

PUBLIC HEARING
BEFORE THE
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
CENTRAL COAST REGIONAL WATER QUALITY CONTROL BOARD

In the Matter of:)
)
Administrative Civil Liability)
Complaint No. R3-2005-0137)
)
Re: Los Osos Community Services)
District, Los Osos Wastewater)
Project)
San Luis Obispo County)
_____)

CENTRAL COAST WATER BOARD
CONFERENCE ROOM, SUITE 101
895 AEROVISTA PLACE
SAN LUIS OBISPO, CALIFORNIA 93401

VOLUME I of II

THURSDAY, DECEMBER 1, 2005

Recorded by:
Board Personnel

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

BOARD MEMBERS PRESENT

Jeffrey S. Young, Chairperson

Russell M. Jeffries, Vice Chairperson

Gary C. Shallcross

Daniel M. Press

John H. Hayashi

Monica S. Hunter (recused)

Leslie S. Bowker (recused)

BOARD ADVISORS

Michael Thomas, Assistant Executive Director

Sheryl Schaffner, Attorney

WATER BOARD PROSECUTION STAFF

Roger Briggs

Lori Okun

Matt Thompson

Sorrel Marks

Harvey Packard

LOS OSOS COMMUNITY SERVICES DISTRICT

John McClendon, Attorney

Jon Seitz, Attorney/Consultant

Dan Bleskey, Interim General Manager

Robert Miller, District Engineer

Lisa Schicker, President, Director

LOS OSOS COMMUNITY SERVICES DISTRICT

Chuck Cesena, Director

John Fouche, Director

Bruce Buel, General Manager on administrative
leave

ALSO PRESENT

Ed Moore, Monterey Mechanical

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1 P R O C E E D I N G S

2 --o0o--

3 CHAIRPERSON YOUNG: Welcome, everybody,
4 here. I'm Jeff Young, Chair of the Regional Water
5 Quality Control Board. And, yes, I have been
6 reappointed; came in at the last minute --

7 (Applause.)

8 CHAIRPERSON YOUNG: But the way things
9 work in Sacramento, sometimes you have to hold
10 your breath.

11 Let's have roll call. Carol.

12 MS. HEWITT: Thank you. Monica Hunter.

13 BOARD MEMBER HUNTER: Here.

14 MS. HEWITT: Gary Shallcross.

15 BOARD MEMBER SHALLCROSS: Here.

16 MS. HEWITT: Russell Jeffries.

17 VICE CHAIRPERSON JEFFRIES: Happy
18 holidays.

19 MS. HEWITT: Thank you. Jeffrey Young.

20 CHAIRPERSON YOUNG: Here.

21 MS. HEWITT: Daniel Press.

22 BOARD MEMBER PRESS: Present.

23 MS. HEWITT: John Hayashi.

24 BOARD MEMBER HAYASHI: Present.

25 MS. HEWITT: Les Bowker.

1 BOARD MEMBER BOWKER: Here.

2 CHAIRPERSON YOUNG: Okay. Mr. Thomas,
3 would you like to do some introductions?

4 MR. THOMAS: Sure.

5 CHAIRPERSON YOUNG: You know what, I'm
6 going to make sure my cellphone is on vibrate or
7 silent, so I would appreciate it if everybody else
8 would do that right now.

9 MR. THOMAS: Okay. I'll introduce
10 myself. I'm Michael Thomas, the Assistant
11 Executive Officer for the Regional Board. I'll be
12 assisting the Board for the Los Osos CSD hearing.

13 I'll introduce the prosecution staff.
14 Sorrel Marks on my left; Roger Briggs, the
15 Executive Officer; Lori Okun, Staff Counsel; Matt
16 Thompson.

17 We have Carol Hewitt; John Goni (phonetic);
18 Harvey Packard, our Division Chief; Burton
19 Chadwick is in the back along with Sheila
20 Soderberg. They're helping to hand out cards to
21 folks. So if you would like to speak on this
22 item, or any other item, if another item should
23 happen to come up today, which I doubt that it
24 will, you would talk to Sheila. She has her hand
25 up with those cards.

