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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF SAN LUIS OBISPO**
10

11 CITIZENS FOR CLEAN WATER, a)
12 California Nonprofit Corporation a.k.a.,)
PROHIBITION ZONE LEGAL DEFENSE)
13 FUND; LOS OSOS COMMUNITY)
SERVICES DISTRICT (hereinafter)
14 "LOCSO"); ALAN MARTYN;)
JACQUELINE MARTYN; RHIAN)
15 GULASSA; JOHN DerGARABEDIAN;)
JAN DerGARABEDIAN; CINTHEA T.)
16 COLEMAN; LAURIE McCOMBS;)
ANTOINETTE GRAY PAYNE; BRUCE)
17 PAYNE; EDWIN I. INGAN; JUNE Q.)
INGAN; CLINT KOCH; ANN CALHOUN;)
18 CHRISTOPHER ALLEBE; E.E. ALLEBE;)
CHARLES E. WILKERSON; NORMA)
19 WILKERSON; CDO RECIPIENTS #1040;)
JULIE G. MILLER; LAWRENCE)
20 KLEIGER; WILLIAM MOYLAN and)
BEVERLEY DE WITT-MOYLAN,)

21 Petitioners,)
22 v.)

23 REGIONAL WATER QUALITY)
CONTROL BOARD, CENTRAL COAST)
24 REGION; and DOES 1 through 100,)
inclusive,)
25)

26 Respondents.)
27)
28)

CASE NO. CV 070472 (lead case)
CV 070904

**PETITIONERS' BRIEF IN SUPPORT OF
A PEREMPTORY WRIT OF
MANDATE/PROHIBITION**

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I. INTRODUCTION

Petitioners challenge enforcement actions taken by the Regional Water Quality Control Board, Central Coast Region (hereinafter "RWQCB") and the issuance of Cease and Desist Orders ("CDOs") to randomly selected individuals owning or residing on properties located in the Los Osos/Baywood Park Prohibition Zone. On January 5, 2006, after fining the Los Osos Community Services District (hereinafter "LOCSD") over \$6.6 million, Respondent RWQCB directed its staff to initiate enforcement orders against individuals for the community's failure to implement and construct a community wastewater system. Petitioners are amongst the 46 randomly selected homeowners and residents who were subjected to demands for information, repeated notices of hearings, and a multitude of continued hearings before CDOs issued to Petitioners and others unwilling to "agree" to an even more onerous Cleanup and Abatement Order ("CAO"). The CDO's summarily issued following the allotted 15 minutes of defense allowed each Petitioner¹ each subhearing.

Not unlike the attempts to design, locate, finance and construct a community wastewater collection and treatment system in Los Osos/Baywood Park (hereinafter "Wastewater Project"), Petitioners' challenges to the RWQCB's enforcement actions against them as individuals has been an extremely long and arduous process. Petitioners and Respondents likely have a great deal of shared frustration that a Wastewater Project has not yet been constructed. However, the RWQCB's frustration has led it to take arbitrary and capricious punitive measures against 46 randomly selected individual citizens and residents of Los Osos (hereinafter the "Random 46") who have no ability to comply with the order to build or construct a wastewater project by January 1, 2011. The United States Supreme Court has recognized that government agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law are an abuse of governmental power and must be set aside (*Citizens to Preserve Overton Park, Inc. v. Volpe* (1971) 401 U.S. 402, 413-414). Unfortunately, as with all things related to the Los Osos Wastewater Project, this writ procedure, which affords the only means to obtain judicial review of RWQCB actions, has not proven to be the plain, expedient, adequate remedy afforded under *C.C.P.* §§ 1086 and 1094.5.

¹Each married Petitioner or co-owners of property were required to present their defense together in the allotted time.

There has undoubtedly been a failure over these many years to get a Wastewater Project completed in Los Osos. But that failure rests with the *governmental bodies* (namely the RWQCB, LOCSD and the County of San Luis Obispo) who had and have the authority and duty to build it. It is neither the duty, nor within the ability of 46 randomly selected property owners such as Petitioners and other individuals, living or conducting business in the Prohibition Zone to implement the design and construction of a community Wastewater Project in Los Osos. In fact, the individual Petitioners and other residents and homeowners in Los Osos were and are entirely incapable of ensuring a system is ever built, and thus necessarily have placed their faith in the state and local governmental bodies to build a system that complies with state law. Due to the failures of the governmental bodies whose duty it was to construct a Wastewater Project, the RWQCB has arbitrarily and capriciously commenced the challenged RWQCB Enforcement Proceedings against individuals who own or reside in 46 randomly selected homes located within the Prohibition Zone.

In their the Petition for Writ of Mandate and/or Prohibition, Petitioners request this court find that the RWQCB has proceeded without or in excess of its jurisdiction, that the enforcement proceedings and hearings were unfair and/or that there was a prejudicial abuse of discretion by the RWQCB in that it failed to proceed in the manner required by law, its orders and decisions are not supported by the findings, or the findings are not supported by the weight of the evidence. Accordingly, Petitioners request that the court issue a peremptory writ of mandate or prohibition (a) vacating each and every CDO issued against Petitioners and others similarly situated; (b) invalidating and vacating Resolution 83-13; (c) invalidating any and all attempts to apply fines retroactive to 1988; (d) ceasing further issuance of CDOs and other enforcement orders against individual residents, homeowners, entities and business owners within the Los Osos/Baywood Park Prohibition Zone pursuant to Resolution 83-13; (e) ordering Respondents to produce all public records requested by Petitioners; and (f) compensating Petitioners' attorney for her efforts to enforce important rights affecting public interests and pursuant to *Code of Civ. Proc.* §1021.5, and *Government Code* §§ 800, 6258 and 6259.

II. STANDARD OF REVIEW

As set forth in *Water Code* § 13330(d) and *Code of Civ. Proc.* § 1094.5, when exercising

1 judicial review of RWQCB decisions and orders, the court is authorized by law to exercise its
2 independent judgement of the evidence. Abuse of discretion is established if the court determines that
3 the findings are not supported by the weight of the evidence. (*C.C.P.* § 1094.5) Since the independent
4 judgment standard Review applies, the court is authorized to consider and admit evidence in addition
5 to the administrative record (*C.C.P.* § 1094.5(e); *Hand v. Board of Examiners* (1997) 66 Cal.App.3d
6 605, 607).

7 It goes without argument that the court must be provided with the full and complete
8 Administrative Record all the documents that were part of the RWQCB's decision making process.
9 The record must include all written and oral testimony, as well as documents that the RWQCB
10 considered or were submitted as evidence, whether or not accepted into evidence by the agency.
11 Petitioners submit that the Administrative Record is, in fact, incomplete and does not contain evidence
12 considered by the RWQCB in issuance of these challenged CDOs. The court may also consider
13 relevant evidence that exists outside the administrative record, which was improperly excluded in the
14 agency proceedings, or in Petitioners' exercise of reasonable diligence could not have been produced
15 (*C.C.P.* § 1094.5(e); (*Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559,
16 578). Not only may the court consider evidence that was specifically and improperly excluded by the
17 agency, the court may also consider evidence of events occurring after the date of the agency hearing.
18 (*Windigo Mills v. Unemployment Ins. Appeals Bd* (1979) 92 Cal.App. 3d 586, 596-597).

19 **A. The Administrative Record Belatedly Submitted by the RWQCB (after Much**
20 **Resistance) Was Inadequate and Incomplete.**

21 The "Administrative Record" that was finally submitted by the RWQCB was wholly
22 inadequate.² Respondent RWQCB failed to make any attempt at labeling the evidence submitted by
23 Petitioners (or any other "the Designated Party") in response to the Prosecution Team's proposed
24 CDOs and rearranged the order and labeling of their other evidence. Rather, Respondent after
25 originally merely providing three of the four discs of the Designated Parties' evidence as part of the
26 Record, lodged the fourth disc of evidence 10 months later with no index for any of the four discs. A

27
28 ²Petitioners requested the Administrative Record from the RWQCB at least 14 times, beginning in
November, 2006, but the Record was not produced until February 4, 2008, in response to a Court Order.
(Pet., Exh. 13)

1 copy of the indices of evidence proffered by the Designated Parties was prepared through the effort
2 and cost of Petitioners, and was provided to the court and RWQCB with Petitioners' Motion to
3 Augment the Record (Request for Judicial Notice ("RJN"), Exhibit "A"). Petitioners submit an
4 agency's decision may be reversed where an agency fails in its responsibility to prepare, label, organize
5 and index a complete record of documents adequate for review. (*Protect Our Water, et. al., v. County*
6 *of Merced* (2003) 110 Cal.App.4th 362, 366)

7 Much of the Administrative Record lodged by the RWQCB is missing documents, staff reports,
8 hearing transcripts of testimony and arguments on agenda matters directed related to these challenged
9 enforcement actions and CDOs. Even though the indices and many of the missing documents were
10 provided to the RWQCB to be included in the Administrative Record, and other records not available
11 to Petitioners have been identified and requested numerous times (RJN "C"), the RWQCB refused to
12 add and lodge the missing records. Petitioners therefore filed on September 16, 2008, a Motion to
13 Augment the Record.

