

**LOS OSOS COMMUNITY SERVICES DISTRICT
P.O. Box 6064
Los Osos, CA 93412**

**LOS OSOS COMMUNITY SERVICES DISTRICT'S
RESPONSE AND REQUEST FOR CONTINUACE
TO ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R-3-2005-0137**

IN THE MATTER OF:

**LOS OSOS COMMUNITY SERVICES DISTRICT
LOS OSOS WASTEWATER PROJECT
San Luis Obispo County**

PLEASE TAKE NOTICE THAT:

The Los Osos Community Services District hereby submits this document as its initial *Response* to Administrative Civil Liability Complaint No. R-3-2005-0137 (Complaint).

PLEASE TAKE FURTHER NOTICE THAT:

The Los Osos Community Services District hereby requests that this matter be continued and that such motion for continuance be heard at the commencement of these proceedings.

1.

INTRODUCTION AND SUMMARY OF RESPONSE

“The first to present his case seems right, until another comes forward and questions him.” – Solomon [Book of Proverbs 18:17]

Los Osos Community Services District (LOCSD) welcomes this opportunity to come forward and question the accuracy and validity of *Administrative Civil Liability Complaint No. R3-2005-0137* (Complaint) and the *Worksheet for Assessment* and November 10, 2005, *Staff Report* prepared in connection therewith.

The Complaint issued by the staff of the Regional Water Quality Control Board for the Central Coast Region (CCR) is unprecedented in California history. Never before has the outcome of an election been the impetus for the staff of a California Regional Water Quality Control Board (RWQCB) to issue an administrative civil liability complaint. Never before have penalties of such magnitude been sought against such a small public agency having no ability to comply with an order that was flawed and unattainable from the start.

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Since the CCR board's issuance of Time Schedule Order No. 00-131 (TSO) in 2000, the CCR has consistently responded to the LOCSD's quarterly progress reports by finding that delays in the LOCSD's compliance with the TSO were *not* within the LOCSD's reasonable control. Each time, CCR staff has advised its board that it should not impose civil liability for the LOCSD's violations under the TSO, and each time the CCR board has followed staff's advice. Notably, the CCR board was granting this absolution despite the fact that the LOCSD had rejected the County-approved wastewater treatment project and was moving forward instead on building a project that CCR staff considered highly questionable.

However, even before the San Luis Obispo County Clerk-Recorder had certified the results of the September 27, 2005, special election recalling three LOCSD board members and approving an initiative measure amending the LOCSD's *Code* (Measure B), CCR staff were drafting the Complaint. In a silence that is deafening, the Complaint, the Worksheet, and the Staff Report say nothing about the fact that, to date, the CCR board has always found that the LOCSD's failure to comply with the TSO was beyond its control and for that reason has always refused to impose civil liability. The LOCSD submits that the results of an election that CCR staff improperly participated in and that did not go as staff wanted is not a proper basis for issuing the Complaint, much less imposing civil liability thereunder. This is payback/punishment of the electorate, pure and simple, for voting in favor of people and an initiative that CCR staff volubly opposed during the course of the campaign.

Contrary to claims made by CCR staff, the record clearly demonstrates that, since the election, the new LOCSD board of directors has not taken any action in contravention of the TSO. CCR staff's implication that campaign materials and statements made by individual elected and/or appointed LOCSD officials form a basis upon which the CCR may impose civil liability reveals an embarrassing misunderstanding on CCR staff's part of the laws governing community services districts.

The record shows the new LOCSD board working tirelessly to keep the community's wastewater project moving forward. However, the reason why construction has stopped has nothing to do with anything the LOCSD has done. Instead, the reason is that staff members of the State Water Resources Control Board (SWRCB) have apparently concluded (1) that under California law, Measure B must be accorded a presumption of validity unless and until a court of competent jurisdiction rules otherwise, (2) that such a court is likely to uphold Measure B, either in whole or in part, and (3) that Measure B prevents the SWRCB from continuing to fund the SRF Loan. As a result, the LOCSD was recently informed that SWRCB "will continue to withhold payment" to the LOCSD for the wastewater project's

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construction. The contractors know this, know that the LOCSD does not have any other way to pay the construction costs except for the SRF Loan, and are unlikely to work for free.

Finally, there are many serious errors and flaws in the Worksheet's arguments and calculations. First, it tries to have it both ways by assessing liability under three of the four 1999 Cease and Desist orders as well as the TSO. However, it fails to note that, in 2000, the CCR incorporated all four orders into the TSO, and the CCR's Executive Director informed the LOCSD that the TSO constituted a superseding directive to the LOCSD on the theory that the prior implementation schedule provided by the LOCSD and incorporated by the CCR in the four earlier Cease and Desist orders had become stale.

Second, it states facts that are simply not true. (These will be dealt with below.) Third, it skims over the two most relevant factors set out in Water Code section 13327: (1) the LOCSD's ability to pay the penalties sought, and (2) the LOCSD's ability to continue serving its community if penalties are imposed. Regarding (1), unlike most public and private entities, the LOCSD is an enterprise district that, under California law, does not have taxing powers and can only impose rates and charges directly related to the services it provides. Regarding (2), CCR staff itself has previously acknowledged that imposing penalties on the LOCSD would only result in bankrupting the LOCSD and thus be counterproductive to a timely resolution of the community's water quality problems.