1 Normally Roger Briggs, the Executive
2 Officer, is sitting here advising the Board. On
3 this case we have a separation of functions that
4 the Chair will talk about in a few minutes or now.

5 CHAIRPERSON YOUNG: Okay, and I'd like
6 to also have us introduce -- I think we have all
7 five members of the Los Osos CSD here. So,
8 welcome. Are they here? There's four, okay, four
9 are here. And then Mr. Bleskey and Mr. Seitz and
10 Mr. McClendon.

11 And at this point we have a couple of
12 Board Members that need to make a statement, and
13 they're not going to be participating in this
14 proceeding. So, Dr. Hunter, would you like to say
15 a few words?

16 BOARD MEMBER HUNTER: Yes, thank you.
17 Some of you know that I'm a homeowner in the
18 prohibition zone, and as a result I'll recuse
19 myself from the proceedings today. And just
20 wanted to make a statement for the record that I
21 have not spoken with either the staff, with the
22 prosecutorial team, or with any of my fellow Board
23 Members about the enforcement action today. Thank
24 you.

25 CHAIRPERSON YOUNG: Okay. And then, Dr.

1 Bowker.

2 BOARD MEMBER BOWKER: On the advice of
3 Board Counsel --

4 MS. HEWITT: Your microphone, please.

5 BOARD MEMBER BOWKER: All right, is that
6 better? Technology.

7 On the advice of Board Counsel I am
8 recusing myself from this matter. Although I'm
9 not in the prohibition zone, I do live in the
10 community of Los Osos. Both my wife, Rosemary,
11 and I have been active in community service for
12 many years.

13 Previously I have served on the County
14 Service Area CSA 9 Board, which was still
15 wrestling with wastewater issues. And before my
16 wife's terminal illness, Rosemary served on the
17 Los Osos CSD Board, was its first president.

18 And as these facts do not constitute a
19 conflict of interest in the legal sense, I wish to
20 avoid even the perception of bias in these
21 proceedings.

22 Thank you.

23 CHAIRPERSON YOUNG: Thank you, Dr.
24 Bowker. And then Sheryl Schaffner was not
25 introduced. She is the Board's attorney in this

1 proceeding.

2 And Mr. Thomas briefly told you about
3 the separation of functions, and that is done when
4 we do enforcement proceedings like this. And that
5 is to wall off discussions between the Board and
6 staff which does take place all the time on other
7 matters that don't involve adjudicative
8 proceedings.

9 So my contacts are then with Sheryl
10 Schaffner, not with Lori Okun and not with Mr.
11 Briggs, or any of the other prosecution team
12 members. My contacts are then with Sheryl and
13 Michael. I think that has been about it. We're
14 kind of enclosed in our own world in trying to
15 prepare for this hearing.

16 I had a couple of comments that I wanted
17 to address really to the public.

18 (Pause.)

19 CHAIRPERSON YOUNG: How many of you have
20 a lot of anxiety and are pretty uptight and
21 nervous about what may or may not happen today?
22 Okay. I'm in that group with you, all right. And
23 I think everybody in this room is in that group.
24 I think all the lawyers are; I'm sure the Board
25 Members are. And I'd like to try to get the

1 emotion level down somewhat so we can kind of get
2 through this and not make it a personal event.

3 I'd like us to stick to the facts and
4 the issues through this, and I really need your
5 cooperation in doing that.

6 And I want to start off by telling you
7 that the regional water boards are not the same as
8 the State Water Board. The State Water Board,
9 there's only one State Water Board. That's in
10 Sacramento. Those five members are paid; they
11 have a full-time job. And we are not paid for
12 doing this work. We get paid \$100 a day; we don't
13 get paid for all the review and preparation that
14 we do.

15 And we are not accessible to the public
16 because we have, in a legal sense, the role of
17 administrative law judges. Unlike the city
18 council or your supervisors, county supervisors,
19 who you can approach and call up at any point in
20 time, you can't do that with us.

