



State Water Resources Control Board



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FROM: Reed Sato, Director *Reed Sato*
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DATE: July 20, 2006

SUBJECT: PROSECUTION TEAM'S RESPONSE TO QUESTIONS REGARDING
PRESENTATION OF PROSECUTION TEAM'S CASE
PROPOSED CEASE AND DESIST ORDERS, NOS. R3-2006-001 TO
R3-2006 - 1049

The Prosecution Team submits its response to briefs in conformance with the briefing schedule dated May 18, 2006. As indicated in their briefs, there are various opinions among the respondents about restarting this matter. Four parties ask for the proceedings to start over. Four parties ask for the proceedings to continue without starting over. Eleven parties ask for dismissal of the draft cease and desist orders and for the recusal of the Regional Board members from participating in further proceedings. Two parties simply ask that enforcement be discontinued altogether. None of the arguments for restarting, dismissal, or recusal are compelling and the Regional Board should proceed with the hearings with the current record before it.

In the event, however, that the Regional Board determines to restart the Prosecution Team's oral presentation, the Prosecution Team has a recommended procedure for doing so.

NEITHER THE INDIVIDUAL RESPONDENTS NOR THE LOCSD HAVE PRESENTED A CASE FOR STRIKING THE PROSECUTION TEAM'S ORAL PRESENTATION OF ITS CASE ON APRIL 28, 2006

A. The Individual Respondents Have Simply Alleged Due Process Concerns Without Demonstrating Any Legal or Factual Support for Their Contentions

The individual respondents who submitted briefs in this matter argue that Ms. Okun's involvement in these proceedings mandates dismissal. None, however, offered any legal basis for that demand nor have they presented any factual basis for such an outcome.

First of all, the respondents erroneously presume some sort of misfeasance on the part of Ms. Okun to justify their comments. Ms. Okun, however, was not removed from the Prosecution Team by the Regional Board. She voluntarily withdrew despite a determination by the Regional Board that there was no basis under *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, for her to step aside. Under the specific circumstances of these proceedings regarding the Regional Board's potential issuance of cease and desist orders to enforce a basin plan prohibition, Ms. Okun's participation in these actions did not raise any due process concerns. Therefore, to the extent that the respondents argue for dismissal based on an assumption that Ms. Okun's conduct in this matter has been judged or determined to be inappropriate, that assumption is faulty, and any argument based on it should be disregarded. In the alternative, the respondents have failed to cite any specific conduct by Ms. Okun that would be questionable under *Quintero* given the totality of the circumstances in this matter.

Secondly, nothing in *Quintero*, assuming *arguendo* that it was properly decided, requires the dismissal of a contested matter. At best, *Quintero* simply requires a rehearing on the matter presented by a different counsel. Therefore, regardless of what the Regional Board decides to do under these circumstances, dismissal of the individual cease and desist orders is not compelled, required, or even contemplated under the existing case law.

B. LOCSD's Legal Contentions are Misapplied

While the individual respondents did not provide any legal argument in support of their requests for dismissal, the LOCSD did make such an attempt and cited *Howitt v. Superior Court of Imperial County* (1992) 3 Cal. App. 4th 1575, and *Civil Service Commission v. Superior Court* (1984) 163 Cal.App.3d 70. The LOCSD's reliance on the *Howitt* and *Civil Service* decisions, however, is misplaced. *Howitt* held that the same person cannot serve as the advocate and the advisor to the decision maker in the same matter (3 Cal. App. at 1585). Where a single legal office provides counsel, *Howitt* held

that dual representation satisfies due process requirements where the legal office establishes an effective screening process (Id. at 1587) – as the Office of Chief Counsel and the Regional Board staff did here. *Civil Service Commission* addressed whether a county counsel could ethically represent another quasi-independent client agency that was suing the county. That case did not implicate due process issues, and is factually inapposite to this matter.

Since rehearing is the procedural avenue currently being explored by the Regional Board, the requests for procedural changes beyond rehearing, including but not limited to dismissal of the individual cease and desist order hearings, should be rejected.