In support of this initial *Response*, the LOCSD will submit records referenced in the attached *Index* and additional relevant documents. However, please note that, given the fact that (1) CCR staff—by its own admission—accelerated the issuance of the Complaint in order to “get the drop” on the new LOCSD board, (2) the CCR *thrice* rejected LOCSD requests for a delay in the December 1, 2005 hearing on account of (among other things) the unavailability of LOCSD's long-standing attorney for CCR and SWRCB matters due to his vacationing in Europe [see *Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299], and (3) the SWRCB has agendized a resolution regarding the SRF Loan for its November 16, 2005, public meeting in Sacramento, the LOCSD reserves its right under all relevant law, rules, and/or regulations to augment this Response and/or the administrative record for any reason, including (without limitation) the receipt of further and/or additional responses from the CCR and SWRCB.

2.

BACKGROUND FACTS

The Complaint and Worksheet lose sight of the fact that, while the prohibition has been in existence since 1983, the LOCSD has only been around since 1999. In fact, the LOCSD was formed by the Los Osos/Baywood voters for the purpose of (among other things) exercising local control in seeking a solution to the community's wastewater problem. The LOCSD inherited this and other problems from San Luis Obispo County, including the four wastewater systems covered in the 1999 Cease and Desist orders.

Stepping back to see the big picture since that time, it is clear that the CCR's motive in issuing the TSO in October of 2000 was to quickstep the LOCSD in bringing a wastewater facility online. It is equally clear that CCR staff was putting a major gloss on it in stating that "[b]y all accounts the schedule represents the shortest time frame the project could feasibly be completed." In fact, since 2000, it was apparent to all that the time schedule set out in the TSO was completely unrealistic given the realities of litigation and public agency permitting.

The Complaint documentation fails to note that the LOCSD responded to the TSO by having its CCR/SWRCB special counsel (Gary J. Grimm) file a *Petition for Review* with the SWRCB on or about November 20, 2000, protesting the TSO on the grounds that (among other things) "[t]he project delays alleged were beyond the reasonable control of [the LOCSD];" that the TSO held the LOCSD responsible "for actions that occurred prior to [its] creation" as a public entity; that the penalty amounts were punitive; and that the TSO was "inappropriate and unreasonable." Since that time there has been an informal truce between the CCR and LOCSD, with the CCR regularly acknowledging that project delays were beyond the ability of the LOCSD to control, and the LOCSD annually requesting the SWRCB to hold the *Petition for Review* in abeyance. Presently, the SWRCB is continuing to hold the *Petition for Review* in abeyance until December 18, 2005.

If there is a single theme that can be derived from the period since the TSO issued in 2000, it is "haste makes waste." The rush to bring *any* wastewater treatment system online as quickly as possible resulted in lower cost, environmentally superior alternatives being rejected and the community becoming increasingly alienated from the former LOCSD board. More alarming was the former LOCSD board's acceptance of bids for the project's construction that were so far above estimates (46% higher) that (1) the District's Engineer and Counsel *both* recommended that the bids be rejected, and (2) even CCR staff

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acknowledged that accepting such bids would not resolve the community's wastewater problem in the "least costly manner feasible" and offered to support the LOCSD should it pursu[e] more competitive construction bids." (March 11, 2005 letter from Roger W. Briggs to Bruce Buel.)

By this time, however, the wastewater facility had become a political issue in the recall and initiative campaigns, and the former LOCSD board chose not to pursue more competitive bids, opting instead to expedite commencement of construction as many weeks as possible before the election. This did not set well with the voters and, on September 27, 2005, they recalled three board members and approved the Measure B initiative.

At its first public meeting on October 1, 2005, the new LOCSD board called a brief "time out" to allow time to assess problems that had already surfaced from the previous board's rush to start the project before the election. The new board did this by exercising its right under a provision in Article 15, section 15.1, of the construction contracts that were approved by the SWRCB, allowing the LOCSD to temporarily suspend project construction:

"The [CSD] may, at any time and without cause, suspend the WORK or any portion thereof for a period of not more than 90 days by notice to the CONTRACTOR."

Just 13 days later (October 13, 2005), as LOCSD staff was preparing to deliver notices to each of the contractors to resume work, SWRCB staff contacted the LOCSD with the unexpected news that the second disbursement under the SRF Loan was being withheld. (Following the Special Election, LOCSD staff had received assurances from SWRCB staff that "the check was in the mail.") At first, SWRCB staff said the disbursement was being withheld because of a phone call received from one of the contractors saying it was being terminated. LOCSD staff informed SWRCB staff that actions predicated on the verbal representation of a contractor not a party to the SRF Loan contract between the LOCSD and the SWRCB was not in accordance with the terms of the notification requirements of the SRF Loan contract.

Then, after the contractor's verbal allegation was shown to be false, SWRCB staff next said that disbursements would be withheld because the LOCSD had materially breached the SRF Loan contract and was also threatening to materially breach the contract. This was likewise shown to be false by reference to the LOCSD's rights under Article 15, section 15.1 of the construction contracts.

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Third and finally, SWRCB staff explained that the voters' adoption of Measure B was the reason why all future disbursements would be withheld. On October 18, 2005, SWRCB staff followed up with a letter to the LOCSD (received October 25, 2005) that did not mention Measure B; only that the SWRCB was withholding funding on account of the earlier temporary suspension of work that had.

On October 21, 2005, the LOCSD issued notices to each of the contractors directing them to proceed with construction on the condition that the SWRCB resumed reimbursement and submitted proof thereof to the SWRCB.

The following week, Assemblyman Sam Blakeslee mediated week-long negotiations between the LOCSD's negotiating team and the SWRCB's negotiator. Towards the end of those negotiations, LOCSD negotiators presented the SWRCB negotiator with a proposal, in accordance with the results of the negotiations, for the reinstatement of the SRF Loan. On October 28, 2005, the SWRCB presented a counteroffer to the LOCSD: a take-it-or-leave-it, all-or-nothing proposal that the LOCSD must agree to in order for the SWRCB to resume its SRF Loan funding obligations. On Sunday night, October 30, 2005, at a Special Meeting, the LOCSD board met in open session and, after six hours of public comment, by a unanimous vote, approved the SWRCB's proposal in its entirety and directed LOCSD staff to notify the SWRCB of this approval.