21 And the reason is we can't be engaging
22 in ex parte contacts, talking to people off the
23 record and getting information. I know you can do
24 that with the Coastal Commission, but you can't do
25 that with regional boards. And so we're walled

1 off additionally in that sense.

2 But we've volunteers basically to do
3 this, and we really come with a quite varied
4 experience and background. The five of us that
5 are going to be participating as essentially
6 hearing officers, with me as the Chair, and I'll
7 start with Dr. Press over here, just for those of
8 you who don't know who we are, and present new
9 faces to you.

10 He was appointed in 2002, Dr. Press.
11 He's an Associate Professor environmental studies
12 at the University of California at Santa Cruz.
13 It's a position he's held since '92. He's
14 authored several articles relating to water,
15 environmental studies, including developing
16 hazardous waste capacity and the greening of
17 industry achievements and potential.

18 He is a member of the board of directors
19 of the Open Space Alliance. And I think also,
20 Daniel, you are now the chair of the environmental
21 studies department?

22 BOARD MEMBER PRESS: That's right. And
23 you can promote me to full professor now.

24 CHAIRPERSON YOUNG: Okay. All right.

25 (Laughter.)

1 CHAIRPERSON YOUNG: I wish things were
2 that easy. Okay.

3 Mr. Jeffries, right over here.
4 Appointed in '92, he is our longest serving Board
5 Member. I consider him to be the institutional
6 member. He goes back a long way with this Board.
7 And he is formerly the Mayor and a Council Member
8 of the City of Salinas, which is the largest city
9 in our Central Coast Region.

10 He also sits on the Moss Landing Harbor
11 Board as an elected member. He's also previously
12 served as a commissioner for the Salinas Valley
13 Water Commission, and as a member of the Monterey
14 County Resources Agency.

15 Mr. Hayashi down on the end, appointed
16 in 2000. He is the former president of the State
17 Board of Food and Agriculture; is a member of the
18 Agricultural Education Advisory Committee and the
19 California Institute for the Study of Specialty
20 Crops.

21 And his family owns and farms about 1000
22 acres of vegetables -- something like that. In
23 Oceana?

24 BOARD MEMBER HAYASHI: We farm from
25 Arroyo Grande to Morro Bay.

1 CHAIRPERSON YOUNG: Okay, in the fog
2 belt.

3 BOARD MEMBER HAYASHI: Yeah.

4 CHAIRPERSON YOUNG: And then Gary
5 Shallcross over on this end. Appointed in 1999.
6 He has served on several water-related task forces
7 and boards. He was district director for Assembly
8 Member John Laird from 2002 to 2004. And for
9 Assembly Member Fred Keeley from 1996 to 2002.

10 From '93 to '94 he was a volunteer attorney
11 for the Santa Cruz AIDS project.

12 And I'm also an attorney, as well as Mr.
13 Shallcross. So collectively, we've got a lot of
14 experience and a lot of qualifications to sit here
15 and to try to get this nut cracked, and try to see
16 what we can do to get things, you know, resolved,
17 if possible, and moved in a direction that at
18 least the Water Board feels it needs to get going
19 in.

20 There are long-standing issues with Los
21 Osos and the septic tanks and et cetera, et
22 cetera. The Board, itself, has direct involvement
23 with this because we've issued some orders in the
24 past. There have been some things that have come
25 up before us. And I have represented this Board

1 in front of the Coastal Commission on occasion.

2 But today the issues are limited as to
3 what we're going to be addressing. And those are
4 addressed in the staff's civil liability complaint
5 that addresses alleged violations of the time
6 schedule order that was issued a few years ago.
7 And that's really what we're focused on here
8 today.

9 I've read all of the letters that were
10 submitted to the office. I think there's about
11 126 of them. I know generally where everybody
12 stands on this. We've got two camps: those that
13 want to see things proceeding as quickly as
14 possible; and those that really want to go to
15 another site, look at other technology, and
16 basically asking for more time.

