and a Petition for Order to Take Deposition. The RWQCB quashed the subpoena by the Notice of Chairman's Ruling Regarding Subpoena Documents posted on the RWQCB website on October 18, 2006. The Chairman's Ruling was issued ex parte and without providing Petitioners with an opportunity to be heard or to submit legal authority to support the issuance of their requested subpoena for the deposition of Briggs.

The fact that Briggs agreed to be deposed by some parties, and made himself available

for a limited deposition on October 4, 2006, with only those documents which he decided to bring along, does not bear on the Petitioners' right and ability to seek a deposition of Briggs. A witness subpoenaed to testify and produce documents does not have the authority to choose which documents to produce or when and where to discuss them. For obvious reasons, the alleged "availability" of Briggs during the limited time period to certain persons for the apparent discussion of limited issues, all at the discretion of Briggs rather than the Petitioners, is not acceptable for meeting the RWQCB's obligation to allow Petitioners to conduct discovery and confront the person responsible for execution of the discharge prohibitions which Petitioners have been singled out and alleged to have violated.

Briggs is the person responsible for the research, reasoning, and actual issuance of the prior CDOs. Due to the lack of cooperation by Briggs and the RWQCB, the refusal to provide adequate notice and reasonable opportunity for Petitioners and others to conduct and complete the deposition of Briggs, and the Chairman's order quashing the Deposition Subpoena, Subpoena Duces Tecum, and Notice of Taking Deposition of Roger Briggs, the RWQCB eliminated any reasonable ability of the Petitioners to depose the witness who is most crucial to the issues decided at the December Hearings.

Petitioners have the right to take the deposition of and require the attendance at the hearing of witnesses and can make a request to the RWQCB for their attendance or for issuance of the subpoena pursuant to *Government Code* section 11190 and under their constitutional right to confront witnesses. These actions by the RWQCB were made in an attempt to circumvent the Petitioners' right to depose the key witness and request the production of relevant and important documents. Such improperly motivated acts are a violation of the RWQCB's authority and the Petitioners' rights regarding discovery granted under the Government Code.

Petitioners request an order vacating all issued CDOs, Settlement Agreements, orders, acts, determinations, and/or rulings made by the RWQCB prior to, during or relating to the December Hearings. Petitioners further request an order rescheduling the enforcement hearings against them until a time when Briggs will be available for cross-examination, and after the completion of a deposition of Briggs, which deposition inquiries will include all issues related to the issuance of CDOs and/or Settlement Agreements, including inquiries into the adoption of

the Basin Plan Prohibition Zone and Resolution 83-13.

III. THE ISSUANCE OF CDOs AGAINST PETITIONERS WAS ARBITRARY, CAPRICIOUS, LACKING IN EVIDENTIARY SUPPORT, AND AN ABUSE OF DISCRETION.

A. The RWQCB Has Subjected the Targeted Citizens of Los Osos to An Arbitrary Compliance Date Which They Have Absolutely No Authority To Control or Power To Ensure Achievement.

In all cases, agency action that is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law is unlawful and will be set aside (*Citizens to Preserve Overton Park, Inc. v. Volpe* (1971) 401 U.S. 402, 413-414).

The attempt to reach an agreement on the design, financing and construction of a wastewater collection and treatment center in Los Osos has admittedly been a long and arduous process. The frustration has led the RWQCB to take these arbitrary and capricious punitive measures against individual citizens of Los Osos. The RWQCB has ordered the issuance of CDOs and the Settlement Agreement and Order against Petitioners, and required that all property owners have their septic systems connected to the anticipated Los Osos city sewage treatment facility by January 1, 2011, and that all discharges from individual septic tanks cease as of that date. If the sewage treatment facility is not built by that date (and there is no guarantee, or even evidence to show, that it will be) Petitioners will be subject to penalties and fines under the CDOs and Settlement Agreement, which is essentially a Cleanup and Abatement Order (CAO).

Petitioners, as individual property owners and residents of Los Osos, have absolutely no ability or authority to ensure completion of the city's planned sewage treatment facility or compliance with the RWQCB's orders by that date. Yet, by issuance of the CDOs and CAO agreement, the RWQCB has given themselves the authority to enforce fines against Petitioners of up to $5,000 per day until the sewage treatment facility is completed and Petitioners have connected to it. The arbitrary and capricious actions by the RWQCB, which lack evidentiary support as discussed below, have unjustly and selectively penalized Petitioners for conditions beyond their control.

