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State Water Resources Control Board



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TO: Michael Thomas, Central Coast Regional Water Board [via email only]
John W. Richards, OCC [via email only]

FROM: Lori T. Okun
Senior Staff Counsel
Water Board Prosecution Team
OFFICE OF CHIEF COUNSEL

DATE: February 21, 2006

SUBJECT: LOS OSOS CEASE AND DESIST ORDERS – OBJECTION TO INDIVIDUAL
REQUESTS FOR DESIGNATED PARTY STATUS

The Central Coast Regional Water Quality Control Board (Central Coast Water Board) Prosecution Staff objects to all requests for designated party status other than the request by the Los Osos Community Services District (District).¹ We received a series of form letter requests requesting designated party status. The list of requestors is at <http://www.waterboards.ca.gov/centralcoast/los%20osos/documents/FormLetterList.pdf>. Al Barrow submitted two requests, one in the form letter and one by email dated February 5, 2006. Daniel E. Wickham of Pirhana ABC, Inc. also requested designated party status.

Gail McPherson inadvertently submitted a list of persons that attended a meeting, and the list was attached to a form letter. It is my understanding that only those members of the public who submitted individually signed form letters requesting designated party status are requesting such status.

¹ The District's letter of February 14, 2006, requesting designated party status also included legal and factual arguments and a list of documents. Prosecution Staff reserves all rebuttal to such arguments for our rebuttal due on March 13, 2006.

Los Osos Residents

Form Letter

Prosecution Staff responds to the points in the form letter as follows:

- *I may be subject to a CDO in the future based on the same facts at issue here. Collateral estoppel may prevent me from relitigating a matter decided in this hearing. I have an interest in ensuring the arguments that I want to present are fairly presented here. Factual determinations by the State Water Board or a court might affect me.*

In most cases, interested persons are limited to policy comments. (Cal. Code of Regs., tit. 23, § 648.3(d).) In this case, interested persons have the right to submit technical evidence and expert opinion evidence, in addition to comments. Their testimony will be limited to two minutes, but testimony from designated parties will also be limited as necessary to avoid duplication and conduct an orderly hearing. Attorneys for designated parties can issue subpoenas, but both designated parties and interested persons must go through the Water Board Chair to obtain subpoenas. (Cal. Code of Regs., tit. 23, § 649.6(b); Gov. Code, §§ 11450.05(b), 11450.20(a).) In some proceedings, interested persons are not entitled to receive copies of documents. (Cal. Code of Regs., tit. 23, § 648.3(d).) In this case, relevant documents and communications are posted on the Water Board's website and are available to everyone. Therefore, in this case the only differences between designated parties' rights and interested persons' rights are a potentially longer presentation; the right to cross-examine witnesses; and, unless the Chair eliminates or consolidates closing argument, the right to make a closing statement. The practice of Central Coast Water Board members is to question witnesses extensively. Between the five Board members hearing this item and the 45 designated parties, it is unlikely that any additional cross-examination or closing argument will be necessary.

Some persons who are not designated parties may have site-specific arguments that will not otherwise be addressed, or might seek approval of a particular alternative to bimonthly pumping. The Board need not even address the issue of permissible alternatives to pumping; as the orders are proposed, the Executive Officer will address requests for approval of alternatives after the orders take effect. In a civil action, collateral estoppel only applies to parties to the first action. (7 Witkin, Cal. Proc. [4th ed. 1997]) Judgments, § 388.) In an administrative action, the record from this hearing could be included in the record of a subsequent hearing, but the parties to the second hearing could respond to the evidence in the subsequent hearing.

Even if collateral estoppel did apply, interested persons can adequately protect their own interests since the Hearing Notice allows them to submit legal and policy arguments and technical data to support their position. In addition, the District is a designated party based in part on its position that its participation is necessary to protect its individual constituents. Thus,

the District intends to protect the interest of these individuals. These individuals submitted identical form letters and a sign-up sheet indicating who they were, and the District's request for designated party status included language identical to the form letter. The District and the various requestors are already working together, and can continue to do so to the extent they deem necessary to protect everyone's interest.