17 I would urge you, when it's time for
18 public comment, and depending on how many cards we
19 have, I'm going to have to decide how much time I
20 can allot everybody. So, I would urge you to help
21 this process along, I would briefly tell us where
22 you sit on the fence, but then it would really be
23 helpful if you listen to what the attorneys and
24 the witnesses have to say, and then be ready to
25 use your time to offer you critique and comment

1 and other information that you may have that may
2 help the Board in evaluating the credibility or
3 believability of any of this testimony.

4 So, use your time as you want, but I'm
5 just kind of encouraging you, because we're going
6 to have to listen to as much as we can --

7 MR. KING: Are you going to introduce
8 Roger Briggs?

9 CHAIRPERSON YOUNG: He was introduced.

10 MR. KING: Oh, he was --

11 CHAIRPERSON YOUNG: This is Sorrel
12 Marks, this is Roger Briggs, this is Lori Okun,
13 this is Matt Thompson. Okay? And who are you,
14 sir?

15 MR. KING: My name's Wayne King.

16 CHAIRPERSON YOUNG: Wayne King, okay.

17 MR. KING: I'm a taxpayer.

18 CHAIRPERSON YOUNG: Okay, good, I'm a
19 taxpayer, too, Mr. King. I'm glad we're on the
20 same side of that.

21 (Laughter.)

22 CHAIRPERSON YOUNG: Okay. Now, I just
23 want you to know that when today is concluded or
24 tomorrow, most likely this is going to go on past
25 today, just because of everything that's got to be

1 covered.

2 But when the hearing is concluded, if
3 any party is not satisfied with the result there's
4 an appeal process that has been built into this.
5 It applies to all administrative proceedings. And
6 the State Water Board will have review capability,
7 if any party feels that that needs to take place.
8 And then there's further review in Superior Court.
9 So this is not necessarily the end of the line,
10 but we would like to move in the direction where
11 we are getting the water quality issues addressed.

12 Something else I want to address, and
13 that is the decorum I'm going to expect throughout
14 this proceeding. I don't want to see anyone raise
15 their hands when they agree or disagree with a
16 speaker. I just don't want to see it in here. It
17 is distracting, and it takes away from our ability
18 to focus on what the witnesses are saying or what
19 the lawyers are saying.

20 I don't want to see placards held up; I
21 don't want to hear noise in the background, and
22 people verbally trying to participate in what's
23 going on. If you feel the urge that you've got to
24 do that, please step outside. And if that is not
25 going to be possible, then I will have to ask you

1 to please leave. I don't want to do that. But I
2 have been to some Coastal Commission hearings, and
3 I do know what can happen in an emotion-filled
4 situation. Let's try to get the personal part out
5 of this and let's focus and get this resolved.

6 I want to tell you a little bit about
7 what I see as our time schedule constraints in
8 this process. The District has asked for two
9 hours to put on their case. They're going to have
10 two hours to do that. That's extended to the
11 staff, the Prosecution Staff to do the same thing.
12 That's four hours right there, with a break in
13 between, and questions. We'll probably go right
14 past 5:00 I would say.

15 My goal would be to get through as much
16 as we can as quickly as possible and get to public
17 comment. And, again, depending on how many cards
18 we have, may have to limit public comment in terms
19 of the time per speaker, and that's so everybody
20 can be heard.

21 And targeting stopping at about 7:45,
22 because I'm going to lose a Board Member and we're
23 not going to have a quorum. And we'll see where
24 we're at at 7:45. I'm anticipating that we've got
25 to continue this tomorrow, and I'll check with the

1 lawyers and see whether it should be at 8:30 in
2 the morning or whether it should be at 1:30 in the
3 afternoon. It has been noticed for tomorrow, so
4 we can go ahead and do that. I just want to give
5 you that heads-up.

6 Okay, I think that covers everything I
7 wanted to say. So I'm going to go sit down and
8 we're going to get into a more formalized
9 beginning of these proceedings.