In addition, in the Spring of 2006, the RWQCB took off of its calendar an action that

would have forced Morro Bay to upgrade its existing sewage treatment plant to meet all current scientific and environmental standards within approximately nine and a half years. In contrast, the CDOs and Approved Settlement Agreement issued at the December Hearings, subject the individual citizens of Los Osos to **mandatory** fines of $500 a day, and additional fines up to $5,000 a day, if a brand new sewage treatment plant has not been financed, designed, permitted, and constructed from scratch in little over four years. It is arbitrary and unreasonable to grant one local government a decade in which to update their sewage treatment plant, while another is forced to act quickly or face punishment of its citizens when starting from scratch. While the RWQCB claims that their only motive is to protect the quality of groundwater in Los Osos, these acts provide proof of the board's improper motives.

B. The RWQCB Has Not Provided Any Evidence Of Any Violations By Any Individual Property Owners Or Individual Septic Systems.

With regard to the ***actual*** **scientific evidence** provided in support of the contention that each of the septic tanks has violated Resolution 83-13, Petitioners contend that there is **none**. The list of evidence submitted by the Prosecution Team admits that the RWQCB relied on general studies rather than measurements of each individual tank, as no individual tanks have ever been tested. The Prosecution Team's evidence against each individual homeowner and resident of Los Osos consisted of pointing to a map to show that the Petitioner owned property within the Prohibition Zone. The Prosecution Team produced no evidence of discharges on individual properties.

Most of the septic tanks currently in use in Los Osos/Baywood Park Prohibition Zone are approved septic systems that were placed in use prior to the enactment of 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 the 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 action. Yet, the RWQCB initiated this action and made their rulings 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 or other more drastic enforcement measures.

It is clear that the RWQCB has completely and utterly failed to develop any scientific evidence with regard to individual properties. In the more than twenty years since Resolution 83-13 was adopted, the RWQCB **never** collected site-specific or property-specific information, but rather, has prosecuted, 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. In addition, the Prosecution Team's evidence was taken from wells which are admittedly unpermitted and illegal. Without actually studying the individual properties, the RWQCB must have prosecuted Petitioners **by implication** when it made its orders, actions, and rulings at the December Hearings. The RWQCB cannot conclude that the Prosecution Team's finding provide corroborative evidence of illegal discharges of Petitioners wells based on the mere correlation of the Prosecution Team's wells to those of Petitioners. Such actions are arbitrary, capricious, and cannot be allowed. This further disproves the RWQCB's claim that the purpose of the CDOs is the actual protection of groundwater and instead supports the notion of improperly motivated RWQCB actions.

IV. THE SETTLEMENT AGREEMENT AND ORDER, ISSUED BY THE RWQCB AFTER THE DECEMBER 14, AND 15, 2006 HEARINGS IS UNENFORCEABLE AND VOID.

The RWQCB posted a Proposed Modified Settlement Agreement dated December 6, 2006, which document Petitioners were led to believe would be the operative settlement document should they agree to settlement and forego their opportunity to present a defense at the December hearings. The proposed agreement stated, "we will add language to make clear that there is no required minimum penalty which must be imposed in the event that there is an action taken to enforce the terms of the settlement agreement." Petitioners believed this document would be their settlement agreement with the RWQCB, and the document specifically promised that the agreement would not allow minimum penalties by the RWQCB. Neither the

Prosecution Team or RWQCB, nor the proposed settlement agreement made any mention of a Cleanup and Abatement Order, or admitted that the agreement was, in fact, a CAO. Petitioners were unaware that the agreement was a CAO and were also intentionally left uninformed about the myriad of ramifications of such an order, including the possibility of a lien against their property, mandatory fines of $500 per day and additional fines of up to $5,000 per day, the ability of the RWQCB to take possession of their property and make whatever remedial actions they saw fit, and their ability to civilly and criminally enforce payment of such remedial actions against Petitioners.

Those Petitioners who had agreed at some point along the long history of the enforcement action, to settle with the RWQCB pursuant to any one of the several versions of the still unsettled settlement agreement were not allowed a subhearing. Those Petitioners who participated in the December 14, 2006 hearings, after being forced to agree to whatever settlement the RWQCB chose to issue, were coerced and forced under duress to agree to sign any settlement agreement which resulted from the RWQCB and Prosecution Team's hearing on the matter. The lengths to which the RWQCB went in order to coerce agreements to settle from Petitioners is fully documented by the video tape footage of the December hearings, which have been included herein in Exhibit packet 5.