14 Together with their Motion to Augment the Record, Petitioners submitted public record videos
15 of hearings wherein the RWQCB enforcement proceedings against individuals were on the agenda for
16 consideration neither those hearings nor evidence introduced therein are included in the
17 Administrative Record. For example, the original agenda for the RWQCB May 11, 2006 hearing
18 included continued hearings to take testimony for issuance of CDOs (AR 6111). The agenda was
19 revised on May 5, 2006 (AR 6115) to conduct a status conference to consider procedural issues related
20 to conducting the CDO hearings yet acknowledgment of that hearing and any documents or discussion
21 that occurred therein, other than the RWQCB order that emanated therefrom (AR 6116-6117) are not
22 included in the record. The videos depict the full amount of public, staff and Board testimony
23 concerning the CDOs that were not transcribed as part of the Administrative Record. The public
24 record videos have been authenticated by the declaration of AGP videographer Nancy Castle, who had
25 been retained by the RWQCB from February 2001 to December 15, 2006 to document RWQCB
26 meetings and to provide copies, either on tape or DVD, to the RWQCB for their public record (RJN,
27 Exhibit "F"). Even those videos not purchased by the RWQCB were part of the public record, as
28 Board members admitted to watching the videos of the January 22, 2007 subpanel hearings before

1 rendering their decision to issue CDOs against Petitioners Wilkersons and Moylans (AR 11605,
2 011912).³ Most of the transcripts of hearings on the agenda to address enforcement, and all of the
3 videos, were missing from the Administrative Record submitted by the RWQCB.

4 As stated by the Court in its ruling on October 29, 2008, Petitioners' Motion to Augment the
5 Record, "If the motion seeks to correct the record to include documents considered by the Board that
6 are now omitted, those documents should be included in the Administrative Record. . . As to the other
7 voluminous documents requested by the Petitioners, the same principle applies. If the documents were
8 considered by the Board in making its decision, they should be included as part of the Administrative
9 Record." (RJN, Exh. "G")

10 On December 19, 2008, the RWQCB finally lodged two more discs of additional documents
11 Petitioners had repeatedly requested be included in the record, including the RWQCB Notice of
12 Violation (AR 14298) and FAQ (AR 14293), and a still incomplete set of the documents sent with
13 their original proposed CDO (AR 14266-14288) and some (but not all) of the 14 or more public
14 records requests, as well as a few of the RWQCB's and SWRCB's same counsel's responses thereto.
15 (Pet., Exh. 13 and 14; AR 14312-14344)

16 To the extent that Petitioners rely on documents that were omitted from the RWQCB's
17 Administrative Record, or were precluded from being included in the Administrative Record,
18 Petitioners identify and cite to those documents as the "Supplemental Administrative Record" or
19 "SAR" (Index at RJN, Exh. "C") exhibits to the Second Amended Petition ("Pet. Exh.") or as
20 judicially noticed documents ("RJN").

21 **B. Court Consideration of Records That Were Omitted from the Administrative**
22 **Record Provided by Petitioners as a Supplemental Administrative Record Is**
Proper.

23 Petitioners further contend that evidence presented at hearings on agenda items pertaining to
24 issuance or rescission of CDOs or continued enforcement actions related to issuance of the CDOs
25 excluded from the Administrative Record should properly be considered by the Court in exercising
26 its independent judgment. Evidence presented at RWQCB hearings and RWQCB actions and
27

28 ³ The RWQCB ceased paying for the video recordation following the December 15, 2006 hearings
(AR 11605, 11912, 13054-55).

1 inactions, specifically related to the CDO's and continued enforcement actions under Resolution 83-13
2 that occurred before, during and after the agenda items for the issuance of CDO's should be included
3 in the record. An example of the need to consider video evidence is especially important with regard
4 to the **January 27, 2007 subpanel hearings** to address: Agenda Item No. 3 entitled "Request for
5 Rescission of Various CDOs Issued by the Water Board on December 15, 2006", including Petitioner
6 CDO 1040, for consideration in conjunction with the issuance of the CDOs (AR 13039). Agenda Item
7 No. 4 "Consideration of Panel Hearing Recommendation to Adopt Proposed Cease and Desist Orders"
8 against the Moylans and the Wilkersons, and Agenda Item No. 6, entitled "Direction to Prosecution
9 Team Regarding Future Proceedings for Individuals who own or Use Septic Systems in the Los Osos
10 Prohibition Zone". (AR 13039)

11 Agenda Item No. 3 hearings on rescission of CDOs was continued until May 10, 2007 as only
12 a subpanel of three Board Members appeared at the January 22, 2007 hearing (AR 1355-1357).
13 Although the Board took the position that a subpanel could not rule on the rescission of a CDO (AR
14 13046), the same subpanel *took testimony and proceeded with the hearing to recommend* issuance of
15 CDOs against Petitioners Moylans and Wilkersons. Although the transcript of a portion of the January
16 22, 2007 Agenda Item No. 4 is included in the Administrative Record (AR 13046), the DVD viewed
17 by the Board Members who were not present is *not included in the Record*.

18 Moreover, the court reporter was relieved of his duties at the lunch break and therefore did not
19 transcribe the Board Member comments or the continued evidence presented by the Prosecution Team
20 regarding Agenda Item No. 4 pertaining to the issuance of the CDOs. Also, the transcript also fails
21 to include Agenda Item Nos. 5 or 6 on January 22, 2007 that continued the discussion pertaining to
22 issuance of CDOs. *None of that evidence is available in the record* unless the court reviews the public
23 record DVDs of the proceedings which Petitioners have submitted as RJN "E".

24 **May 10, 2007 hearing:** Omission of evidence before the Board occurred again during the May
25 10, 2007 hearing. The hearing transcript and evidence (SAR 21152) is missing consideration of
26 Agenda Item No. 5 noticed as,

27 "Consideration of request for rescission of CDOs to rescind Cease and Desist Orders
28 issued by the Water Board on December 15, 2006 pursuant to the failure of the
specified designated Parties to respond to the Prosecution Team's proposal for Cease
and Desist Orders for individual septic system dischargers in the Los Osos Prohibition

1 Zone, or to appear at the hearings held on December 14 and 15, 2006. The specified
2 Designated Parties have indicated their desire to accept settlement as proposed by the
3 Prosecution Team and approved by the Water Board on December 14, 2006. **The**
4 **Water Board will only consider rescinding Cease and Desist Orders for those**
Designated Parties who have signed the Board-approved settlement agreement,
or those who are present and sign the Board-approved settlement agreement
during this agenda item.” (Emphasis on original)

5 The testimony and argument related to rescission was omitted from the Transcript. (AR 13635)

6 The Administrative Record for May 10, 2007 also omits the evidence and transcript of that
7 portion of the hearing pertaining to Agenda Item 6, entitled “Consideration of How to Proceed With
8 the Seven Remaining Proposed Cease and Desist Orders. (Order No. RB3-2006-1000 [Petitioners
9 Antoinette Gray Payne and Bruce Payne] 1017, 1025, 1029 [Petitioners John and Jan DerGarabedian],
10 1036, 1042 and 1045 [Former Appellants Barry Carney and Katherine Thomas] and all other future
11 enforcement proceedings for individuals who own or use septic systems in the Los Osos Prohibition
12 Zone” (AR 13635-13636).

13 **December 7, 2007 hearing:** Other RWQCB hearings where evidence was considered by the
14 Board directly related to the CDOs but was excluded from the Administrative Record is the evidence
15 and discussions related to the Los Osos Wastewater Project Update presented on December 7, 2007
16 to the RWQCB. The record is missing San Luis Obispo Board Supervisor Bruce Gibson’s request to
17 the RWQCB that it consider rescinding the Cease and Desist Orders (SAR 021293) and the RWQCB
18 Board’s direction to its Staff to schedule a hearing for December 7, 2007 to consider rescinding the
19 CDOs and settlement agreements related to the Prohibition Zone (SAR 021300). Following the
20 December 7, 2007 RWQCB Board expressing receptiveness to rescinding the CDOs and directive to
21 its Staff, a RWQCB Advisory Team report issued on November 8, 2007 advising against vacating the
22 CDOs (SAR 021300). Without benefit of any notice of any agenda with public or closed sessions
23 related to the CDOs from July 7, 2007 through December 7, 2007 , in violation of the Bagley Keene
24 Act (*Govt Code* § 11125.1), the Board and its “advisory team” stated,

25 “(1) There is no compelling reason to rescind the Cease and Desist Orders and
26 settlement agreements at this time. The Orders and settlement agreement do not require
27 any burden from actions now or in the near future . . . The Orders and settlement
28 agreements may have a negative affect on property values, however, this possibility
was known prior to adoption and is not a reason to rescind them. (2) Rescinding the
Orders and settlement agreements would be a good will gesture to the community
considering the positive results of the 218 assessment vote; however . . . recent
comments . . . demonstrate the very real possibility that attempts will be made to derail

1 the project again . . . Therefore, the results of the 218 vote and the County's efforts to
2 construct a wastewater facility are not a guarantee of success . . (3) The Cease and
3 Desist Orders and settlement agreements are being litigated in San Luis Obispo
4 Superior Court. As such, any hearing and discussion by the Water Board may be
inappropriate given the current status of the litigation. (4) The Court's decision
regarding the Cease and Desist Orders and settlement agreements is important to the
Water Board relative to future enforcement actions . . . (SAR 021301).

5 As reflected in the December 7, 2007 Staff Report by the "Advisory Team" that was not
6 supposed to be talking to the Prosecution Team (AR 14275-142777), the Advisory Team stated:

7 "Regarding future enforcement actions, the Prosecution Team has indicated its intent
8 to take enforcement action against all residents simultaneously. The Prosecution Team
9 could issue additional proposed Cease and Desist Orders for Board consideration or
10 could issue Cleanup and Abatement Orders. Any proposed Cease and Desist Order
11 must be considered and adopted by the Water Board itself. As an alternative, Clean-up
12 and Abatement Orders could be issued directly by the Executive Officer or his
13 designee. If the Prosecution Team proceeds with enforcement actions in the future, the
14 Advisory Team may pursue the option of 'paper' hearings which means the
15 enforcement actions would be processed entirely via written submittals and there would
16 be no oral hearings before the Water Board. This is a legally appropriate approach and
17 would facilitate relatively prompt processing of the approximately 4,500 cases." (SAR
18 021301).