On October 31, 2005, LOCSD staff sent written notification of its board's unanimous approval of the SWRCB proposal to the SWRCB and requested that its staff immediately agendaize the item for formal SWRCB approval. That same day, SWRCB staff informed LOCSD staff that the item could not be agendaized until November 16, 2005.

However, by letter dated November 1, 2005, SWRCB staff rejected *its own* take-it-or-leave-it proposal without first presenting it to its board, stating that the SWRCB would "consider resuming funding" if construction proceeded "under the terms of the Installment Sales Agreement." On November 7, 2005, by unanimous vote, the LOCSD board adopted "*A Resolution of the Board of Directors of the Los Osos Community Services District Affirming its Commitment to Proceed with the Construction of a Wastewater Collection and Treatment System for the Los Osos Community*" stating that

"... by this resolution the LOCSD Board further reaffirms its commitment to quickly construct the Los Osos Wastewater Project in accordance with State and local laws and the terms of the SRF Contract."

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The next day, LOCSD staff sent notices to each of the contractors informing them that they were "hereby directed to commence work on the subject project immediately." The notices were not conditioned on the SWRCB resuming disbursements under the SRF Loan. That same day, at 3:07 p.m., LOCSD's interim District Counsel received the following voicemail message from SWRCB's staff counsel:

"Hi, this is Ann Hartridge from the State Water Resources Control Board.
(916)341-5166.

I'm going to give you 3 code citations that may help frame the discussion:

33 USC section 1383(d)(1)(c);
40 CFR section 35.3120(a)(1)(4); and
California Water Code section 13480(b)(1)(c).

The gist of these three sections is that the Water Board is required to have a dedicated source of revenue in all of its loan agreements. And, the bottom line is if we talk about ... Measure B says we can't have the treatment plant at the Tri-W site ... then what is your dedicated source of revenue that's received approval?

Anyway, we can talk more about this if you'd like. Give me a call, 341-5166, in area code 916."

The LOCSD asks the CCR board to take official notice of the above three provisions. The SWRCB's reference to those provisions constitutes an admission on its part that (1) it apparently agreed to fund the SRF Loan without first considering what impact the approval of Measure B would have on the SWRCB's obligation to comply with those code provisions; and (2) that Measure B must, at this time, be accorded a presumption of validity.

In response to the LOCSD sending the contractors back to work, on November 10, 2005, the SWRCB's Chief of the Division of Financial Assistance sent a letter to the LOCSD's General Manager stating that:

"Until Measure B no longer presents a problem for the District in moving ahead with the approved project . . . the [SWRCB] will continue to withhold payment pursuant to its right under . . . the SRF contract."

3.

CCR STAFF ISSUED THE COMPLAINT WITH UNSEEMLY HASTE

“One who proceeds with 'unseemly haste' bears a risk 'that his conduct might bear the stigma of bad faith.’” (*McCarthy v. California Tahoe Regional Planning Agency* (1982) 129 Cal. App. 3d 222, 233; see also *Aries Devevelopment Co. v. California Coastal Zone Conservation Comm.* (1974) 48 Cal.App.3d 534, 549; *Russian Hill Improvement Assoc. v. Board of Permit Appeals* (1907) 66 Cal. 2d 34, 39.)

Although LOCSD staff has only had time to review a limited amount of CCR staff’s written and electronic documents relating to the September 27th Special Election, it is already apparent that CCR staff was coordinating efforts with the opponents of the recall and Measure B initiative both before and after the election. More troubling still is the fact that this information reveals CCR staff’s motive in issuing the Complaint: to bushwhack the new LOCSD board *before it did anything* and to punish the electorate for failing to vote the way CCR staff had wanted.

For example, shortly after midnight on the night of the election, when it was looking like the recall and initiative might pass, the opposition leader wrote the following frantic email titled “Can we transfer the project this week?” to the recalled LOCSD directors, the County’s CAO, and CCR staff:

“Gentlemen,

Granted, it’s late, but could the LOCSD transfer the sewer project to the county BEFORE the current “CSD-3” leave office? Cotracts have been signed, the project is underway, we are in violation of the clean water act can a emergency agency be prepared to include transferring the project?

Please...is there any way to salvage the project???????????????????? [sic]

Pandora [Nash-Karner]”

Following receipt of the County CAO’s response informing Ms. Nash-Karner that “other agency options” aren’t realistically on the table unless and until the CSD goes out of existence or gives up its wastewater authority,” at 8:45 a.m., she responded with an email to

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the CAO, the recalled LOCSD directors, and CCR staff stating, "I hope the CSD gets fined out of existence fast enough to save the contractors and the low-interest loan!"

A bit later, at 12:59 p.m., Ms. Nash-Karner wrote CCR Executive Director Roger Briggs the following:

"Dear Roger,

In order to expedite the situation and lesson the damage, can the enforcement issue be placed on the October RWQCB agenda?