On December 14, 2006, the RWQCB issued a Settlement Agreement and Order, which document was mailed to each Petitioner who had agreed to settle at any point along the way. The Settlement Agreement and Order did not "make clear" that no mandatory fines would be imposed, in violation of the promises made by the Prosecution Team in their previous proposed settlement agreement, which many of Petitioners had relied upon in their decision to accept settlement. Rather, the agreement and order made absolutely no mention of the fines specifically mandated by the Water Code.

Many Petitioners who had previously agreed to settle began to question the revised terms and conditions of the Settlement Agreement and Order. Thus, on January 3, 2007, yet another "Corrected" Settlement Agreement and Order was sent to all Petitioners who had previously agreed to settle. The "Corrected" agreement added a paragraph concerning the mandatory fines,

which the RWQCB claims were "mistakenly omitted." The new language provided:

> "However, the parties agree that California Water Code section 13350(e)(1)(A) does not require the Water Board to impose a required minimum penalty of $500 for each day of discharge in violation of this agreement. In the event the Water Board seeks to enforce this agreement pursuant to section 13350, the Water Board shall consider the factors set forth in California Water Code section 13327, pursuant to section 13350(f)."

The order clearly does not "make clear that there is no required minimum penalty which must be imposed in the event that there is an action taken to enforce the terms of the settlement agreement" as was promised by the Prosecution Team's last version of the proposed settlement agreement before the December hearings. Rather, the (Corrected) Settlement and Order provides that pursuant to Water Code section 13327, the RWQCB has full authority to impose penalties up to $5000 per day on each individual homeowner, and a **nondiscretionary duty** to impose mandatory fines of $500 per day unless the board makes an express finding based on specific factors setting forth the reasons such a penalty is inappropriate.

The December 15, 2006 and January 3, 2007 settlement agreements are illegal and unenforceable as a matter of law. First the agreements are unenforceable because there was no offer and no acceptance. While some Petitioners have agreed to various drafts of proposed settlement agreements stretching as far back as November 2006, the (Corrected) Settlement Agreement and Order issued by the RWQCB after the December 14, 2006 hearing is different than any of the previous draft to which Petitioners have agreed. A contract that leaves an essential element for future agreement of the parties is usually held fatally uncertain and unenforceable. In *Albett v. Clauson* (1954) 43 C.2d 280, 284, the court held that, "if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise."

Second, the agreement is invalid in that is was procured by coercion, undue influence, and under duress. Any agreement made under duress is voidable. An agreement entered into when the person does not understand the transaction or does not intend to enter into the contract, is

void (*McGrath v. Hyde* (1889) 81 C. 38, 39). As is stated above, the Petitioners were coerced and forced under duress to agree to the RWQCB's settlement option. The RWQCB and Prosecution Team abused their authority and grossly took advantage of Petitioners' lack of specialized knowledge on the legal and administrative issues, and their utter distress caused by these unprecedented enforcement actions. Any resulting agreements to settle are either legally void or voidable by Petitioners.

Third, the agreement is invalid in that it was procured by fraud. Fraud will render the contract void, or become grounds for recision or reformation (*Civil Code* §§ 1566, 1689, 3399). The Prosecution Team specifically stated that the agreement would make clear that there is no required minimum penalty imposed for violation of the agreement. However, the (Corrected) Settlement Agreement and Order never made such statement clear, and rather the agreement cites the sections of the Water Code which specifically mandate such mandatory fines. Such fraudulent representations were made by the RWQCB with the intent to induce Petitioners to agree to the settlement, and many Petitioners did, in fact, agree to the CAO with no knowledge of the mandatory fines and other serious ramifications of such an order.

Fourth, the agreement is invalid in that it failed to include a waiver of rights pursuant to Civil Code section 1542. Pursuant to such section, the agreement does not waive any claims by Petitioners which were unknown and unsuspected at the time of execution of the agreement, which would have materially affected the settlement agreement. As described above, Petitioners were unaware that the Settlement Agreement and Order was a CAO, and also unaware of the serious and mandatory ramifications of the same. Thus, the agreement is voidable by Petitioners for the reasons which they were unaware of at the time they agreed to settle.

Petitioners claim that the (Corrected) Settlement Agreement and Order which the RWQCB is purporting to bind them to, is invalid and unenforceable because it is impossible, was procured by fraud, duress, coercion, and undue influence, and failed to include a waiver of claims which Petitioners were unaware of at the time of agreement. The illegal and improper acts of the RWQCB and Prosecution Team caused Petitioners to forego their opportunity to present a defense to the proposed CDOs at the December hearings, in violation of their due

process rights. Should the RWQCB insist on continuing this illegal, unsupported, and unprecedented enforcement action, Petitioners were improperly forced to settle demand a subsequent hearing, and proper notice of the same, so that they may present evidence and testimony in their defense of the CDOs and CAO agreement.