19 Petitioners submit that the evidence and testimony presented during the December 7, 2007
20 hearing pertaining to the agenda item to consider rescission, vacation and issuance of more CDOs is
21 relevant in this action. This is especially true for Petitioners Paynes, CDO 1040 and the
22 DerGarabedians, who remain targeted with threatened CDOs or CAOs and have no other means of
23 redress for this continued abusive enforcement process. The agenda items addressing continued
24 prosecution against those Petitioners constitute actions that may be addressed pursuant to *Water Code*
25 §13330, for which Petitioners have exhausted all administrative remedies. In *Windigo Mills v.*
26 *Unemployment Ins. Appeals Bd.* (1979) 92 Cal.App.3d 586, the court found that "The traditional role
27 that mandamus, unlike certiorari is an equitable proceeding designed to achieve justice where no other
28 remedy is available" citing *Mobile Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293 and Section
1094.5(e) found it is proper "to receive relevant evidence of events which transpired after the date of
the agency's decision." (Ibid at pp. 596-597)

29 **III. PETITIONERS ARE ENTITLED TO RELIEF PURSUANT TO 30 *CODE OF CIVIL PROCEDURE* §1094.5 AND *WATER CODE* §13330.**

31 Pursuant to *Water Code* §13330, judicial review under *C.C.P.* §1094.5 of the RWQCB's final
32 order or decision made as the result of a proceeding in which, by law, a hearing is required to be given,

1 evidence is required to be taken, and discretion in the determination of facts is vested in the
2 administrative agency is appropriate. Review under §1094.5 extends to questions of whether the
3 RWQCB proceeded without or in excess of jurisdiction, whether there was a fair hearing, and whether
4 there was any prejudicial abuse of discretion (C.C.P. §1094.5(b)). Petitioners have alleged that the
5 RWQCB actions were in excess of jurisdiction on the following grounds: (1) The CDOs and CAOs
6 were never intended to be issued against individuals such as Petitioners; (2) the RWQCB has
7 improperly failed to proceed under any established formal hearing procedures, and has failed to
8 proceed with hearings that are free from bias or appear to be so; and (3) the RWQCB has proceeded
9 beyond their jurisdiction *ultra vires* by offering piecemeal ad hoc hearing notices and ever-changing
10 RWQCB enforcement proceedings which were for the first time initiated against random individuals
11 to “create the political will” (AR 4867) to force construction of a community wastewater project.
12 Finally, there was no formal fair hearing or process and the piecemeal procedures randomly adopted
13 by the RWQCB and purportedly followed by the RWQCB resulted in numerous violations of
14 Petitioners’ due process and equal protection rights. The evidence overwhelmingly shows prejudicial
15 abuse of discretion and punitive, arbitrary and capricious actions by the RWQCB.

16 **A. The RWQCB’s Arbitrary Enforcement Actions Against Innocent Individuals Is**
17 **an Illegal, Unnecessary, and Unprecedented Action Beyond the Authority of the**
RWQCB, and in violation of Petitioners’ rights to Equal Protection.

18 CDOs, CAOs, and Notices of Violation (“NOVs”) were not intended to be used as an
19 enforcement vehicle to impose unfunded, unattainable mandates on individuals. The RWQCB does
20 not have the authority to issue the challenged orders against property owners and residents of Los Osos
21 in their individual capacity under these circumstances. Published case law and the RWQCB’s own
22 enforcement policies reflect that CDOs are designed for and have been upheld only when issued
23 against commercial polluters and municipalities - not individuals.

24 Further, the Orders are arbitrary and unattainable. The Orders subject the targeted citizens of
25 Los Osos to the arbitrary compliance dates of January 1, 2011 to cease using their septic tanks if a
26 favorable “218 benefit assessment” is not approved by the voters by July 1, 2008; Or, if approved, and
27 there is a “material cessation of progress” on the Community Wastewater System, by January 1, 2011
28 or “within two years of notice by the RWQCB”. These orders subject Petitioners to a arbitrary

1 compliance dates over which they have absolutely no authority to control or power to ensure is
2 achieved. Although the order purports to allow Petitioners to propose an “alternative method” of
3 ceasing unpermitted discharges if the County fails to build by the wastewater system, the RWQCB has
4 stated,

5 “We do not see enhanced or alternative individual onsite systems to be a solution to
6 waste water problems in Los Osos. As staff, we do not plan on recommending
7 approval of such systems to the Water Board . . . Alternative individual systems will
8 not provide compliance with the discharge prohibition [sic]. The basin plan prohibits
9 waste discharge altogether, without making allowances for meeting a particular
10 treatment standard. The basin plan does provide for acceptance to the prohibition
11 which we would recommend the Board granting for a suitable community system, but
12 we will not recommend acceptance for individual alternative systems.” (Pet. Exh. 11)

13 Additionally, the fines imposed are arbitrary and in violation of the right to equal protection.
14 The RWQCB’s orders are even more absurd when the mandatory and discretionary fines they imposed
15 are considered. These fines are in addition to a maximum liability fine of \$5,000 per day for every day
16 since 1988 that septic tanks continued to be used, which the RWQCB continues to maintain can be
17 retroactively imposed. (AR 13777-13778) While Petitioners Wilkersons and Moylans CDOs issued
18 on May 10, 2007 are limited to capped fines of up to \$30 per day, the recipients of CDOs issued on
19 December 15, 2006, face fines of up to \$5,000 per day. Moreover, while the CDO recipients face no
20 monetary mandatory fines under the law, those who entered into a settlement agreement in the form
21 of a CAO are by *Water Code* §13350(e)(1)(A)(B) required, without special findings, to pay a *minimum*
22 mandatory fine of \$500 per day if there is a discharge into a septic tank (and \$100 to day if not), up
23 to \$5,000 per day. Whether the fines are a “mere” \$30 per day to live in one’s home as the RWQCB
24 has ordered against the Moylans and Wilkerson or the \$500 per day the CAO settling parties are
25 required to pay pursuant to the *Water Code* §13350(e) or the \$5,000 per day that can be imposed under
26 the CDOs against the rest of the CDO recipients, *no* individual should be subjected to fines for a
27 condition he or she cannot remedy or control except by vacating his/her home. The enforcement
28 process is so onerous that residents may have no choice but to pay fines or evacuate their home on or
before January 1, 2011, if the RWQCB subjectively determines that there has been a “material
cessation of progress”.

B. The Adjudicatory Hearing Procedures Formulated by the RWQCB on an Ad Hoc Basis During the Challenged RWQCB Enforcement Proceedings Violate Petitioners’ Due Process Rights and Are Not Authorized by Law.

1 State action against individuals is limited by the guarantee of equal protection and due process
2 in the Federal and State Constitutions, which provide that no person may be denied equal protection
3 of the laws (*Cal. Const.*, Article I, §7(a)). The United States Supreme Court has held that it is
4 necessary that “the inexorable safeguard... of a fair and open hearing be maintained in its integrity...
5 The right to such a hearing is one of the rudiments of fair play... assured to every litigant by the
6 Fourteenth Amendment as a minimal requirement.” (See *Ohio Bell Tel. Co. v. Public Util. Com. of*
7 *Ohio* (1937) 301 U.S. 292, 304). “Notice is required before property interests are disturbed, before
8 assessments are made, before penalties are assessed.” (*Lambert v. California* (1957) 355 U.S. 225,
9 228). Procedural due process imposes constraints on governmental decisions depriving individuals
10 of liberty or property interests (*Phillips v. San Luis Obispo County Dept. of Animal Regulation* (1986)
11 183 Cal.App.3d 372, 376). Decisions construing the federal and state due process guarantees generally
12 require that an individual receive notice and some form of hearing before he is deprived of his property
13 or liberty (*Id.*, at 378). In all cases, agency action must be set aside if the action failed to meet
14 statutory, procedural or constitutional requirements (*Citizens to Preserve Overton Park, Inc. v. Volpe*
15 (1971) 401 U.S. 402, 413-414).

16 The RWQCB enforcement proceedings at issue lacked any consistent or solidified structure
17 or procedure, and can be described as nothing less than “chaotic” -- certainly a far cry from a public
18 hearing process with any semblance of due process protection. Respondent RWQCB claims to have
19 opted out of the formal hearing procedures for administrative adjudicatory actions set forth in the
20 Administrative Procedures Act (“APA”), (*Govt. Code* §11500 et seq., *California Code of Regulations*,
21 Title 23, §648(c).) While rejecting the procedural safeguards of formal hearings and the judicial
22 review process set forth in the APA, the RWQCB attempts to circumvent due process constraints of
23 a formal hearing by claiming all hearings are “informal” and governed by its regulations (at *C.C.R.*,
24 Title 23, sections 647-648.8) for informal adjudicative public hearings. However, as evidenced by
25 *Govt. Code* § 11445.20, the issuance of CDOs and CAOs *do not fit* within the circumstances that
26 permit use of informal hearing procedures (i.e., proceedings with no disputed issues of material fact
27 or involving less than \$1,000.). Moreover, *Water Code* §13301 specifically requires that CDOs be
28 issued only after notice and hearing. Therefore, proper notice and a formal hearing are required and

1 these informal hearings conducted without formulation of proper rules and policies to conduct such
2 hearings exceeds their jurisdiction.