Thanks,

Pandora"

At 5:44 p.m., Mr. Briggs responded to her email as following message:

"Pandora, we're just wrapping up the Oct agenda right now, and legally required lead times for a hearing may not reasonably allow it. But I've already received and reviewed a draft ACL complaint, so we're rolling. I'm shooting for getting an ACL to the District next week, even before the new b[oar]d can meet. I want them to understand what they will be stepping into before they vote on any motion to delay.
Roger"

CCR staff collusion with opponents of the recall and initiative did not end there. In an October 2, 2005, email from Ms. Nash-Karner addressed to (among others) Mr. Briggs, she noted that the group formed to fight the recall and Measure B was being dissolved and a new group, "Taxpayer Watch," was forming. Taxpayer Watch later filed in San Luis Superior Court a petition for writ of mandate against the LOCSD and sought a temporary restraining order (TRO). The morning after CCR staff issued the Complaint (October 7, 2005), at the court hearing on the Taxpayer Watch TRO, LOCSD's counsel was surprised to find CCR's legal counsel, Lori Okun, seated as "second chair" to Taxpayer Watch's counsel. When Ms. Okun attempted to address the court on behalf of Taxpayer Watch, LOCSD counsel objected, and the judge sustained that objection, thereafter denying the TRO.

“There is a difference between the conduct of public officials in speaking out on controversial political issues and their use of governmental power to affect the election.” (*Colorado Taxpayers Union, Inc. v. Romer*, 750 F. Supp. 1041, 1045 (D. Colo. October 31, 1990); *appeal dismissed*, 963 F.2d 1394 (10th Cir. 1992), *cert. denied*, 507 U.S. 949, 113 S. Ct. 1360, 122 L. Ed. 2d 739 (1993).) In discussing “[t]he importance of governmental impartiality in electoral matters,” the California Supreme Court has stated that, “In our polity, the constitutional commitment to “free elections” guarantees an electoral process free of partisan intervention by the current holders of governmental authority or the current trustees of the public treasury.” (*Stanson v. Mott* (1976) 17 Cal.3d 206, 219, 227.) That constitutional commitment was broken by CCR staff abusing their governmental positions to threaten and intimidate LOCSD voters against voting for the recall and the initiative. The CCR board should not compound the mistake by affirming a Complaint issued in response to the outcome of an election.

4.

THE COMPLAINT AND THIS HEARING ARE PREMATURE

The Complaint and this Hearing are premature in that (1) no court has yet ruled on the validity of Measure B, and (2) the SWRCB has not taken formal action to revoke the SRF Loan or acted to construct the wastewater treatment project within the Prohibition Zone.

Of vital concern to the LOCSD and SWRCB is the ability to proceed with the implementation of the wastewater treatment project in light of Measure B. A judicial determination as to the (in)validity of Measure B is crucial to a determination as to whether or not the LOCSD can even legally proceed with the existing wastewater treatment project. Therefore, this hearing should be continued until such time as a court has formally ruled on Measure B. It is further recognized that, while SWRCB staff is currently refusing to release further disbursements under the SRF Loan due to the voters’ approval of Measure B (see Exhibit “28”), the SWRCB board has not taken action to declare the SRF Loan in default or exercised its rights under contract provisions to take over the construction of the wastewater treatment project.

The LOCSD requests that this matter be continued until such time as Measure B’s validity has been adjudicated.

5.

**CCR HAS ALWAYS FOUND THE LOCSD'S NONCOMPLIANCE
WITH THE TSO TO BE BEYOND ITS ABILITY TO CONTROL**

“Los Osos CSD has rigorously and successfully responded to each appeal of discretionary approval and each court challenge. Project delays, and noncompliance with the Time Schedule Order, are clearly beyond Los Osos CSD's ability to control.” (*CCR Staff Report for Regular Meeting of July 9, 2004.*)

The foregoing quote is but of many from CCR staff acknowledging that compliance with the TSO dates is and always has been beyond “LOCSD's ability to control.” Similar CCR statements can be found in its reports for: December 7, 2004; March 11, 2004; September 19, 2003; July 30, 2002; December 5, 2001; June 30, 2001; April 3 & 5, 2001; and June 1, 2000.

As for the SWRCB's position on delay, the commencement of construction of the wastewater treatment facilities was initially delayed by nine months without resulting in any SRF Loan fund issues. By letter dated February 7, 2003, the SWRCB informed the LOCSD that commitment of preliminary SRF loan funds to the LOCSD (by SWRCB Resolution No. 2002-02) would expire unless the LOCSD initiated construction of the Wastewater Facilities Project by September 11, 2003. Responding to the LOCSD's request for extension, the SWRCB explained that:

“Due to legal delays of the District's project, the District is proposing to initiate project construction by June 28, 2004. ... Based on our review and in consultation with [CCR] staff, we will recommend approval of your extension request...” (*Id.*)

How is it that the SWRCB can accept a nine month delay in the start of construction as a delay beyond the control of the LOCSD, while the voter's approval of Measure B, the recall of a majority of the former LOCSD board, and the impending installation of new LOCSD board directors, is deemed to be a situation that is so within the LOCSD's control that CCR staff issued the Complaint?

6.

THE NEW LOCSD BOARD HAS NOT ACTED TO CAUSE DELAY

The CCR Staff Report for this matter claims that “the [LO]CSD chose to . . . delay efforts to invalidate Measure B.” Not only is this statement not true, but it reveals a basic misunderstanding of the legal requirements governing LOCSD board actions.

By its own admission, CCR staff issued the Complaint based on political positions taken during the election by the candidates who replaced the recalled LOCSD board members. In doing so, CCR targeted the Complaint at the constitutional rights of free speech and petition exercised by individual LOCSD board members *despite the fact* that, by law, individual speech and expression is not and cannot be determinative of the official actions taken by the LOCSD board (or, for that matter, any elected body). The evidence CCR staff proffers in support of the Complaint is therefore inaccurate and irrelevant.