V. THE RWQCB PROCESS WAS VIOLATIVE OF EQUAL PROTECTION BECAUSE THE CDO RECIPIENTS HAVE NOT BEEN TREATED EQUALLY.

State action which classifies individuals is limited by the guarantee of equal protection and due process in the Federal Constitution and as an independent ground which may provide additional guarantees, the State Constitution, which provides that no person may be denied equal protection of the laws (*Cal. Const.*, Article I, §7(a)). The Equal Protection Clause requires that persons under like circumstances be given equal protection and security in the enjoyment of personal and civil rights, the acquisition and enjoyment of property, the enforcement of contracts, and the prevention and redress of wrongs. The Clause specifically requires that persons similarly situated receive equal treatment (*Skinner v. Oklahoma* (1942) 316 U.S. 535).

Sometime after November 21, 2006, a still unserved but posted notice entitled *Notice of Proposed Settlement Agreement Continuance of Hearing for Designated Parties Who Have Agreed to Settle and Order of Proceedings for Public Hearing on December 14, 2006*, changed the December hearing procedure. (Attached as Exhibit "E" to the Writ pleadings filed on December 11, 2006). The RWQCB required each one of the 45 randomly selected, targeted homeowners to individually present their case at a "subhearing" on the scheduled December 14, and 15, 2006 hearing dates. Each recipient (unless they are married and in that case, the homeowner is given half the time) was allocated 30 minutes to present, cross-examine and argue their case. It was a violation of Petitioners' equal protection rights to force married individuals to split the already scant time allotted for defending against issuance of the CDO. As the issuance of a CDO or CAO would affect both individuals equally and as harshly as unmarried homeowners, each proposed recipient, whether married or not, should have been granted the same amount of time to present their defense.

Petitioners were also not allowed to have another party present their case unless he or she was an attorney, or was acting under a validly executed power of attorney. Elderly and ill people, like the Montaros and the Colins, were forced to stand up before the RWQCB and present their case like an attorney or risk default issuance of a CDO that would force them out of the homes if the sewer is not complete by the arbitrary date the RWQCB has selected. Denying Petitioners the right to have a non-attorney representative assist in the presentation of their defense, as is typically allowed in administrative hearings, violated their equal protection rights.

Further, pursuant to the RWQCB's November 21, 2006 procedure-setting order, individual proceedings for each proposed cease and desist order were to be considered in alphabetical order by last name. The order continued:

> "Any person named in a proposed Cease and Desist Order may, upon a showing of property-specific relevance and materiality and with the approval of the Chair, incorporate by reference any testimony offered by other persons named in proposed cease and desist orders... Individuals named in proposed Cease and Desist Orders will be encouraged to incorporate testimony from other individual proceedings that is relevant and material to the individual proceedings into the record of such individual proceedings in order to expedite the hearing process (*i.e.*, do not repeat testimony from other parties."

However, as the individual proceedings for each CDO began, the RWQCB made rulings after each and every individual subhearing ordering and issuing CDOs. Thus, in violation of their own procedural guidelines, the Petitioners whose subhearings were held first (those with last names beginning with A, B, etc.) were denied the right to incorporate by reference the evidence and testimony presented by other individuals over the two full days of hearings. Petitioner number 1 was allowed to present his testimony, and was then issued a CDO. Petitioner number 2 was then allowed to present his testimony, and could incorporate the evidence presented by Petitioner number 1, and was then issued a CDO, and so on. Each of the Petitioners, regardless of their spot in the RWQCB's set order, are entitled to incorporate the testimony of all other Petitioners, including those who presented evidence and testimony over December 14, and 15, 2006, those with hearings scheduled for January 22, 2007, as well as the 4500 Los Osos residents who will continue to present evidence and testimony at hearings on the

CDOs and CAO agreement in the future. The RWQCB's procedures, actions, and rulings made at the conclusion of each individual subhearing were violative of their own procedural guidelines set forth in their November 21, 2006 order, and violative of Petitioners' equal protection rights.