3 Petitioners challenge to the RWQCB's final decisions also includes a broader challenge to the
4 agency's conduct, policies, and enforcement procedures for issuance of enforcement orders that do not
5 comply with the APA or due process requirements of the California State and Federal Constitutions.
6 Not only does the RWQCB improperly claim exemption from the APA rules for formal hearings, since
7 all actions conducted by the Board are purportedly "informal" what limited rules they have adopted
8 for "informal hearing" (Title 23, CCR Section 647-648.8) provide that these rules may be waived:.
9 "The presiding officer may waive any requirements in these regulations pertaining to the conduct of
10 adjudicative proceedings including, but not limited to, the introduction of evidence, the order of
11 proceeding, the examination or cross-examination of witnesses, and the presentation of argument, so
12 long as those requirements are not mandated by state or federal statute or by the state or federal
13 constitutions" (23 C.C.R. § (648(d)). Even assuming, *arguendo*, these CDOs could issue on the basis
14 of an informal hearing process, the RWQCB fails to comply with *Govt. Code* §11445.30, requiring
15 the notice of hearing to state the agency's selection of the informal hearing procedure. Notices of the
16 CDO hearings in December 2006 and January 2007 did not include any statement that the hearings
17 were to be conducted informally. In fact, the notice of public hearing specifically stated that the Water
18 Board would hold a **formal** consolidated hearing (Emphasis on Original). (AR14269, 06382, 5051)
19 Petitioners contend that the RWQCB's varied ad hoc and piecemeal procedural requirements did not
20 comply with due process requirements.

21 As stated in *Phillips v. San Luis Obispo County Dept. of Animal Regulation* (1986) 183
22 Cal.App.3d 372,

23 "A hearing granted as a matter of discretion is no substitute for due process... A
24 **provision in the statute or ordinance providing a hearing ensures that the**
25 **response of the administrative entity will be a settled and uniform procedure,**
rather than a haphazard one." (*Id.*, at 380, emphasis added).

26 The gratuitous informal hearing process ordered by the RWQCB did not satisfy due process
27 of law because it was not rooted in and required by the ordinances related to such situation (*Id.*, at p.
28 376). Although *Water Code* §13301 directs that notice and a hearing is required prior to issuance of
any CDO under that section, the RWQCB has attempted to opt out of the formal hearing requirements

1 set forth in the APA. Yet, they have failed to implement or adopt any substitute formal uniform
2 noticed procedures. Petitioners contend that the RWQCB's purported implementation of various
3 procedural notices and orders, in lieu of the proper adoption of uniform formal hearing procedures,
4 is a violation of due process and as such the orders issued pursuant to these hearings should be vacated.

5 **C. The RWQCB's Continuing Enforcement is Contrary to the Intent of AB 2701.**

6 Assembly Bill 2701, *Government Code* § 25825.5, introduced in February 2006 and enacted
7 on September 20, 2006 before the CDOs, CAOs and Novs issued stated:

8 "It is the intent of the legislature in enacting this section and amending section 61105
9 of the Government Code to authorize the County of San Luis Obispo to design,
10 construct and operate a wastewater collection and treatment project that will eliminate
11 these discharges, particularly in the prohibition zone, to avoid a wasteful duplication
12 of effort and funds, and to temporarily prohibit the Los Osos Community Services
13 District from exercising those powers.

14 The Central Coast Regional Water Quality Control Board has imposed substantial fines
15 on the Los Osos Community Services District for failing to make adequate progress
16 toward eliminating these discharges. . .

17 The Los Osos Community Services District is a relatively small staff that has no
18 experience of successfully designing and constructing facilities of the size and type
19 needed to eliminate these discharges."

20 If the LOCSD is unable to design and construct the facilities (and even the County is
21 questioning whether they can do it, even with this special legislation), these individual homeowners
22 certainly do not have the capability to build the wastewater project. The Water Board's continuance
23 of individual enforcement after having been unsuccessful in forcing the LOCSD to build the system,
24 and then fining them out of existence, is patently oppressive. The legislative intent of AB 2701 makes
25 clear that the County of San Luis Obispo has been delegated the responsibility to comply with the
26 mandates of the RWQCB **if** it chooses to do so. If not, the "Random 46" will be saddled with the
27 penalties.

28 The RWQCB acted (and continues to act) with an improper purpose in proceeding with these
enforcement actions against individuals violating the purpose and intent of Assembly Bill 2701 . The
enforcement proceedings against the Random 46, which were admittedly brought by the RWQCB "to
create the political will" (AR 4867) as "the folks of Los Osos are really not capable of addressing these
issues with their wastewater disposal in a rational way," (AR 4873) was declared by Board Members
Young and Shallcross, while expressing outrage to the voter-approved Measure B affecting the prior

1 Wastewater Project (AR 4868-4873). The enforcement proceedings had the intended and successful
2 impact of “changing the political will” of the citizens, resulting in a successful vote to assess
3 themselves a second time for the Wastewater Project.⁴ Although the RWQCB indicated a willingness
4 to reward the community for overwhelmingly voting to assess themselves in order to vacate the CDOs
5 during a public hearing on September 7, 2007 of the Los Osos Wastewater Project (coupled with the
6 plea of San Luis Obispo Supervisor Bruce Gibson to vacate the CDOs) (SAR 021281-021294), the
7 RWQCB has continued the enforcement process and in fact has taken ongoing actions to strengthen
8 its enforcement powers against individuals with onsite septic systems.⁵

9 **D. Petitioners’ Were Not Given Proper Notice of the Hearings, Procedures Nor**
10 **Evidence Against Them.**

11 *Water Code* § 13301 requires notice and a hearing before issuance of a CDO. But even
12 where a statute is silent as to notice, due process requirements mandate adequate notice and
13 opportunity to be heard. It is a fundamental right guaranteed by our Constitution:

14 Due process of law requires that defendants be afforded notice of
15 proceedings involving their interests and an opportunity to be heard.
16 Basically, this requires ‘ . . . notice reasonably calculated, under all the
17 circumstances, to appraise interested parties of pendency of the action
18 and afford them opportunity to present their objections.’ [*Mullane v.*
19 *Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314, 70 S.Ct.
20 652, 657; and see *Mennonite Board of Missions v. Adams* (1983) 462
21 U.S. 791, 795-798, 103 S.Ct. 2706, 2709-2711] Rutter Group § 5:3

22 “Notice is required before property interests are disturbed, before assessments are made, before
23 penalties are assessed.” (*Lambert v. California* (1957) 355 U.S. 225, 228, emphasis added).
24 Petitioners were not served or provided proper notice of the hearings, varying RWQCB orders
25 regarding procedures and guidelines, and the evidence or objections before the CDOs issued. The

26 ⁴Although Petitioners contended the RWQCB engaged in illegal electioneering pursuant to *Elections*
27 *Code* §§18540 and 18501, the RWQCB’s demurrer to those allegations was sustained. (RJN “G”)

28 ⁵ During the pendency of this Petition challenging the unrestrained powers of the RWQCB, it has
continued to expand its powers over existing septic systems by recently adopting Resolution R3-2008-0005.
(Pet., ¶43) The Water Basin Amendment billed by the Water Board staff as merely clarifying “vague”
language and improving “consistency” adopted by the RWQCB on May 9, 2008 not only reaffirmed
Resolution 83-13 but also was adopted without proper notice or CEQA environmental review regulations
affecting, prohibiting, and eliminating septic tank use throughout the rest of San Luis Obispo County and
seven other counties. Petitioners submit that R3-2008-0005 will be the Resolution “83-13” to haunt the rest
of septic tank users in Region IX.

1 RWQCB's defective, untimely, and improper and inadequate attempts to serve Petitioners (by posting
2 on their website rather than by mail) notice containing misleading and erroneous information, as well
3 as their failure to give notice at all to certain parties, is a clear violation of due process.

4 Not only must notice have been adequate, but there must have been enough time allowed for
5 the parties to prepare or present their opposition to the Prosecution Team's belatedly filed, and
6 constantly changing documents, at least in accordance with the procedural guidelines periodically
7 issued by the RWQCB. Due process mandates that all "notice must be in a reasonable time period"
8 is codified throughout all areas of the law as it springs from the U.S. and California Constitutions. It
9 logically follows that any changes to notice given must also be made in a reasonable time as well. (See
10 Rutter Group § 13:122; CA Rules of Court Rule 29(a)(2), et al.)

11 In this case, Petitioners and the randomly selected individuals -- including those who were
12 without benefit of a computer internet access -- were not served or provided the written documentation
13 from the RWQCB, but were nevertheless required to obtain the evidence being used against them from
14 the website of the RWQCB or from review of the records at the RWQCB office. Unfortunately, the
15 website then containing the documents of the RWQCB Prosecution Staff was often corrupted and
16 therefore inaccessible periodically throughout this enforcement process. Furthermore, the documents
17 were not made available at the RWQCB offices as required. The RWQCB wrongfully takes the
18 position that their posting of notice of their actions on their website constitutes "service of notice" in
19 this adjudicatory proceeding against Petitioners and the other randomly selected individual property
20 owners.

21 None of the Petitioners have agreed to accept service of process by email or by RWQCB
22 website posting, and no justification for service of process by those means exists in the *Water Code*,
23 *Government Code*, *California Code of Regulations*, or otherwise. When the RWQCB has elected to
24 serve notices and rulings by mail, it has not served the documents on all Petitioners, or even those who
25 have specifically requested such service in writing. Failure to serve prosecution documents or the
26 undated and unsigned RWQCB order to Petitioners and failure to include any proof of service or notice
27 (when they bothered to serve by mail) affording the additional five days for mailing normally required
28 under *Code of Civil Procedure* §1013.

1 Even the CDO's kept changing, without prior notice to Petitioners and an opportunity for them
2 to review each change. For example, as of December 1, 2006, less than 10 days from the date of the
3 December hearings, the Prosecution Team recommended a new and different CDO be issued against
4 Petitioners. (AR 11482) Again, Petitioners were not served with a copy of the amended proposed
5 CDO, much less proper and sufficient notice. Even this proposed CDO -- again, not properly served --
6 was different than the CDO eventually adopted.