THE ARGUMENTS REGARDING THE DISMISSAL OF THE INDIVIDUAL CEASE AND DESIST ORDERS FOR REASONS OTHER THAN MS. OKUN'S PARTICIPATION ARE NOT RESPONSIVE TO THE ISSUES RAISED BY THE BRIEFING SCHEDULE ORDER

The arguments regarding either removal of Regional Board staff from the Prosecution Team or the recusal of members of the Regional Board itself from hearing these matters are beyond the scope of matters to be addressed in the May 18, 2006 briefing order. Even if they were within the scope of the order, they are baseless for the reasons set forth below.

A. There Is No Case Law Cited by Respondents That *Quintero* Applies to Persons Other than Attorneys

The *Quintero* case applied specifically to the situation where an attorney acted as both counsel and advocate before the same hearing body.¹ There is nothing in that decision which would mandate that Mr. Briggs, Mr. Packard, Mr. Thompson, or Ms. Marks be precluded from presenting factual information in this matter or from otherwise participating on the Prosecution Team.²

At this time, the ultimate legal arguments and requests for final Regional Board action will be made by and through Reed Sato, the Prosecution Team's newly appointed counsel. There is no dispute that Mr. Sato has not counseled or advised this

¹ The LOCSD refers to another case entitled *Morongo Band v. SWRCB*. The LOCSD fails to advise the Regional Board that *Morongo* is on appeal, and, therefore, cannot be cited as legal authority.

² The LOCSD is incorrect to the extent it assumes that Ms. Marks or Mr. Thompson are senior staff. They are both line staff.

Regional Board on any prior or other matter. The fact that information which is relevant to the Regional Board on the cease and orders is presented under oath by one or more of its staff is not a due process issue nor one that creates any inherent bias.³ Moreover, if the LOCSD arguments that any senior staff should be barred from presenting information to the Regional Board on potential enforcement matters related to cease and desist orders were adopted, it essentially would mean that all staff could never make presentations or recommendations to the Regional Board if they had made prior, unrelated recommendations on some other matter.

B. The Current Regional Board Members Can Address Septic System Enforcement Actions Related to the Prohibition Regardless of Whether the Current Proceedings on these Individual Cease and Desist Order Are Maintained, Restarted or Dismissed

The LOCSD alleges that Regional Board directed "Mr. Briggs to prosecute ..." the cease and desist orders at issue in this matter. That assertion is clearly disingenuous. The record demonstrates that Regional Board did not indicate any predisposition on how to address this matter.

The Regional Board simply asked for the staff to report on the status of enforcement measures to address ongoing discharges (page 413). What Mr. Briggs provided was a status report of what staff-initiated enforcement measures against individual discharges were already underway. In fact, as early as October 2005, Mr. Briggs had indicated to the LOCSD that the regional board staff intended to "begin enforcement proceedings against individual discharges; that is, individual property owners with septic systems discharging in violation of the Basin Plan Prohibition." (see letter transmitting Administrative Civil Liability Complaint to LOCSD, dated October 6, 2005). There is simply no basis for the claim that the Regional Board improperly initiated these enforcement efforts against the individual dischargers.

While some Regional Board members expressed a preference for individual enforcement actions and asked the staff to present individual enforcement actions for Regional Board consideration, they did so in the context of a discussion of enforcement actions that should be pursued for on-going violations that were a matter of record and had just been discussed in the hearing. The Regional Board did not direct staff as to the type of enforcement action that should be pursued (cease and desist orders versus cleanup and abatement orders versus administrative civil liability penalties versus referral to the Attorney General's Office for civil litigation) or the specific persons against whom the enforcement actions would be directed. In short, the Regional Board did not

³ As stated previously, the LOCSD reliance on either *Howitt* or *Civil Service Commission* is misplaced. Neither case stands for the proposition that staff for a board can not make factual presentations to that Board on disputed matters.

give its staff any more direction than is normal or customary when the Regional Board is interested in or authorizes its staff to present a matter for its consideration in the future.