None of the requestors identified any specific determinations that might prejudice them. It is beyond dispute that the prohibition took effect in 1988, and that all septic system discharges violate the Central Coast Water Quality Control Plan (Basin Plan). None of the interested persons has suggested that he or she has a type of sewage disposal system other than an individual onsite system. Interested persons can adequately address policy issues – such as whether the Water Board should require residents to comply with the Basin Plan through cease and desist (or cleanup and abatement) order, or when, or whether interim measures to protect water quality are appropriate – in their capacity as interested persons.

The ability of the State Water Resources Control Board (State Water Board) or a court to issue precedential decisions is not enough to confer party status on everyone in Los Osos. The State Water Board and courts routinely issue precedential decisions that affect non-parties. That is the purpose of a precedential decision. Interested persons can protect their interests now by submitting written evidence and comments, and presenting public comments at the hearing. Since the District is purporting to represent the interests of all residents, interested persons can further protect their rights by ensuring that the District adequately represents them. Finally, if an interested person is later subject to an order or proposed order, the person can request a hearing on factual issues at that time. If a hearing is required to satisfy due process requirements or, if not required, the Water Board grants a hearing in its discretion, interested persons who are later subject to orders can present new evidence then.

Adding additional parties not currently subject to any enforcement action could impair the orderly conduct of this hearing. Since prejudice to the requestors would not result, Prosecution Staff requests the Chair to deny the request.

- *The Central Coast Water Board required me to submit my comments with this request in order to discriminate against me based on content.*

There is no support whatsoever for this allegation and we therefore decline to respond. In any case, none of the persons requesting designated party status complied with this requirement. Prosecution Staff requests the Chair to either modify this requirement, or deny all requests for failure to comply with the Hearing Notice.

- *I did not have time to prepare my comments.*

Prosecution Staff requests the Chair to consider the timing in ruling on the requestors' failure to submit comments with their requests. The Hearing Notice was issued on January 27, 2006. Due to the shootings at the Goleta post office, some mail deliveries were delayed for a week or two. Some interested persons were not known to the Prosecution Staff and therefore learned of the Hearing Notice requirements at some later date through reading the newspaper, the District's outreach efforts, or our website. Since the comments do not appear necessary to decide the requests, Prosecution Staff suggests that the due dates be March 1, 2006, where designated party status is granted, and March 8, 2006, for all others. These are the designated party/interested person due dates in the Hearing Notice.

- *Compiling comments would be a waste of time if the Water Board is going to deny my request for designated party status.*

This statement is incorrect because these comments could be submitted by interested persons. In fact, interested persons have an extra week to submit their comments and evidence. If the requestors believe that would be a waste of time, it is unclear why they would seek designated party status in the first place.

- *Property owners are being deemed guilty until proven innocent.*

The basis for this complaint is unclear. As with every order the Water Boards issue, staff members who are recommending the orders have submitted proposed orders and explained the basis to recommend the orders. This is no different from a complaint or legal brief in a civil or criminal proceeding. The Water Board has not heard the evidence or made a decision on the proposal and will not do so until the hearing.

Additional Information from Al Barrow

Mr. Barrow's February 5 email provides information and arguments in opposition to the proposed CDO requirements. The email does not provide additional support for Mr. Barrow's status as a designated party, but provides evidence, legal argument and policy issues that apply generally to the entire proceeding. Mr. Barrow may submit the information and arguments as an interested party, pursuant to the Hearing Notice. Prosecution Staff will respond to the merits of the points in the email in our response to interested party comments (or rebuttal, if the Chair grants his request for designated party status).

Daniel E. Wickham

Mr. Wickham sells alternative treatment systems. Although his business could benefit from Water Board orders allowing installation of alternative systems in lieu of pumping, this is not the type of interest that the Water Boards generally allow as a basis for designated party status. Lobbying the Central Coast Water Board to issue orders that increase his business is not an appropriate role for a designated party.

In addition to his business interest, Mr. Wickham's letter discusses alternative treatment technology and research results. He indicates he will submit additional information on these matters. The Hearing Notice allows him to submit this information as an interested person. Water Board staff will respond to the technical discussion in Mr. Wickham's letter, and any other timely submittals we receive from him, in our response to interested party comments.

cc: Philip G. Wyels, OCC [**via email only**]

Central Coast Water Board Website

All persons requesting designated party status [**via email only, where email addresses are available**]

All designated parties who have submitted email addresses [**via email only**]

All other designated parties [**via U.S. mail**]