7 Due to the Prosecution Team's failure to meet the deadline for submission of their case, the
8 RWQCB issued a Revised Notice of Hearing resetting the hearing for December 14 and 15, 2006 and
9 requiring all documents to be submitted by Petitioners by November 15, 2006. The Revised Notice
10 of Public Hearing requiring the Petitioners to submit their documents by November 15, 2006 was
11 posted in the United State Mail on October 16, 2006 to some but not all of the Petitioners and other
12 targeted individuals. For example, while notice was mailed on October 16, 2006, posted to William
13 R. Moylan by the U.S. Mail, the RWQCB neglected to serve his wife and co-tenant Beverley DeWitt-
14 Moylan with any notice. Beverley DeWitt-Moylan has repeatedly requested orally and in writing
15 notice and a right to be heard separately from her husband. The record included copies of portions of
16 Beverley DeWitt-Moylan's April 28, 2006 and May 4, 2006 written requests for notice and an
17 opportunity to be heard. The RWQCB has repeatedly engaged in gender bias and deprivation of due
18 process by failing and refusing to serve Beverley DeWitt-Moylan and other spouses of targeted
19 individuals and by failing to allow both spouses equal time in presenting their defense.

20 **IV. RESOLUTION 83-13 IS INVALID AS IT WAS IMPROPERLY NOTICED,**
21 **ADOPTED, INTERPRETED AND AS APPLIED TO PETITIONERS', IS**
22 **UNENFORCEABLE.**

23 Petitioners contend that their challenge to Resolution 83-13 as applied to them is ripe and
24 timely, as set forth in Section IVA, below. Petitioners further contend that Resolution 83-13 was
25 adopted without proper publication and notification to the public and affected property owners as
26 required by law. Moreover, the "Resolution 83-13" claimed by the RWQCB to be adopted on
27 September 16, 1983, does not appear to be the same resolution that was attached to and approved by
28 the State Water Resources Control Board ("SWRCB") as Resolution 84-13. 83-13 is also inconsistent
on its face and unenforceable as applied. Furthermore, any resolution authorizing the RWQCB to order

1 a water basin amendment for an *immediate* prohibition of discharge, without a prior review and
2 hearing before the SWRCB, violates *Water Code* §13245, as set forth in Section IV B, below. In
3 addition to the irregularities involved in its adoption, the resolution is now being interpreted and
4 enforced differently than originally intended. Petitioners contend that the Water Board's interpretation
5 and application of Resolution 83-13 violates the water quality goals, standards and objectives set forth
6 in the *Water Code* which is addressed in argument IV C, below.

7 **A. Petitioners' Challenge to Resolution 83-13 as Applied Is Timely and Ripe for**
8 **Consideration by the Court.**

9 Now that the Water Board has issued CDOs enforcing Resolution 83-13 against the Random
10 46, review of Resolution 83-13 as applied to Petitioners and others is ripe for review. However, over
11 the last two decades and during the hearings to challenge CDOs to enforce 83-13, the RWQCB has
12 refused to hear any arguments or challenges to the legality of Resolution 83-13. As reflected
13 repeatedly during the hearings and in the Notice of Public Hearing for the enforcement order,

14 "The scope of the hearing will be limited to the proposed enforcement actions against
15 selected individual property owners or residents of Los Osos and Baywood Park. The
16 only issues before the Water Board in this proceeding are those directly relevant to the
17 determination of the following cause:

18 (1) Are individual property owners or residents of Los Osos discharging
19 waste in violation of the prohibition; and

20 (2) Is the proposed remedy for violation of prohibition appropriate?

21 Validity of the prohibition is **not** an issue in this hearing. The prohibition
22 against discharges from sewage disposal systems was added to the Regional Water
23 Quality Plan for the Central Coast Region pursuant to Section 13243 of the *Water Code*
24 in 1983 and became effective on November 1, 1988. The time for challenging the
25 prohibition has long since expired. Therefore, the Central Coast Water Board may
26 exclude evidence or comments related to the propriety of the prohibition. Any person
27 desiring to submit such evidence or comments will be required to justify its relevance
28 to the issue in the hearing." (AR 5545, 6383 and 11467)

Further, in their Notice of Continued Hearing to January 22, 2007, Respondents went so 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." (AR 12721) However, Respondent
had no authority to limit any challenges to the enforceability of Resolution 83-13 on appeal, and such
statements improperly prevented any challenge to the validity of Resolution 83-13 on the record.

1 When the RWQCB issued Cease and Desist Orders against randomly selected citizens in Los
2 Osos, those recipients were forced to file an immediate appeal to the SWRCB to meet a 30 day statute
3 of limitations; and when their appeal was rejected, a writ of mandate had to be filed with the Superior
4 Court another 30 days later, as required by *Water Code* § 13330. If a writ petition is not timely filed,
5 the CDO recipients cannot later object to the issuance of the CDOs when fines or orders to vacate the
6 premises issue, or criminal actions commence to enforce the CDOs. Just as the Regional Board claims
7 it is too late to object to Resolution 83-13 (that they now interpret as rendering *all* of Los Osos'
8 permitted septic tanks illegal), a CDO recipient could expect the same claim from the RWQCB that
9 it is too late to challenge a CDO, even when it is enforced **years later**, unless the recipient proceeds
10 through this expensive and time-consuming writ process. The RWQCB maintains absent an aggrieved
11 party's compliance with short appeal deadlines, presentation of all facts and arguments during the
12 hearing to the RWQCB, and again to the SWRCB within 30 days of the hearing, any challenge is
13 barred for failure to exhaust all administrative remedies.

14 The California Supreme Court has held that the statute of limitations on a challenge to enforce
15 a regulation (such as Resolution 83-13) actually begins to run when the cause of action accrues through
16 enforcement against an individual. (See *Dillon v. Board of Pension Commissioners* (1941) 18 Cal.2d
17 827. Until *Water Code* § 13330 was amended in 1996, any party or aggrieved affected could have filed
18 a challenge at any time to the reasonableness and validity of a decision or order of the Regional Board
19 in any judicial proceedings brought to and for such a decisional order, or for other civil remedies.
20 Since Respondent bases its Cease and Desist Orders on Resolution 83-13, Petitioners are entitled to
21 challenge Resolution 83-13 as applied at the time the CDOs to enforce it are issued. Due process has
22 been and would continue to be seriously undermined if these Petitioners, burdened with adopted and
23 issued CDO's, are not allowed to challenge a resolution upon which those CDO's are based,
24 particularly now, decades after adoption of 83-13, the RWQCB decides to engage in an overt act of
25 enforcement.

26 While arguing Petitioners have failed to timely appeal 83-13 to exhaust all administrative
27 remedies, the RWQCB ironically argued to this court during the January 14, 2009 hearing (RJN, "H")
28 that Petitioners' inclusion in their writ of their CEQA challenge to the Water Basin Plan Amendment

03-2008-0005 (newly adopted on May 9, 2008) was “premature” because it is not challengeable until the SWRCB and the Office of Administrative Law (“OAL”) approve it. In response, Petitioners note that pursuant to *Gov. Code* § 11353, water basin plans are exempt from the normal OAL approval requirements (SAR 020105-020108) and the SWRCB has failed to comply with *Water Code* §13246 to act within 60 days to approve or disapprove this amendment or the related R3-2009-0012 adopted on 3/20/09. The RWQCB’s argument that there can be no challenge nor harm arising from a RWQCB resolution until after the resolution is effective (RJN “H”, 1/14/09; Reporter’s Transcript, p. 9:1-25) runs contrary to the RWQCB’s repeated assertions that it is too late for those harmed by Resolution 83-13 to challenge it as review was not timely sought within 30 days pursuant to *Water Code* § 13330. The RWQCB has repeatedly stated that one cannot wait to be harmed by a resolution to challenge it, yet the RWQCB has also repeatedly stated they are not seeking fines or eviction right now under those CDOs, so a challenge to the CDO’s is premature. If Petitioners let the CDOs stand against them without filing a timely appeal to the SWRCB and proceeding with this writ action, Petitioners could be precluded from challenging these CDOs. If Petitioners had not filed their writ of mandate petition within 30 days of SWRCB rejection they most assuredly would have been accused of failing to exhaust administrative remedies.

Even worse for CAO recipients, *Water Code* § 3304 allows the RWQCB to take whatever immediate actions they require to remediate without a hearing , with the costs constituting a lien on the CAO’s property. Thus, the RWQCB takes inconsistent positions that it is “too late” to challenge Resolution 83-13 water basin plan, but it is “premature” for an aggrieved party to challenge the most recent RWQCB water basin plan amendment, even under CEQA, which requires early review.

B. Petitioners Contend That Due to Irregularities by The Agencies, The Version of Resolution 83-13, Which the RWQCB Now Seeks to Enforce, Was Not Properly Adopted by the RWQCB or The SWRCB.

1. Notice of the RWQCB’s Hearing Was Inadequate and Therefore Improper.

On July 28, 1983, Notice of Public Hearing was filed and published to provide notice of the Sept 16, 1983 hearing to consider amendment to Chapter 5 of the Basin Plan as follows:

“Chapter 5 of the Basin Plan specifies in part, certain conditions or areas where the discharge of waste, or certain types of waste, will not be permitted. The proposed amendment of Chapter 5 will prohibit discharges from new and existing individual

1 disposal systems upon amendment to said plan in area described as follows:

2 'Within the boundaries generally described as real properties situated within and near
3 the Los Osos/Baywood Park area, roughly bounded to the West by the bay shoreline,
4 the south, by the foothills of the Irish Hills; to the east, by Clark Valley Road extending
to Warden Lake, to the north, by the creek draining Warden Lake, joining Los Osos
Creek and back to the bay shoreline.'