10 One thing i would also suggest, if you
11 guys have questions that are just burning and
12 comments that you really want to make because
13 you've heard something, write them down on the
14 paper. You can give them to Michael Thomas when
15 there's a break. And the lawyers and I will
16 decided whether we want to address those comments,
17 whether they want to kind of bring them up, get
18 them addressed, or if I want to do that. Or you
19 can save that and wait for your own public
20 comment.

21 Okay, thank you for your attention.

22 (Pause.)

23 MR. THOMAS: I'd also like to point out
24 that there are a few chairs up here in the front
25 that are open, for those of you standing in the

1 back. There are also some chairs here reserved
2 for the press, so if you're with the press and
3 want the front-row seat, there's some reserved.
4 If those chairs are not filled by the press, then
5 others should feel free to take them.

6 The bathrooms are out through that door
7 in the back, on my left where it says exit. And
8 there is an overflow area out in the front of the
9 office in our atrium area. There is a television
10 out there, and the Board hearing is being
11 televised over that television.

12 And also I'd like to thank Tim Hedges
13 and the San Luis Obispo Police Department for
14 being here today; we greatly appreciate it.

15 And that's it.

16 CHAIRPERSON YOUNG: Okay. Here we go.

17 This is the time and place for a hearing
18 by the Central Coast Regional Water Quality
19 Control Board for consideration of the proposed
20 administrative civil liability for the Los Osos
21 Community Services District.

22 This matter has been duly noticed and
23 two parties have been designated for this
24 proceeding, the Los Osos Community Services
25 District and the Regional Water Quality Control

1 Board Prosecution Staff.

2 Since this is a prosecutorial matter,
3 staff functions have been separated into two teams
4 which I previously alluded to. This is done to
5 insure that the Board has neutral advisors who
6 have not been personally involved in the
7 prosecution of the proposed enforcement action.

8 Everyone has been introduced. And I've
9 told you that both sides are going to have two
10 hours to put their cases on. And, by the way, the
11 Board can ask questions at anytime. And the way I
12 do this is when we start to ask questions and are
13 eating into your time, I'm going to stop the
14 clock. So I don't want you to get worried that
15 we're trying to take time away from anybody.
16 That's not what we're trying to do. But sometimes
17 it's better for the flow of what's happening that
18 we interrupt and ask a few questions to get
19 something clarified. So I'm going to stop the
20 clock when that happens.

21 Okay, the order of presentation will be
22 as follows: Witnesses called by the Prosecution
23 Staff, cross-examination of staff witnesses by the
24 CSD. And I'm going to use the acronym CSD which
25 everyone, I'm sure is familiar with.

1 Witnesses called by the CSD; cross-
2 examination of CSD's witnesses by staff. Policy
3 statements by representatives of agencies. Policy
4 statements by other interested persons. Summation
5 or closing statements by the discharger and
6 Regional Board Staff. Again, it's looking like
7 closing statements will be taken tomorrow, not
8 today. And that will also give both sides an
9 opportunity to collect notes, develop their
10 closing arguments, and to kind of let everything
11 kind of filter in.

12 Board Members and Board Counsel and
13 Michael Thomas and Board Counsel may ask questions
14 of witnesses and representatives at any time.

15 Each person who testifies at this
16 hearing -- and this is what's different, folks,
17 about this hearing than what you normally see go
18 on, everyone who is going to testify is going to
19 take an oath. The same oath that you would take
20 as if you were in a court of law. Everyone is
21 expected to tell the truth.

22 Each person who testifies at this
23 hearing shall begin by stating his or her name and
24 address, unless the address has already been
25 given. All persons who may testify at this

1 hearing, please stand. And I assume that's most
2 everybody, including public comment people. If
3 you're going to come to the podium, please stand.
4 Even if you don't plan to testify, but are
5 involved in this matter, I still want you to raise
6 your right hand and take the following oath:
7 Whereupon,

8 ALL PROSPECTIVE WITNESSES

9 to be called as witnesses and to testify herein
10 were thereupon duly sworn, en masse.