Discretionary action by the LOCSD Board is governed by the enabling law of the Ralph M. Brown Act (Brown Act) and Community Services Districts Law (CSD Law). (See, Cal. Gov. Code § 54950 et seq., and Cal. Gov. Code § 61000 et seq. [as modified by S.B. 135, effective January 1, 2006], respectively.) These laws confirm the relevancy of the collective voting of the LOCSD Board during open and public meetings. For example, Government Code section 61223 states that, “The board shall act only by ordinance, resolution, or motion.” Government Code section 61224 confirms that a majority of a LOCSD board shall constitute a quorum for transacting business, and Government Code section 61225 states that no ordinance, resolution or motion shall be passed without the affirmative votes of at least a majority of the members of a LOCSD board.¹

¹ Effective January 1, 2006, Senate Bill 135 reaffirms the manner in which a Community Services District can conduct business and enact law:

- “(a) A majority of the total membership of the board of directors shall constitute a quorum for the transaction of business.
- (b) The board of directors shall act only by ordinance, resolution, or motion.
- (c) Except as otherwise specifically provided by law, a majority vote of the total membership of the board of directors is required for the board of directors to take action.
- (d) The minutes of the board of directors shall record the aye and no votes taken by the members of the board of directors for the passage of all ordinances, resolutions, or motions.

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With specific regard to action relating to the wastewater treatment project subsequent to the exercise of the recall and initiative powers by the Los Osos electorate, the newly elected LOCSD Board has only (1) approved a motion calling for a brief "time out" under Article 15, section 15.1, of the construction contracts to facilitate the assessment problems that had already surfaced from the previous board's rush to start the project before the election and the impact of the voter's approval of Measure B, and (2) adopted the aforementioned "*Resolution of the Board of Directors of the Los Osos Community Services District Affirming its Commitment to Proceed with the Construction of a Wastewater Collection and Treatment System for the Los Osos Community*" so that the LOCSD board could "further reaffirm[] its commitment to quickly construct the Los Osos Wastewater Project in accordance with State and local laws and the terms of the SRF Contract."

Those two action are the best and *only* relevant evidence available. On its face, the Resolution explains that, following a contractually provided for temporary suspension of work on the wastewater treatment facilities, the LOCSD board-enacted Resolution confirming the commitment to proceed with construction of a wastewater collection and treatment system for the Los Osos community.

By law, the enactment of the Resolution required a majority vote of the LOCSD Board, and it passed by unanimous vote. Accordingly, the statements, beliefs, or political positions held (or not held) by individual member of the LOCSD Board (and improperly relied on as evidence by CCR) are neither relevant nor controlling and certainly form the basis for claiming delay by act of the LOCSD board. Only the official acts of the LOCSD in accordance with the open meeting requirements of the Brown Act and CSD Law are relevant and controlling, and presently, only the Complaint issued by CCR is causing a delay.

(e) The board of directors shall keep a record of all its actions, including financial transactions.

(f) The board of directors shall adopt rules or bylaws for its proceedings.

(g) The board of directors shall adopt policies for the operation of the district, including, but not limited to, administrative policies, fiscal policies, personnel policies, and the purchasing policies required by this division." (Cal. Gov. Code § 61045.)

Notably, the CSD Law confirms that the constitutional powers of initiative and recall are binding upon a Community Services District. (Cal. Gov. Code § 61450; see also Cal. Gov. Code § 61046(a) [initiative], (b) [referendum], (c) [recall].)

LOCSD's interim District Counsel did stipulate to a continuance of oral arguments on the Court of Appeal's *Order to Show Cause* hearing to December 14, 2005, as a professional courtesy to opposing counsel who had booked a Disney Cruise vacation for his family that conflicted with the prior hearing date. The interim District Counsel extended this professional courtesy without LOCSD board approval under the following general provision in his contract with the LOCSD preauthorizing him to extend such courtesies:

“12. **CIVILITY TOWARD OPPOSING COUNSEL.** Courtesy is customarily honored with opposing counsel, such as extensions to file pleadings or responses to other deadlines. In our experience, the reciprocal extension of such courtesies saves our clients' time and money. By signing the letter of engagement you are confirming your approval of this practice in your case.”

The extension of professional courtesy among lawyers is a practice that is much encouraged by the courts. Refusing to grant such courtesy would have only forced opposing counsel to bring that fact to the Court of Appeal's attention and have likely sparked its displeasure with the LOCSD.

7.

LOCSD BOARD MEMBERS CANNOT IGNORE THE LAW

As explained above, the Complaint is a reaction to both (1) a particular vote by the Los Osos electorate, and (2) the LOCSD's decision to follow the SWRCB's lead and presume that Measure B is valid unless and until a court rules otherwise. As a result, the Complaint's retaliation goes beyond implicating the exercise of constitutionally-protected rights and, by expressly seeking penalties on account of the LOCSD's refusal to comply with Measure B, attempts to force LOCSD board members to commit a criminal offense.

In according a presumption of validity to Measure B *for the time being*, the SWRCB and LOCSD are acting consistent with well-established State law, as recently explained by the California Supreme Court in *Lockyer v. City and County of San Francisco* (2004) 33 Cal. 4th 1055 (*Lockyer*):

“. . . a local public official, charged with the ministerial duty of enforcing a statute, generally does not have the authority, in the absence of a judicial determination of unconstitutionality, to refuse to enforce the statute on the

basis of the official's view that it is unconstitutional.” (*Lockyer*, 33 Cal. 4th at 1082.)

“ . . . we conclude that prior to the adoption of [California Constitution] article III, section 3.5, it already was established under California law--as in the overwhelming majority of other states [] -- that a local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis refuse to apply the statute.” (*Lockyer*, 33 Cal. 4th 1055 at 1086.)