Perhaps most significantly, the first 45 randomly selected and targeted homeowners and residents of Los Osos have been made an example of by way of the December hearings, to the remaining thousands of Los Osos residents whom the RWQCB intends to continue to issue CDOs against. The first 45 targeted individuals have been forced to deal with each and every procedurally incorrect step of this abusive process. They have expended enormous amounts of time and money to challenge the legality of this enforcement process and the authority of the RWQCB to issue CDOs against them individually. They have spent countless hours trying to reach an agreement with the RWQCB which will serve to reach the environmental goals of the Prohibition Zone and which they will be physically capable of performing. These improper proceedings have entirely consumed the free time of Petitioners, and the first 45 targeted individuals have done these things to the huge detriment of their health, marriages, jobs, families, and community.

Meanwhile, the remaining 4500 residents of Los Osos, who have cease and desist orders preordained in their future, have been able to sit by and let the first 45 individuals work out all of the procedural and legal issues of the RWQCB's enforcement process. The approximately 4500 remaining Los Osos residents subject to future CDOs have been allowed to sit by while the first 45 individuals to endure the distress of these proceedings and bear the high costs of challenging these enforcement actions for the benefit of all Los Osos residents. Requiring 45 individuals to proceed with the numerous challenges and heavy burden for the benefit of all is a violation of their equal protection rights.

Lastly, all Petitioners who did not attend the December 14, and 15 hearings were considered in default and issued CDOs. However, some, but not all, of these defaulted parties have been given the opportunity to present their case at the subsequently-scheduled January 22, 2007 hearing. Allowing these select few Petitioners to present at the January 22, 2007 hearing, while denying the same right to others in the same situation, and after denying every single

request for a continuance made by numerous Petitioners is a clear violation of equal protection clause edicts. Except that each Petitioner has been treated unfairly by the RWQCB, Petitioners have not otherwise been treated equally at any step of this process.

VI. THE RWQCB DOES NOT HAVE THE AUTHORITY TO ISSUE CDOs AGAINST PROPERTY OWNERS AND RESIDENTS OF LOS OSOS IN THEIR INDIVIDUAL CAPACITY.

The RWQCB has issued CDOs and Cleanup and Abatement Orders through the Approved Settlement Agreement, allegedly pursuant to *Water Code* § 13301. That section provides that the regional board may issue cease and desist orders to ***persons*** who are in violation of discharge requirements. *Water Code* § 13050(c) states, "Person" includes any city, county, district, the state, and the United States, to the extent authorized by federal law." The definition does not include "individuals" in setting forth the appropriate uses of cease and desist orders. Other sections of the *Water Code*, such as section 513, and other numerous California Codes, specifically include "individuals" in the definition of "person". For example, *Water Code* § 513 states that "person" means any **individual**, firm, association, partnership, corporation, or public entity of any kind."

Petitioners contend that the legislature, in defining "person" for purposes of *Water Code* § 13301, specifically left out the term "individual" to ensure that people such as Petitioners would not be the subject of the extremely unfair, discriminatory, and injurious enforcement actions which the RWQCB has executed. In fact, Petitioners have been unable to find one single example of a cease and desist order being issued against an individual property owner who is not engaging in business activities which directly result in illegal discharges. The statute was not intended to address individual homeowners, and the use of CDOs against individuals is unprecedented.

The issuance of CDOs and Cleanup and Abatement Orders against individuals such as Petitioners in this action becomes even more ridiculous when looked at from the viewpoint of the related mandatory and discretionary fines. Cleanup and abatement orders demand a mandatory daily fine of $500 for each violation. Because it is highly unlikely that a Los Osos wastewater collection and treatment plant will be completed by the RWQCB's January 1, 2011

deadline, Petitioners subject to the Approved Settlement Agreement will accrue mandatory fines in excess of $180,000 every year. The maximum allowable fines, if enforced, will total over $1.8 million dollars a year for **each** individual homeowner. While the RWQCB would undoubtedly be thrilled by such a windfall, clearly fines of this magnitude are not intended to be enforced against individual homeowners with no power to remedy the purported illegal discharges.

Los Osos residents and property owners are not responsible for holding discharge permits and have no control over sewage or stormwater collection and treatment. The San Luis Obispo County government currently retains control over individual septic systems and the planning and permitting thereof. The County has recently taken over the process of implementing an environmentally-sound wastewater treatment system for the Los Osos area, and the RWQCB has, for years, looked to the County to regulate septic systems in that area. Indeed, the December Hearings represent the first time the RWQCB has dealt in any way directly with individual septic tank users. While understandably frustrated over the slow progress of implementing such a sewage system, the RWQCB's orders and actions against Petitioners is unprecedented, inappropriate, unsupported, illegal, and ridiculous.