Under the LOCSD view of the world, the Regional Board would not be entitled to direct its staff to gather evidence and prepare legal arguments for its consideration in the issuance of enforcement orders. Clearly, the LOCSD and others who make those arguments, fail to appreciate the distinction between a judicial proceeding versus a quasi-judicial, administrative proceeding before a board that has staff to investigate matters of concern and interest to that board. The LOCSD and others fail to cite a single case in which an administrative board such as the Regional Board was precluded from acting on a matter simply because it engaged in general discussions with its staff on the status of a potential future enforcement matter.

There is no basis for recusal of the Board members. They are entitled to inquire from staff as to the proceedings that may be initiated to enforce a basin plan prohibition under their jurisdiction. To conclude otherwise would vitiate a basic function of the Regional Board.

CONCERNS ABOUT THE "RANDOM" SELECTION OF ORDER RECIPIENTS, PHASED PROSECUTION, AND INTERIM REQUIREMENTS WITHOUT MERIT

The LOCSD acknowledges that issues regarding the selection of the recipients of the orders, phased prosecution and interim requirements are beyond the scope of the Regional Board's requested briefing. The Prosecution Team will similarly oppose the LOCSD's contentions to ensure that it has not waived any counter-arguments to those issues. The Prosecution Team notes, however, that it was the LOCSD itself that endorsed the initiation of individual cease and desist orders. Moreover, the LOCSD's line of argument suggests that it advocates the initiation of civil litigation in lieu of administrative hearings against all of the potential recipients of a cease and desist order. For anyone concerned about the expense to all parties of the proceedings to date, converting these matters into a judicial lawsuit would not appear to ease those burdens.

IF A RESTART IS ORDERED BY THE REGIONAL BOARD, THE PROSECUTION TEAM HAS A RECOMMENDED PROCEDURE

The focus of the Prosecution Team's opening and response briefs has been the Regional Board's solicitation of comments as to whether the Prosecution Team's case, as presented orally on April 28, 2006, must be stricken. Although the Prosecution Team does not believe there is a need to restart or redo any portion of these proceedings, if the Regional Board determines otherwise as to the oral presentation, the Prosecution Team is prepared to proceed as follows:

1. Submit its prior direct oral testimony in declaration form and present any new or additional information via live testimony. There is no material dispute as to the factual evidence previously presented to the Board by the witnesses called by the Prosecution Team.
2. Roger Briggs' prior testimony also can be submitted via declaration and/or by stipulation with LOCSD.
3. The designated parties may cross-examine these witnesses on any matter that is submitted via declaration or live testimony. However, cross-examination should be relevant, not be duplicative between similarly situated parties, nor for the purposes of harassment.
4. The LOCSD can similarly submit any prior testimony via declaration and any additional testimony via live testimony with the same procedure for cross-examination of its witnesses as applies to the advocacy team's presentation of evidence.
5. After the presentation by the LOCSD of its general information, proceed to the subhearings on the individual proposed cease and desist orders with the clarification on the participation of the LOCSD and other designated parties in those subhearings as previously requested by the Prosecution Team which means that only respondents to each respective cease and desist order can present evidence or cross-examine witnesses as to that particular order.
6. The previous public comments by non-parties on this matter can be retained. The public comment period by non-parties should not be reopened.
7. The pre-hearing proceedings and rulings by the Regional Board prior to the hearing on April 28, 2006 should be unchanged. In short, actions by the Regional Board that do not go to the merits of the individual cease and desist orders should not be altered or undone. Matters that are newly raised (such as objections to any newly proposed evidence by any of the parties) should be heard by the Regional Board.

These procedures would enable the Regional Board to go forward in an efficient and time-effective manner which should produce an administrative record with sufficient factual evidence to address the recommended orders as well as provide each of the designated parties the opportunity to fully address the underlying evidence and testimony related to those orders.

CONCLUSION

Neither the individual respondents nor the LOCSD has made a compelling argument for restarting these proceedings. Moreover, there is no legal basis for dismissing any of the individual cease and desist orders or otherwise disrupting the enforcement process that is currently underway.

In the event, however, that the Regional Board determines to restart the oral testimony in this matter, the Regional Board should adopt the Prosecution Team's recommended procedures.