“ . . . one of the fundamental principles of our constitutional system of government is that a statute, once duly enacted, "is presumed to be constitutional. Unconstitutionality must be clearly shown, and doubts will be resolved in favor of its validity.”” (*Lockyer*, 33 Cal. 4th at 1086.)

“ . . . under California law, the determination whether a statute is unconstitutional and need not be obeyed is an exercise of judicial power and thus is reserved to those officials or entities that have been granted such power by the California Constitution.” (*Lockyer*, 33 Cal. 4th at 1092-1093.)

Moreover, for LOCSD board members to practice civil disobedience, as CCR staff urges, violates their oaths of office and would subject them to criminal sanction. Measure B is now a part of the official “Ordinance” of the LOCSD, referred to as the LOCSC’s *Code*: That *Code* provides the following sanction:

“1.02.05. Enforcement

A. Violations, Misdemeanors and Infractions: It is unlawful for any person to violate any provision or to fail to comply with any of the requirements of this Ordinance. A violation of any of the provisions or a failure to comply with any of the requirements shall constitute a misdemeanor except for those specifically declared by this Ordinance to be an infraction. . . . Each and every misdemeanor violation is punishable by a fine not exceeding one thousand dollars, or by imprisonment in the county jail for a period not exceeding six months, or by both such fine and imprisonment.

Each person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provisions of this Ordinance is committed, continued, or permitted by such person and shall be punishable accordingly.”²

Notably, persons whose action cause a violation of Measure B are also liable for criminal sanction under the following paragraph of section 1.02.05:

“B. Violations: Aiding, Abetting and Concealing: Every person who causes, aids, abets, or conceals the fact of a violation of this Ordinance is guilty of a violation of this Ordinance.”

8.

**THE PROPOSED PENALTY IS NOT REASONABLY
NECESSARY TO ACHIEVE COMPLIANCE**

A. Background

Pursuant to Local Agency Formation Commission (LAFCO) approval and voter approval of Measure K-98 (K-98), the LOCSD was formed to provide limited governmental services within the LOCSD boundaries (Exhibit “1”). As a result of K-98, the LOCSD was assigned a majority of the zones of benefit within CSA-9 that were previously operated by the County (K-98 §D). Attached as Exhibit “3” is a depiction of the zones of benefit (except for “H”) that are now operated by the LOCSD. Additionally, the LOCSD took the lead in addressing the prohibitions regarding the use of septic tanks established by CCR Order 83-13 and SWRCB Order 84-13. The Prohibition Zone is depicted in Exhibit “4” attached hereto. By way of further background, three (3) independent water districts provide water service within the Prohibition Zone, the LOCSD (Zone A), California Water (now Golden State Water Company) that is regulated by the Public Utility Commission and S&T Mutual Water Company. Exhibit “5” depicts the various water districts that provide water service within the Prohibition Zone.

² (See also, Cal. Gov. Code § 61064 [violation of a Community Service District’s law is a misdemeanor].)

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LOCSD provides only fire protection and solid waste (garbage) services on a District-wide basis. (Fire service by CDF/County contract and solid waste service by franchise agreement.) All services provided by the LOCSD to its residents and various zones of benefit (that were transferred to LOCSD as a result of K-98) are financed and funded in accordance with the County's historical methodology, California law, and the limitations imposed by Article XIII of the California Constitution. In short, and as further demonstrated herein, the LOCSD does not collect property taxes, business tax, transient occupancy taxes, sales taxes, or other taxes that are otherwise available to incorporated agencies (such as counties and cities) to operate a general fund that is capable of responding to RWQCB fines. What limited property taxes that are collected by the LOCSD are used primarily to fund fire services (see Exhibit "6").

Further, and pursuant to Article XIII of the California Constitution and Government Code section 50076, the LOCSD can only impose rates and charges that reasonably relate to the services provided unless the affected residents impose a special tax. In other words, the LOCSD is prohibited from using water revenues to subsidize fire protection, sewers, street lighting, etc.

Exacting civil penalties against the Fire Department, the Water Department, the Vista De Oro zone of benefit, and the Bayridge Estates zone of benefit will not achieve compliance with Time Schedule Order 00-131. Penalties will affect the limited operations of the LOCSD within the Prohibition Zone and will reduce vital services to its residents.

B. Prohibition Zone

LOCSD does not collect revenues (other than through the Assessment District, which monies have been spent) from residents within the Prohibition Zone for the construction of the Wastewater Treatment Project. Absent providing an actual service (i.e. sewer treatment), the only legally authorized method of imposing revenues from the Prohibition Zone residents is with a new Assessment District (property owner approval) or special tax (2/3's voter approval). In short there are no revenues collected by the LOCSD from the residents within the Prohibition Zone to respond to fines. Further, the SRF Loan installment payments are contractually committed to the construction of the wastewater treatment project pursuant to the SRF Loan contract and cannot be used for payment of fines.

C. Fire Department

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As to RWQCB Cease and Desist Order 95-55 (Exhibit "7") related to the Baywood Park/Los Osos Fire District:

The LOCSD, pursuant to Budget Item 300 (Exhibit "8"), contracts with the County CDF to provide fire protection and emergency services. Fire protection services are primarily funded by property taxes (Exhibit "8" [Line Item 4035]) and special taxes (Exhibit "8" [Line Item 4050]) and transfers from reserves (Exhibit "8" [Line Item 4995]). As noted in Exhibit "16," the ending balance for Fund 300 is approximately \$700,000. Order 95-55 imposes a time schedule order that has not been met. However, Time Schedule Order 99-55 does not automatically impose fines and provides in relevant part "failure to comply with the provisions of this Order may subject discharger - - -". Fund 300 is not capable of responding to fines for the operation of existing septic tanks without reducing fire protection or emergency services. Further, when considering the limited amount of contribution of septic effluent to the groundwater basin and the impact the fines would have on the continued operation of the Fire Department (clearly a "business" within the meaning of Water Code §13327), fining the Fire Department would be inconsistent with Water Code section 13327.