VII. THE RWQCB DOES NOT HAVE THE AUTHORITY TO ISSUE CDOs AGAINST HOMEOWNERS WITH SEWAGE DISPOSAL SYSTEMS EXISTING PRIOR TO THE ADOPTION OF RESOLUTION 83-13.

In 1983, the RWQCB adopted Resolution 83-13 which states:

> "Failure to comply with any of the compliance dates established by Resolution 83-13 will prompt a Regional Board hearing at the earliest possible date to consider adoption of an immediate prohibition of discharge from additional individual and community sewage disposal systems". (Emphasis added.)

A copy of Resolution 83-13 is attached as an exhibit to the Writ of Mandate pleadings filed on December 7, 2006. After the authorized additional 1,150 housing units were built, the moratorium in the prohibition zone went into effect. To Petitioners' knowledge, all of the targeted individuals' homes were built before 1988 and are not any of the additional units subject to Resolution 83-13. Absent a challenge within 30 days of its adoption, Resolution 83-13 could not be successfully challenged until it was enforced under *Water Code* § 13330 then in effect. Although Section 13330 was amended in 1992 to limit all challenges to Water Board decisions

to be made within 30 days, the law in affect in 1983 provided:

> "Failure to file such action shall not preclude a party from challenging the reasonableness and validity of a decision or order of a regional board or the state board in any judicial proceedings brought to enforce such decision or order or for other civil remedies".

Now that the Water Board seeks to enforce Resolution 83-13 against these individuals, Petitioners submit the enforcement of Resolution 83-13 is now ripe for review. However, the RWQCB has refused, in every step of this long history, to hear arguments or challenges to the legality of Resolution 83-13 or the Water Basin Plan.

Petitioners bought their houses with absolutely no notice of any requirements or duties which would arise from Resolution 83-13. The legality of their houses and permitted sewage systems should serve to "grandfather" the Petitioners' property into compliance, because the properties and systems were considered in compliance at the time Petitioners purchased them, and at the time Resolution 83-13 was enacted. To require expensive alterations, repairs, and/or the construction of new sewage systems on homes that were fully legally permitted at the time of purchase creates an unfair economic advantage.

VIII. THE RWQCB CONTINUES TO BE A BIASED PANEL INCAPABLE OF PROVIDING A FAIR AND IMPARTIAL HEARING.

Even after appointment of new counsel to prosecute Petitioners, the current makeup of the Prosecution Team and the failure to restart the entire process from the very beginning continue to make the RWQCB a biased panel who cannot provide a fair and impartial hearing to Petitioners. As the RWQCB has already considered, in *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, the appellate court held that it is violative of due process when the city attorney that routinely advises the city's personnel board also prosecutes before that board... the reason being is that such situation creates an appearance of bias and unfairness.

The holding in *Quintero* was recently applied to the State Water Resources Control Board and its attorneys in a Sacramento Superior Court Case entitled *Morongo Band v. SWRCB*. In *Morongo*, the trial court held that a State Board attorney cannot act as an enforcement attorney before the board while concurrently acting as legal advisor for the board even if the two matters are unrelated. The RWQCB has been unfairly prejudiced in this matter by having its counsel also serve as prosecutor. While former counsel was replaced, the enforcement proceedings were

not wholly stricken and started again from scratch. Thus, the RWQCB failed to remedy the previous bias and unfairness, implied as a matter of law.

In addition, the rationale for the holdings in *Quintero* and *Morongo* is the same for any person, attorney or otherwise, who regularly advises the RWQCB. Such persons should not be allowed to participate in prosecutions before that same board. Executive officer Roger Briggs advises the RWQCB more often than any other person. Senior staff members Harvey Packard and Matt Thompson also advise the RWQCB often. Three of the top six advisors of the RWQCB are on the Prosecution Team (four if one counts former counsel Ms. Okun). Pursuant to the above-cited case law, it is likely that the RWQCB will give more credence to the Prosecution Team, whose members they have looked to for advice and guidance for years, when deciding CDO matters. Whether or not the RWQCB members actually give more credence to Prosecution Team arguments or not, the appearance of such a bias is sufficient to invalidate the hearings, and mandated under *Quintero* and *Morongo*.

IX. THE RWQCB'S ENTIRE ENFORCEMENT PROCESS HAS BEEN IMPROPERLY MOTIVATED IN AN ATTEMPT TO INFLUENCE THE REQUIRED BOND MEASURE VOTE UNDER PROPOSITION 218.