5 The Regional Board *will consider localized prohibition areas within this rough*
6 *boundary description. The Board will also consider specifying conditions of discharge*
7 *other than prohibition with the general purpose of the Basin Plan Amendment and*
complimentary to the specific proposed rules under consideration". (Italics added) (AR
9699)

8 The purpose of Resolution 83-13 was clearly to qualify the Wastewater Project for an "A"
9 priority for financing by creating "findings" of significant and documentary public health hazards
10 involving demonstrated contamination. The aforementioned notice referred the public to a staff report
11 (AR 9700). The Staff Report, dated September 16, 1983 (included in the record by Designated Parties
12 at AR 9681-9683) has attached to it an unsigned second draft of the resolution, apparently modified
13 after the 9/16/83 hearing. The staff report even states

14 "The time and place of this hearing has been duly noticed in the Telegram Tribune.
15 Copies of the Public Notice and Notice of Filing Proposed Resolution, environmental
16 checklist and staff report attachments 1, 2, 3 and 4, respectively, were sent out to all
17 parties concerned on August 12, 1983. *A second draft of the resolution and staff report*
have been prepared to avoid unnecessary duplication, a staff report, errata and
amendment summary has been prepared and circulated (Attachment 5)" (Italics added)
(AR 9682)

18 After repeated requests to the RWQCB, the *first draft* and staff report for of Resolution 83-13
19 and mapped areas of localized prohibition areas, have not been produced and is apparently no longer
20 existent. From what record can be found, it is clear that there are admitted irregularities in the
21 adoption of the Resolution 83-13 that the RWQCB claims was adopted by the SWRCB with its
22 Resolution 84-13. There has been, however, a plethora of maps of the purported prohibition zone and
23 evidence of its changing boundaries that have been referenced in the record as the map of the
24 Prohibition Zone (AR 9692, 9736, 9680, 9689, 9694 and 9693), including the one that has now
25 appeared (without the original Bate Stamp) in the prosecution documents the first time in the Record
26 at AR 397.⁶ The first draft of the Resolution which was apparently the document publicly noticed,

27 _____
28 ⁶Petitioners contend that a signed and duly adopted Resolution 83-13 was not part of the Prosecution
Team's documents. It appears that some AR documents have been altered, or documents not previously
submitted as Prosecution Team documents have been added. Notably, the few Administrative Record

1 has not been located. As stated above, the staff report admits that it is only attaching the second draft
2 of the resolution to avoid unnecessary duplication (AR 9682) The notice that localized prohibition
3 areas within the generally described entirety of Los Osos, could be subjected to the Prohibition not the
4 entire area and the lack of notification that in 1988 their legal septic tanks would be rendered illegal
5 render 83-13 invalid.

6 **2. Records Pertaining to Adoption of Resolution 83-13 Are Irregular,
7 Incomplete and Inconsistent.**

8 The original noticed and proposed 83-13, in addition to having undefined "localized"
9 prohibition areas within the rough boundary was supposed to allege specified conditions of discharge
10 "other than prohibition" (AR 9699). 83-13 provides, in pertinent part:

11 "8. Discharges of waste from individual and community sewage disposal systems
12 are prohibited effective November 1, 1988, in the Los Osos/Baywood Park area, and
13 more particularly described as:

14 "Groundwater Prohibition Zone

15 *(legal description to be provided for area prescribed by Regional Board)*

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

20 *"Discharges from individual or community systems within the Prohibition area in
21 excess of an additional 1,150 housing units (or equivalent) are prohibited, commencing
22 with the date of State Water Resources Control Board approval." (Resp. Item 31)
23 (Emphasis added.)*

24 As reflected by language of Paragraph 8, cited above, failure to comply would impact
25 additional individual and community sewage disposal systems. Petitioners contend this prohibition
26 was to apply to the additional 1,150 new housing units. Even more confusing, is the inconsistent
27

28 documents located at AR 0391 through 0397, in which the signature of then Executive Officer Kenneth Jones
now appears, are missing the telltale Bates stamp numbers contained within the Water Basin Plan submitted
by RWQCB as their "Prosecution Team Documents". (AR 9673-9822) Also, attached to the Basin Plan, at
old Bate Stamp number "009309" (AR 9679), is an *unsigned* Resolution 83-13. The unsigned "resolution"
(AR 9675-9679) was the document used by the Prosecution Team, but Petitioners contend it is not the
resolution adopted or approved by the SWRCB.

Moreover, the map attached as old Bates Stamp "009310" and at AR 9680, shows a boundary
different than the map that is now attached at "AR 397", and is not the map that was attached to the
Prosecution Team's documents nor the map originally attached to Resolution 83-13. Petitioners contend that
the Prohibition Zone has remained undefined since it was first proposed in 1983.

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1 language contained within the resolution itself. For example, while the resolution adopts a finding that
2 “discharges of waste from new and existing individual disposal systems which utilize subsurface
3 disposal in the affected area will result in violation of water quality objectives; will impair beneficial
4 uses of water; will cause pollution, nuisance or contamination; and will unreasonably degrade the
5 quality of waters of the state,” it makes the inconsistent finding that an additional 1,150 housing units
6 will have no impact or increase the purported degradation.

7 The more egregious modification to this RWQCB “adopted” resolution occurred when it was
8 thereafter sent to the SWRCB for approval. As reflected in the September 27, 1983 Memorandum
9 from the RWQCB to the SWRCB (AR 9674, 9697), the SWRCB was notified and requested to make
10 note of rewording of Resolution of 83-13 (AR 9677), and was provided suggested alternate prohibition
11 language (AR 9697). As admitted in Kenneth Jones’ Memorandum to the SWRCB dated September
12 27, 1983 (AR 9673-9674), that “this version of a prohibition of waste discharge differs from the one
13 proposed in the draft resolution shown in the ‘blue sheet’ Agenda Item No. 6.” As further stated by
14 Mr. Jones, “It is important to note the development of the rewording of Resolution 83-13. The adopted
15 resolution contains wording which would call for consideration of a *prohibition of waste discharge*
16 *from future dischargers* if any of the dates established in Resolution 83-13’s time schedule are
17 violated.”

18 As indicated above, the RWQCB requested the SWRCB add to their Resolution 84-13 the
19 following proposed “alternative” or “substitute” language (AR 9697):

20 “If the Board holds a hearing and adopts an immediate prohibition as described above,
21 the prohibition is effective as of the date of the Regional Water Quality Control Board
22 adopts a prohibition of discharge from additional individual community sewage
disposal systems”. (And see, AR 9688 where this new proposed language is identified
with a check mark in the margin)

23 This “substitute” or “alternate” language proposed by the RWQCB was not adopted in
24 Resolution 84-13 by the SWRCB. (AR 560-562) Even if the SWRCB had delegated to the RWQCB
25 the power to adopt an immediate prohibition such a delegation would violate *Water Code* § 13245,
26 which specifically directs that a RWQCB water quality control plan, or a revision thereof, cannot
27 become effective until it is approved by the SWRCB. Therefore, it appears that the RWQCB acted
28 in excess of their powers granted to them in ordering an immediate prohibition of discharge from

1 existing, as opposed to additional, individual and community sewage disposal systems, particularly
2 without SWRCB review and approval. The SWRCB resolution does not contain the proposed
3 language granting the RWQCB the ability to hold a hearing and adopt an immediate prohibition. The
4 RWQCB also acted beyond its jurisdiction in imposing the prohibition on residential systems existing
5 before the additional 1,150 housing units were authorized.

6 **C. The RWQCB's Interpretation of Resolution 83-13 and its Application to**
7 **Petitioners Violates the *Water Code*.**

8 Petitioners' challenge to the RWQCB's enforcement against individuals of Resolution 83-13
9 as applied and as recently interpreted to render all septic tanks illegal and to disallow any discharge
10 into the water basin. This interpretation and application violates water quality objectives to recharge
11 the basin and recycle water. (See *Water Code* § 13241 requiring water quality objectives to consider
12 economics and the need to develop and use recycled water. See also 1/22/07 hearing transcript,
13 AR013121 through 013123.)

14 The CDOs are fatally flawed as they are based upon enforcement of the RWQCB's latest
15 interpretation of Resolution 83-13, which they claim prohibits any discharge, not only from existing
16 legally permitted individual and community systems, but any discharge even if it is clean water
17 (1/22/07 RWQCB Hrg Transcript, at 73:11-75:24 AR103121-013123). Moreover, even though the
18 mandated community Wastewater Project will violate 83-13, as any community system that
19 "discharges" is a violation, the RWQCB will grant an exemption from 83-13 if the community
20 wastewater system is approved by them. Recycling by discharging into the basin is exactly what any
21 community Wastewater Project will do and should do in order to recharge the basin to benefit the
22 entire community. Prohibition of such recharge by Resolution 83-13 is therefore contraindicated. The
23 CDOs provide that if the community Wastewater Project is not constructed then the CDO recipients
24 will have to construct approved individual onsite systems that are prohibited from discharging into
25 the water basin. It is imperative that whatever system is installed (whether it be onsite or community
26 wide), that it recharge the water basin not only to provide protection from salt water intrusion but also
27 to replenish the community's water resources. Proceeding with the challenged recent interpretation
28 of 83-13 to prohibit any discharge of water regardless if it qualifies as "waste" or not while mandating
that even a community Wastewater Project cannot discharge without exemption from 83-13 is

1 ludicrous.