D. Water Department

As to RWQCB Cease and Desist Order 99-54 (Exhibit "9") related to the Baywood Park Water Division:

The LOCSD, pursuant to Budget Fund 500 (Exhibit "10"), operates a water division on an enterprise basis (funded solely through rates and charges and without transfer of property taxes. See Exhibit "10"[Line Item 4030-500-00].) Additionally, the LOCSD has borrowed and dedicated significant revenues to upgrade the water supply system (CIEBD Loan). The LOCSD's Water Department budget is further augmented as follows:

- The LOCSD Water Department has received approximately five hundred thousand dollars (\$500,000) (net) as a result of its litigation related to MtBE groundwater contamination;
- The LOCSD Water Department has received grants to perform both groundwater studies;
- The LOCSD Water Department has received a FEMA grant to repair damage to a water tanks caused by the recent earthquake; and

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- The Water Department receives transfers from its reserves of approximately two hundred thousand dollars (\$200,000) per year to meet budgeted items.

Although Exhibit "16" shows a reserve balance of \$3,095,262; that reserve fund is comprised of both capital and cash, (pursuant to GASB 34 Enterprise Fund accounting). Order 95-54 imposes a time schedule order that has not been met. However, Time Schedule Order 99-54 does not automatically impose fines and provides in relevant part "failure to comply with the provisions of this Order may subject discharger - - -". Fund 500 is not capable of responding to fines for the operation of the existing septic tank without reducing LOCSD's ability to maintain adequate water service to the residents that are served by its Water Department. Further, when considering the limited amount of contribution of septic effluent to the groundwater basin and the impact the fines would have on the continued operation of the Water Department (clearly a business within the meaning of Water Code §13327) fining the Water Department would be inconsistent with Water Code section 13327.

E. Bayridge Estates

As to RWQCB Cease and Desist Order 99-53 (Exhibit "12") related to the Bayridge Estates subdivision:

The LOCSD, pursuant to Fund 200 (Exhibit "13"), provides drainage, street lighting, septic tank maintenance and open space maintenance within this special zone of benefit as inherited from the County of San Luis Obispo (as a result of K-98). Bayridge Estate services are primarily funded through yearly special charges that are collected on property taxes. (See Exhibit "13" [Line Item 440-220].) Additionally, a limited amount of property taxes, consistent with the County's practices, augment revenues collected (Exhibit "13" [Line Item 4035-200]), and transfers from its reserves (Exhibit "13" [Line Item 9500-200]). The anticipated reserve balance for FY 05-06 is approximately \$31,624 (Exhibit "16"). Order 99-53 imposes a time schedule that has not been met. However, Time Schedule Order 99-53 does not automatically impose fines and provides in relevant part "failure to comply with the provisions of this Order may subject discharger - - -". Fund 200 is not capable of responding to fines for the operation of the existing septic tanks without reducing or eliminating drainage, street lighting, septic maintenance or open space maintenance. Further, when considering the limited amount of contribution of septic effluent to the groundwater basin and the impact the fines would have on the continued operation of the Bayridge Estates

subdivision (clearly a business within the meaning of Water Code §13327) fining the Bayridge Estates subdivision would be inconsistent with Water Code section 13327.

F. Vista De Oro

As to RWQCB Cease and Desist Order 99-56 (Exhibit "14") related to the Vista De Oro subdivision:

The LOCSD, pursuant to Fund 400 (Exhibit "15"), provides drainage, street lighting and septic tank maintenance to the residents of this zone of benefit as inherited from the County of San Luis Obispo. Vista De Oro services are primarily funded through yearly special charges that are included on the property tax bills and transferred from reserves. (See Exhibit "15" [Line Items 4035-400 and 9950-400].) The anticipated reserve balance for FY 05-06 is approximately \$19,720 (Exhibit "16"). Further, when considering the limited amount of contribution of septic effluent to the groundwater basin and the impact the fines would have on the continued operation of the Vista De Oro (clearly a business within the meaning of Water Code §13327) fining the Vista De Oro would be inconsistent with Water Code section 13327.

9.

THE WORKSHEET FACTORS ARE INCORRECT

The Worksheet's primary flaw is that it is predicated on the assumption that the LOCSD is a "corporate" agency having a "general fund" capable of responding to \$10,000 per day fines for \$11,190,000. As noted above, this is simply not the case. Other flaws are addressed below by factor:

A. The Nature, Circumstances, Extent, and Gravity of the Violation

The situation presented here is utter unique in California RWQCB history both as to the elections issue, as well as the magnitude of fines being sought against such a small public agency.

In response to the Worksheet's discussion of this factor, the LOCSD contends that any fines exacted against the LOCSD will only further deter the LOCSD from ever having the ability to address the gravity of the degraded groundwater basin and the Morro Bay National

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Estuary. The CCR board and staff are reminded of the clear and unequivocal facts as follows:

1. The SWRCB has, as of the date of this response, not declared the LOCSD in default under the SRF loan to pay for the project, but has withheld payment on account of Measure B.
2. Pursuant to the SRF Loan contract, the SWRCB is now in a position to assume the wastewater project and address the issues raised by this factor.
3. CCR staff has not enforced penalties as referenced in the TSO because of facts and circumstances beyond the LOCSD's control. (See Exhibits "19" and "27.") CCR staff is now recommending cumulative fines even during the periods that staff agrees were beyond the control of LOCSD. Such fines are clearly punitive in nature and violate Water Code section 13308(b).