Assembly Bill 2701 introduced February 24, 2006 and signed into law on September 20, 2006 gave the County of San Luis Obispo control over this project. However, instead of waiting for the vote and for the County to proceed with the community wastewater collection system, the RWQCB has proceeded with abusive, random enforcement procedures by issuance of the CDOs against individuals. The Prosecution Team stated in their December 1, 2006 rebuttal that:

> "The modified CDO makes clear that **so long as the community wastewater system contemplated by AB 2701 is moving forward, the respondent is not required to cease use of the septic system for the Respondent's site**. (see, ¶ A.1) There is no requirement in the modified CDO that the community wastewater system be completed by a particular date. That was the intent of the proposed CDO but the Prosecution Team believes the modified CDO is clear in that regard" (Emphasis added).

In the order issuing CDOs, which can be enforced criminally or civilly against Petitioners, the Water Board again requires the unattainable. Although a vote could take place on or before July 1, 2008, there is no way that the County will be able to exercise their due diligence to select and approve the project as is required under Assembly Bill 2701 by July 1, 2008.

Furthermore, if the vote fails, or if the County chooses not to proceed as they have discretion to refuse under AB 2701, the CDO does in fact have a completion date of January 1, 2011. While the RWQCB has consistently asserted that there is no deadline for building a sewer system, the order issuing CDOs specifically requests:

> "1. In the event that the County is successful in approving a benefits assessment by July 1, 2008 to finance the construction of a community wastewater collection and treatment system after providing the owners of the subject property with notice and an opportunity to protest the assessment in accordance with Article XIIID of the California Constitution, and, thereafter, the County completes a timely due diligence review for the construction of a community wastewater collection and treatment system, and constructs a community wastewater collection and treatment system in accordance with a schedule approved by the Regional Board. (a) The Discharger shall cease all unpermitted discharges (discharges not approved or permitted by the Water Board) from the Septic System no later than 60 days after a community wastewater collection and treatment system is available for connection to the Site. . . .
>
> 2. In the event that the benefits assessment is not approved by the County before July 1, 2008, the Discharger shall cease all discharges from the Septic System no later than January 1, 2011 unless the Water board has approved an onsite system for discharge for the Site by June 30, 2010, the Discharger shall submit a technical report proposing a method of complying with the January 1, 2011 discharge prohibition date. The proposed alternative must be adequate to cease unpermitted discharges from the Septic System by January 1, 2011 ..."

The Prosecution Team admitted in their December 6, 2006 proposed settlement agreement summary that, "This discharge cessation date takes effect either because the County fails to approve a benefits assessment by January 1, 2008, or because during the process of designing and building the community wastewater project, there is a material cessation (i.e., work stoppage) of the project, as determined by the Water Board." Clearly, there is a discharge cessation date which will take effect if events completely out of the Petitioners' control occur.

Petitioners have no control over the financing or building of this system. The 45 homeowners cannot control the 218 vote required under Assemblyman Blakeslee's bill (Exhibit "G" to the Writ pleadings filed on December 11, 2006) which the order issuing CDOs requires be approved by July 1, 2008. If the vote is unsuccessful, or if there is no sewer system in place by January 1, 2011, these victimized homeowners will have to move out of their homes because the privilege of flushing a toilet will be revoked and will be violative of the CDO. The RWQCB

wants the ability to enjoin people from discharging even if that means requiring that they be forced out of their homes.

Although the Prosecution Team claims that individuals have the option to put in a different design system on or before January 1, 2011, if it is approved by the Water Board, it is very clear that the Water Board will not approve any system that any individual could possibly put in place to meet the deadline if the vote fails. Therefore, this leaves the Petitioners and their fellow targeted neighbors no option but to ensure that the "community wastewater system contemplated by AB 2701 is moving forward" and passes, or move from their residences as of January 1, 2011 if the community wastewater and treatment system is not completed by the County.

Petitioners can control whether their septic tanks are pumped or not, and Petitioners have, in fact, recently had their tanks pumped. Petitioners have not refused to take reasonable mitigation measures. However, Petitioners cannot control a vote authorizing a bond measure imposing all costs of the construction of a community wastewater collection and treatment system, estimated now at well over $100 million. They cannot install an alternative individual site specific system as the Water Board will not approve any system other than a community wide system. These 45 homeowners cannot control the construction and completion of a system by January 1, 2011. To ask Petitioners to agree to a settlement or to issue CDOs which demand the same is a request completely void of legal support, administrative authority, and rational thought processes.