2 As reflected in Exhibit 11 to the Petition (SAR 021218-021220), the RWQCB has no intention
3 of approving any individual alternative systems while mandating that CDO recipients must have them
4 and ordering fines if they do not.

5 Petitioners contend that a signed and duly adopted Resolution 83-13 was not part of the
6 Prosecution Team's documents. The lack of a signature or the original Bate Stamp numbering
7 indicates that Respondent has *added* to the Administrative Record (at AR 0391) a signed document
8 that is not attached to the Basin Plan and was not included in the Administrative Record as part of the
9 Prosecution Team's documents.

10 **V. THE RWQCB'S ENFORCEMENT HEARING PROCESS WAS UNFAIR.**

11 The court has directed Petitioners to brief and argue this long and arduous challenged
12 enforcement process in 30 pages or less. Given the number of hearings, orders, notices, orders
13 changing procedures, hearings that started and ended and restarted all over again, and the ever-
14 changing CDOs even after issuance, this is a daunting task. Petitioners intend to submit before, or
15 introduce at trial, identification of numerous procedural defects and arbitrary and capricious actions
16 and events that make clear the unfairness of the process to which Petitioners were subjected.

17 As reflected in the Administrative Record, the RWQCB's enforcement process has been
18 conducted and prosecuted in an inherently unfair and chaotic fashion. For example, although prior
19 preliminary orders indicated the proceedings would be conducted numerically, the RWQCB's
20 November 21, 2006 procedure-setting order stated individual proceedings for each proposed cease
21 and desist order were to be considered in alphabetical order by last name. The order finally setting
22 forth how the proceedings would be conducted (posted after Petitioners filed their first Petition for a
23 Writ of Mandate challenging the RWQCB's procedures) stated:

24 "Any person named in a proposed Cease and Desist Order may, upon
25 a showing of property-specific relevance and materiality and with the
26 approval of the Chair, incorporate by reference any testimony offered
27 by other persons named in proposed cease and desist orders...
28 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." (AR 11465)

1 However, as the individual proceedings for each CDO began, the RWQCB summarily made
2 rulings after each and every recipient presented their 15-minute presentation during their individual
3 subhearing. Thus, Petitioners whose subhearings were held first (those with last names beginning with
4 A, B, etc.) were denied the right to incorporate by reference the evidence and testimony presented by
5 other individuals over the course of the hearings. For example, Petitioners Chris and E.E. Allebe were
6 allowed to present their 15 minutes of testimony and were then issued a CDO. Petitioner Cinthea T.
7 Coleman was then allowed to present her 15 minutes of testimony, and could only incorporate the
8 evidence presented by Petitioners Allebe, and was then issued a CDO, and so on. Each of the
9 Petitioners, regardless of their placement in the RWQCB's set order, were purportedly entitled to
10 incorporate by reference the testimony of all other Petitioners, including those who presented evidence
11 and testimony December 15, 2006, January 22, 2007, and May 10, 2007. The RWQCB's procedures,
12 actions and orders at the conclusion of each individual subhearing, were violative of the RWQCB
13 November 21, 2006 procedural order and previous preliminary orders for all Petitioners to jointly
14 present their case by incorporation by reference.

15 When formed, the Prosecution Team consisted of four out of six most senior staff members
16 including Senior Legal Counsel, Lori Okun - - the one's who most regularly advise the RWQCB
17 members the most - - were the Prosecution Team. During the prosecution, Roger Briggs relinquished
18 his regular advisory position as Executive Officer to his next in line, Michael Thomas and left on
19 sabbatical before he could provide any live testimony during the December 8, 2006 subhearings.
20 Given the unavailability of Roger Briggs to testify or to be cross-examined during the hearings when
21 CDOs issued, renders the orders invalid. (*Manufactured Home Communities, Inc. v. County of San*
22 *Luis Obispo* (2008) 167 Cal.App.4th 705.)

23 Due process is guaranteed by the U.S. Constitution and its provisions should be interpreted
24 broadly, not narrowly. From a procedural prospective, this constitutional right means simply that the
25 government must ensure a fair decision making process before depriving an individual of life, liberty
26 or property. Due process always requires a relatively level playing field with a fair trial and a fair
27 tribunal before neutral or unbiased decision makers. (*Nightlife Partners v. City of Beverly Hills* (2003)
28 108 Cal.App.4th 81, 90.)

1 The record is clear that there has been no separation between the level advisors who are
2 prosecuting this action the RWQCB Board Members, their “advisory team”. There is no Chinese wall
3 and it is clear from the record that regardless of the Memorandum purporting to keep the “teams”
4 separate (AR 14275-277), the Prosecution and the advisors, together with the Board, are acting in
5 concert to prosecute these individuals. By the time the Board ruled on the LOCSD motions for
6 dismissal for violation of *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810 and the pending
7 *Morongo Band of Mission Indians v. SWRCB* (2008) 45 Cal.4th 731, it was clear that the adjudicative
8 arm of the government had not been kept separate from the prosecution arm in these proceedings. In
9 this case, four RWQCB Board members crossed the line by straying from their role as adjudicators and
10 openly directing individuals to be prosecuted during the January 5, 2006 hearing agendas. In the case
11 of *Quintero v. City of Santa Ana*, supra, at p. 810, the appellate court held that it is violative of due
12 process when the city attorney who routinely advises the city’s personnel board also prosecutes before
13 that board. In the case at bar, Ms. Okun, who was the primary senior counsel identified in agendas and
14 regularly advises the RWQCB, including providing briefs on April 19, 2006 to Chairman Young
15 regarding her legal analysis (AR 21162-21197) regarding CEQA challenges to these CDO proceedings
16 (SAR 21155-21161) and providing the April 19, 2006 responses to technical evidence and comment
17 submittals with regard to CDOs (AR 21155-21161).

18 Lori Okun’s departure from the Prosecution Team on May 4, 2006, after conclusion of the
19 prosecution in the 12 hour marathon April 28, 2006 hearing, the RWQCB could not “unring the bell”
20 of the bias and unfairness of the RWQCB being advised by the same staff and attorney as the
21 Prosecution Team. Following the resignation, the RWQCB instead of dismissing the proceedings,
22 issued a ruling stating the Prosecution Team would start over again and all previous evidence,
23 testimony and documents presented by the Prosecution Team to the RWQCB was stricken from the
24 record and the minds of the RWQCB Board Members and the matters set for hearing before those
25 same RWQCB Board Members. In *Morongo*, supra, 45 Cal.4th 731, the court reaffirmed that in
26 administrative adjudicative proceedings, the constitutional guarantee of due process of law requires
27 a fair tribunal. (*Withrow v. Larkin* (1975) 421 U.S. 35, 46.) A fair tribunal is one in which the judge
28 or other decision maker is free of bias for or against a party. (*People v. Harris* (2005) 37 Cal.4th 310,

1 346; See, *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025.) When due process
2 requires a hearing, the adjudicator must be impartial.”) The *Morongo Court* declined to adopt a per
3 se rule where an agency attorney was simultaneously exercising advisory and prosecutorial functions
4 in unrelated actions finding more had to exist under the totality of the circumstances on a case by case
5 review. In this case, the totality of the circumstances include the RWQCB’s restart of the process after
6 hours and hours of hearing and conclusion of the Prosecution Team’s evidence on April 28, 2006.

7 Once the line was crossed at the early hearings, Petitioners submit that it is unrealistic to
8 believe that the same board members, could erase from their minds the Prosecution Team’s arguments
9 and their trusted senior advisor’s arguments while wearing their prosecutorial hats. Even the
10 RWQCB’s selection of an attorney from the SWRCB’s newly created office of enforcement to retry
11 the hearings did not cure the unfairness of prosecution before the same board and their trusted staff.
12 Petitioners contend that the prosecution was irreversibly tainted and could not be resurrected by
13 starting over before the same board. Even after the departure of Ms. Okun and the sabbatical leave
14 of Roger Briggs, relieving him from the live testimony his written orders, actions, arguments and oral
15 testimony during the January through May hearings, were indelibly part of the record, albeit with no
16 opportunity to cross-examine.

17 The bulk of the CDO’s were issued on December 15, 2006. Prior to the December summary
18 hearing, the RWQCB effectively coerced Petitioners DerGarabedians to relinquish their right to a
19 CDO hearing by not allowing them to address settlement or revisions to the CAO unless they first
20 agreed to accept the CAO Settlement Agreement in whatever form the RWQCB issued it. (AR 11672;
21 11734-11736)

22 Respondent RWQCB also improperly withheld the identities of the original group of targeted
23 individuals, resulting in severe limitations on Petitioners’ ability to provide a joint defense against
24 issuance of CDOs.

25 Moreover, The RWQCB also failed to consider (or include in the record) the documents
26 submitted during the hearings. For example, at the May 10, 2007 hearing, a document was submitted
27 to be included in the record which included 111 challenges to the Water Board’s enforcement actions.
28 A copy of that letter is attached to the SAR 021199-21217. For any lay person or even an attorney to

1 present in the allotted 15 minutes each and every statute, violation, code of regulations and argument
2 to preserve all appeals is virtually impossible. This is one of the reasons this Petition challenges the
3 process applied to these Petitioners that were fortunate enough to get a hearing, unlike the rest of the
4 citizens who are just threatened with blanket clean-up and abatement orders with both mandatory and
5 discretionary fines of up to \$5,000/day in addition to the retroactive fines of \$5,000/day which the
6 RWQCB claims can be imposed.