B. Degree of Culpability

The LOCSD board has not issued a temporary stop work order. The only action taken by the LOCSD board was to call a brief "time out" to allow the new board an opportunity to assess problems that had already surfaced from the previous board's rush to start the project before the election.

February 15, 2004 CCR Staff Report (p. 7): "Staff evaluated land use and loading information to determine sources and appropriate implementation actions. The results of this analysis indicate the primary source of nitrates to Los Osos Creek is croplands. However, rangeland is also a source."

C. Susceptibility to Cleanup or Abatement

The cleanup and abatement of the four (4) septic tanks that are actually operated by the LOCSD will do nothing to achieve compliance with Time Schedule Order 00-131. Given recent data (Cleath & Assoc.) indicating a slight trending decrease (6.3%) in nitrate levels, the LOCSD is unaware of any data supporting the Worksheet's claim that "many years will be needed before groundwater quality is restored to drinking water quality."

Up until now, the LOCSD board has been focusing its efforts on following through on “its commitment to quickly construct the Los Osos Wastewater Project in accordance with State and local laws and the terms of the SRF Contract.” If the CCR believes that this focus should instead be directed at implementing a solution for just the four disposal systems covered by the four Cease and Desist Orders, the CCR should tell this to the LOCSD.

D. Voluntary Cleanup Efforts Undertaken by the Violator

The LOCSD did not issue “temporary stop work notices” to the project contractors on October 3, 2005. Instead, the LOCSD ordered a temporary suspension of work as allowed in Section 15.1 of the construction contracts that were approved by the SWRCB. Notably, the final instruction in those letters was:

- “• Contractor shall maintain a standby posture until further notice.”

As previously noted, the current LOCSD board has held numerous public meetings since October 1, 2005. Members of the board serve as citizen representatives and hold regular jobs. Several of them have, at their own cost, taken time off in an effort to keep the project moving forward and SRF Loan in place.

On November 8, 2005, the LOCSD issued unconditional orders to the contractors directing them to proceed with project construction (collectively, Exhibit “18”).

E. Degree of Toxicity of the Discharge

The LOCSD cannot be held responsible for the degree of toxicity for those residences within the Prohibition Zone who operate individual septic tanks. The degree of toxicity from the four (4) septic tanks operated by the LOCSD is minimal, and exacting fines related to those discharges would not achieve compliance with the TSO; its only affect would be to reduce vital services to LOCSD residents.

The LOCSD takes exception to the Worksheet’s misleading statement that “the CSD took seven years from its formation just to start construction.” The CCR’s own records amply show the CCR staff and board acknowledging the factors causing the LOCSD’s inability to comply with the TSO.

F. Prior History of Violations

Contrary to the Worksheet's claim, the LOCSD does not have a long history of violations. The four Cease and Desist orders issued in the 1999 during the LOCSD first year in existence as a special district, the TSO issued the following year, and the LOCSD timely appealed the TSO to the SRWRCB. Faulting the LOCSD for the violations of its predecessor the County, from which the LOCSD inherited this mess, is like penalizing a child for the crimes of her father.

G. Economic Benefit or Savings Resulting from the Violations

Clearly the LOCSD receives no economic savings resulting from violation of the TSO. It must be remembered that the violations are occurring within the Prohibition Zone of the LOCSD, and that the TSO is not a District-wide abatement order. As CCR staff has previously pointed out to its board, imposing fines on the LOCSD would only result in bankrupting it and leaving a community without essential public services.

H. Discharger's Ability to Pay Civil Liability

To the contrary, ample evidence supports the LOCSD's claim that it is a small enterprise district that does *not* have a stream of revenues capable of addressing fines of such magnitude. (See Part 8, *supra*.) The LOCSD cannot simply raise rates for the two small septic facilities it operates to cover such fines. Finally, as noted in Part 6, *supra*, the LOCSD has not taken any "intentional actions" to terminate or delay the wastewater project.

I. Discharger's Ability to Stay in Business

The LOCSD's operation of the four septic tanks at question are business operations and the imposition of fines, as alleged above, will affect the LOCSD's ability to provide vital services to its residents.

The Worksheet claims that the LOCSD's "ability to stay in business is not a factor. To the contrary, the CCR's own staff addressed this very issue a little more than a year ago and concluded that:

"Assessment of penalties under [Time Schedule] Order No. 00-131 would result in bankrupting the CSD and the responsibility for the community

wastewater project would likely revert to San Luis Obispo County. Such action is not likely to result in resolution of water quality problems in Los Osos in a timely manner.” (*CCR Staff Report for Regular Meeting of July 9, 2004.*)

J. Other Matters that Justice May Require

For all of the reasons set forth above, justice dictates that the CCR board deny the Complaint its entirety. Moreover, in is grossly unjust for the Worksheet to recite back to 1983 – some 16 years before the LOCSD's formation.

**10.
CONCLUSION**

For all of the above reasons, the Los Osos Community Services District respectfully requests the CCR to take action as follows:

- Reject the Complaint and take no action to fine the LOCSD because such fines are inconsistent with Water Code section 13327 and will not achieve compliance with the TSO;
- Continue this matter until such time as Measure B is resolved by a court of competent jurisdiction and/or the SWRCB cures its default under the SRF Loan; and/or
- Amend the dates set forth in the TSO as was suggested as an option in the *CCR Staff Report for Regular Meeting of July 9, 2004.*