X. THE CDOs AND CAOs ISSUED AGAINST PETITIONERS WERE AN IMPROPER REMEDY WITH EXTREMELY INAPPROPRIATE RAMIFICATIONS.

All of the proposed CDO recipients have done nothing wrong. They simply live in Los Osos. It was unfair place these homeowners through this abusive process which was not about protecting the water basin, but an abuse of power by the RWQCB. The septic tanks of most Petitioners and CDO recipients have already been recently pumped, and Petitioners do not object to pumping septic tanks every three years. Petitioners object to the CDO and CAO Agreement in that they require completion of a wastewater treatment facility by an arbitrary, unattainable date (January 1, 2011).

The CDOs and CAO Agreement bear absolutely no actual nexus to clean water, and do nothing to ensure improvements in Los Osos water. The only regulation which will allegedly improve water quality is the requirement that all Petitioners cease discharges by January 1, 2011, and this is the only regulation which Petitioners have no control, ability, or power to comply with.

Petitioners submit that this case is not about pumping tanks every three years. It is about the RWQCB abusing its powers to make an example of 45 homeowners to show that they can force the homeowners out of their homes if the County does not approve Proposition 218, and hold them criminally and civilly liable including for **mandatory** fines. If the community or the County, who will have authority to propose a project in January, 2006, does not vote to pay all costs of the community wastewater and collection treatment system or act in accordance with the time lines and mandates set forth in the issued CDOs, it is these 45 homeowners who will have to move from their homes.

Petitioners have agreed to do everything in their power. Petitioners have not refused to participate in some type of work plan, which would require pumping and inspection of well sites, and hook up to a community facility when one becomes available. This would improve the quality of Los Osos water. However, the RWQCB insists on going beyond what is practical and possible, and has issued orders requiring cessation of all discharges by January 1, 2011. Such an order does not have anything to do with improving the quality of water, and instead merely serves to punish Petitioners for living in Los Osos.

The RWQCB has stated that there will be a hearing opportunity before these 45 recipients actually have to move from their homes and/or pay the CDO fines of $500 per day. However, other CDO enforcement actions by the RWQCB reflect that a hearing after a CDO is violated only determines how much should be imposed in fines and whether criminal or civil enforcement penalties will ensue. The issues related to whether the CDO is proper is not is not at issue at those hearings (See, *Water Code* section 13350). As is stated above, the statute was not intended to address individual homeowners, and the use of CDOs against individuals is entirely unprecedented.

The CAO Settlement Agreement mandates a mandatory daily fine of $500 for each

violation. Because it is highly unlikely that a Los Osos wastewater collection and treatment plant will be completed by the RWQCB's January 1, 2011 deadline, Petitioners subject to the agreement will accrue mandatory fines in excess of $180,000 every year. The maximum allowable fines, if enforced, will total over $1.8 million dollars a year for each individual homeowner. These fines are an example of the inappropriate ramifications of the RWQCB's ridiculous use of CDOs and CAOs in this enforcement action. In addition, pursuant to *Government Code* section 4477, any person subject to a CDO issued pursuant to *Water Code* section 13301 is prohibited from entering into any contract with the state. The CDOs may cause Petitioners loss of employment and work as they will be barred from providing goods and services to the State of California.

The RWQCB has consistently stated that it is not their intentions to enforce the mandatory penalties or additional fines available for violation of the CDOs and CAO agreement. The board's agreement that such ramifications are not appropriate as to the individual homeowners and residents of Los Osos seems to prove that the issuance of CDOs and CAOs was an improper and invalid means of enforcement, under which Petitioners should not be punished for violating. These individuals' life, liberty and property were at stake at the December 14, and 15, 2006 hearings. The CDOs and CAOs which were issued could result in individual fines in excess of $1.8 million dollars a year, the loss of Petitioners' homes, their jobs and livelihood under *Government Code* section 4477. None of the Petitioners should have been subjected to what they have endured to date.

CONCLUSION

Petitioners contend that the entire enforcement process conducted by the RWQCB is improper and illegal, and as such, the CDOs and CAOs which resulted from such illegal enforcement actions should be dismissed. Further, the orders issued during the December 14, and 15, 2006 hearings are unenforceable due to the failure by the RWQCB to notify Petitioners of their right to appeal the decision to the State Board, as required under statutory law, including the California Code of Regulations. Petitioners have requested that the administrative record be produced and made available for their review, and have sent subsequent additional requests

for the same. As of yet, no administrative record has been produced. Thus, in addition to the arguments set forth herein, and the exhibits made a part hereof, Petitioners request the opportunity to supplement this appeal with any evidence, arguments, or authority which arise after production of the administrative record.

Dated: January 16, 2007

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