7 **VI. The RWQCB' ACTIONS WERE ARBITRARY AND CAPRICIOUS.**

8 All of Petitioners and other proposed CDO and CAO recipients have done nothing wrong.
9 They simply live in Los Osos. The RWQCB Enforcement Proceedings against Petitioners were
10 punitive, unsupported by relevant evidence, and bore no actual nexus to improving the water in Los
11 Osos. The RWQCB insist on going beyond what is practical and possible, and have issued orders
12 requiring cessation of all discharges by January 1, 2011. Such orders do not have anything to do with
13 improving the quality of water, and instead merely serve to punish Petitioners for the past failure of
14 the LOCSD and County. If the community vote fails or the County does not act in accordance with
15 the time lines and mandates set forth in the issued CDOs and CAOs, it is these 46 homeowners who
16 will be compelled to move from their homes due to the exorbitant fines attached to the RWQCB's
17 orders. The CAOs and CDOs impose drastic ramifications on these innocent Petitioners, stating:

18 "FAILURE TO COMPLY WITH PROVISIONS OF THIS ORDER
19 MAY SUBJECT THE DISCHARGER TO FURTHER
20 ENFORCEMENT ACTION INCLUDING ASSESSMENT OF CIVIL
21 LIABILITY UNDER SECTIONS 13268 OR 13350 OF THE WATER
22 CODE AND REFERRAL TO THE ATTORNEY GENERAL FOR
23 INJUNCTIVE RELIEF AND CIVIL OR CRIMINAL LIABILITY."

24 The RWQCB has interpreted Resolution 83-13 as prohibiting any and all discharges from
25 individual or community wastewater collection and treatment systems. (AR 13121-1323) Thus, the
26 community system mandated by the CDOs and CAOs is equally violative of the RWQCB's own
27 interpretation of Resolution 83-13. Further, pursuant to *Public Contracts Code* § 4477, any person
28 subject to a CDO issued pursuant to *Water Code* §13301 is prohibited from entering into any contract
to provide goods or services to 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. None of the
Petitioners nor any other citizen should be subjected to what Petitioners have endured to date.

1 **A. The RWQCB has not Provided any Evidence of Violations by Any Individual**
2 **Property Owners or Individual Septic Systems.**

3 With regard to the **actual scientific evidence** provided in support of the contention that each
4 of the septic tanks has violated Resolution 83-13, Petitioners contend that there is none. The RWQCB
5 failed to provide any admissible evidence to support their claims that these individual Petitioners have
6 discharged or are discharging waste in violation of the Water Basin Plan or the Porter-Cologne Act.

7 At the enforcement hearings, the Prosecution Team's evidence against each individual septic
8 tank consisted of pointing to a map to show that the Petitioner owned property within the Prohibition
9 Zone. The mere location of Petitioners' properties was considered sufficient evidence for issuance of
10 CDOs and/or CAOs. However, CDOs and CAOs were not intended to be used as an enforcement
11 mechanism absent a showing that each individual's system is actually discharging waste. *Water Code*
12 §13280, specifically addressing individual disposal systems, states:

13 “A determination that discharge of waste from existing or new
14 individual disposal systems or from community collection and disposal
15 systems which utilize subsurface disposal should not be permitted *shall*
16 *be supported by substantial evidence in the record that discharge of*
waste from such disposal system will result in violation of water
quality objectives, will impair present or future beneficial uses of
water, will cause pollution, nuisance, or contamination, or will
unreasonably degrade the quality of any waters of the state.”

17 The RWQCB has provided *no* evidence that Petitioners are discharging waste in violation of
18 water quality objectives, much less *substantial* evidence as required by the *Water Code*. Petitioners
19 have had their tanks pumped since the enforcement process began, and have provided evidence of
20 properly functioning systems. Most of the septic tanks currently in use within the Prohibition Zone
21 are approved septic systems that were placed in use prior to 1988. Yet, at no time has the RWQCB ever
22 inspected the septic systems to determine whether they are faulty or whether they are working as
23 designed and permitted.

24 In the more than 25 years since Resolution 83-13 was adopted, the RWQCB not collected
25 substantial site-specific or property-specific information, but rather, have prosecuted the Random 46
26 without site specific information, with the threat of an *en masse* prosecution with the presumption that
27 the Prosecution Team's evidence applies equally to every property located within Prohibition Zone.
28 Without studying evidence from each individual septic system, the RWQCB has prosecuted these

1 random individuals⁷ *by implication* in making its previous findings, decisions, and orders. This further
2 disproves the RWQCB's claim that the purpose of the CDOs and CAOs is the actual protection of the
3 groundwater and instead supports the notion of improperly motivated RWQCB action.

4 **B. The RWQCB Wrongfully Refused To Admit The Large Majority Of**
5 **Petitioners' Evidence And Documents Into Evidence.**

6 Petitioners timely submitted their arguments, evidence, documents, and objections to the
7 RWQCB's proposed issuance of the CDOs. However, the Prosecution Team failed to timely submit
8 or timely make available to Petitioners their evidence, rebuttal evidence and objections. Regardless,
9 the RWQCB issued orders sustaining the bulk of the objections (AR 11517) See December 8, 2006
10 order that basically gutted the Petitioners' request. As many as 600 of the 847 requested documents
11 were thrown out and made unavailable for reliance by Petitioners in creating a defense to the CDOs.
12 (AR 11544) Not surprisingly, every single document submitted by the Prosecution Team for reliance
13 was duly admitted to the record by the RWQCB. Furthermore, on April 9, 2007, the RWQCB issued
14 a Protective Order prohibiting further discovery. (AR 13629 - 13631)

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

20 This Court, while recognizing that Petitioners appeared to present some valid procedural issues
21 in their first petition to stay regarding the December CDO hearings, held that the prior Petition was
22 premature because the CDOs had not yet issued and the RWQCB could still correct any due process
23 and procedural defects or decide not to issue the CDOs and CAOs (7/23/08 *Hrg Transcript*, 12:19-22).
24 Unfortunately, the RWQCB refused to consider the procedural issues presented in the writ petition as
25 the RWQCB stated that it could "not accept into evidence pleadings from an extraneous case" or even
26 to include the Writ Petition in the record (AR 13104-13108) .

27
28 ⁷ The Water Board has not revealed how the randomly selected recipients were selected although
many requests have been made for that information.

1 **VII. PETITIONERS HAVE PROPERLY PLEAD ALLEGATIONS TO SUPPORT THEIR**
2 **PRAYER FOR ATTORNEYS' FEES.**

3 The RWQCB has subjected the entire community of Los Osos/Baywood Park to unprecedented
4 enforcement actions and threats of massive fines, liability and eviction from their homes to accept the
5 RWQCB's mandate that a community Wastewater Project be finance and built by the community.
6 Petitioners have challenged the RWQCB's enforcement actions as arbitrary and capricious, abusive,
7 unfair and beyond the jurisdiction of the RWQCB on behalf of the entire community that has suffered
8 from the legal action. Respondents have admitted that when they commenced this enforcement
9 process, they did so knowing that it would negatively effect the property values of Los Osos/ Baywood
10 Park (AR 21301). Petitioners seek to enforce an important public right affecting the public and interest
11 and will confer a significant benefit on the general public or a large class of persons which entitles
12 Petitioners reimbursement for attorneys' fees and costs pursuant to *C.C.P.* §1021.5. Additionally,
13 Petitioners' attorneys fees are recoverable pursuant to *Govt. Code* §§ 800, 6258 and 6259.

14 **VIII. CONCLUSION.**

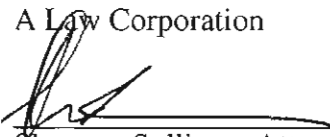
15 Petitioners request that the court issue a peremptory writ based hereon and upon the verified
16 Second Amended Petition for Writ of Mandate and any amendments thereto, all prior pleadings, filed
17 in this action and *Alan Martyn v. RWQCB*, SLO Superior Ct. Case No. CV 060992, the AR, SAR and
18 RJN, the papers and records on file in this matter and on such oral and documentary evidence as may
19 be presented during the trial of this Writ Petition.

20 Dated: July 2, 2009

Respectfully submitted,

Sullivan & Associates
A Law Corporation

21
22
23 By:


Shaunna Sullivan, Attorneys for Petitioners

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA**)
3) ss.
4 **COUNTY OF SAN LUIS OBISPO**)

5 I am employed in the county of San Luis Obispo. I am over the age of 18 years and not a
6 party to the within action. My business address is: 2238 Bayview Heights Drive, Suite C, Los Osos,
CA 93402

7 On **July 6, 2009** I served the foregoing document described as **PETITIONERS' BRIEF IN**
8 **SUPPORT OF A PEREMPTORY WRIT OF MANDATE/PROHIBITION** on the party or
parties named below:

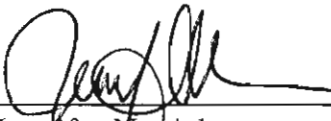
9 Michael Hughes, Esq.
10 California Attorney General's Office
11 300 S. Spring Street, Suite 1702
12 Los Angeles, CA 90013
Via Facsimile (213) 897-2802

13 XX By following ordinary business practice, placing a true copy thereof enclosed in a
14 sealed envelope approved for use by **OnTrac Overnight**, a common carrier
15 promising overnight delivery , for collection by **OnTrac Overnight**, with whom this
16 office has an account, that same day, for delivery the next day in the ordinary course
17 of business, addressed as stated above. I am readily familiar with my employer's
business practice for collection and processing of correspondence for delivery by
overnight courier.

18 **XX VIA EMAIL** - I transmitted the document described above via email service to the persons
19 listed above.

20 _____ By transmitting from facsimile machine, telephone number (805) 528-3364. The
21 facsimile machine I used complied with California Rules of Court, Rule 1003(3) and no error
22 was reported by the machine.

23 I declare under penalty of perjury under the laws of California that the foregoing is true and
24 correct. Executed on July 6, 2009 at Los Osos, California.

25 
26 _____
27 Jennifer Novick
28