11 CHAIRPERSON YOUNG: Okay, thank you.

12 All right, the next thing we're going to
13 address, or what we would call in civil court,
14 superior court, kind of in limine matters. And
15 these are matters that have been raised by the
16 parties where they have some concerns about issues
17 or procedure or things of that nature that they
18 want to get some redress for.

19 And I know that the attorneys for the
20 CSD have made, in their correspondence to Sheryl
21 and myself, have raised some issues about what is
22 going to happen today. And I want to address
23 those now in front of the whole Board so we can
24 get concurrence on how we're going to proceed.
25 And then we can kind of clear that away, and then

1 we can actually begin with the testimony.

2 And first I'm going to deal with the
3 documents. There's a lot of documents in this
4 case. There's hundreds of them. Both the
5 documents in the Regional Board's files and then
6 the CSD has offered, or at this point marked as
7 exhibits, documents that they would like to use in
8 this proceeding.

9 Those documents and their disposition is
10 all handily summarized in a table that Michael has
11 prepared on my behalf. And the parties and the
12 Board Members have been provided that table.

13 And, Michael, who -- and the CSD, the
14 staff? Okay.

15 (Whereupon, aforementioned table was
16 distributed.)

17 CHAIRPERSON YOUNG: This is the Board's
18 effort at getting its hands around the documents.
19 It's not the prosecution team's efforts. I did
20 this in consultation with Michael and with Sheryl.

21 And I want to summarize what my rulings
22 are as reflected in that table. Everything
23 submitted after the applicable deadlines provided
24 in the hearing notice is excluded.

25 In this category are several dozen

1 public comments submitted after November 17th, and
2 still coming in as of last night. And I want you
3 to know that to the members of the public that
4 have been submitting emails and letters up until
5 last night, you know, I appreciate you interest in
6 this. I can understand why you want to get your
7 comments in.

8 At some point it becomes unruly for the
9 Board to deal with a lot of papers coming to us.
10 That's why we have a cutoff. It's simply so we
11 can manage the flow of information.

12 I want the Board to really be focusing
13 on what happens here live, and not to be trying to
14 thumb through what came in last night. It
15 detracts from what needs to be done.

16 And those that have submitted letters
17 late, you have the opportunity to still tell us
18 those concerns and issues in public comment.

19 Okay?

20 Any item that was requested for
21 inclusion in the record by reference, but not
22 provided, is excluded; unless the requirements of
23 regulation section 648.3 of title 23 have been
24 met. Specifically the requirement to identify
25 where in the existing files the document is

1 located, and the portion of the document upon
2 which the party relies.

3 All of the documents excluded in this
4 category were requested for inclusion by reference
5 by the CSD. The CSD, however, made no effort to
6 meet the standards set out in section 648.3 upon
7 submittal of the documents on November 17th, nor
8 when I gave the CSD some additional time to make
9 the showing by November 28th.

10 So, as of all those documents, except
11 the ones noted in the chart, which prosecution
12 staff made the showing for the CSD, are excluded.

13 Some documents, specifically newspaper
14 articles, are being excluded on my own motion.
15 They are hearsay, not meeting the statutory
16 standard in Government Code section 11513.
17 Newspaper articles are not the sort of evidence on
18 which responsible persons are accustomed to rely
19 in the conduct of serious affairs. And there has
20 been no showing that these articles are offered to
21 supplement or explain other evidence, so they are
22 excluded, as well.

23 And, folks, it is the language of that
24 Government Code section which sets out the
25 standard by which hearsay can be used in an

1 administrative proceeding.

2 Yes, Sheryl, go ahead.

3 MS. SCHAFFNER: On the first category of
4 documents that the Chairman described, the late-
5 submitted documents, I'd add that comments
6 actually continued to be received as of the start
7 of the hearing. I believe they've been handed to
8 Carol. And it's my understanding that the
9 Chairman includes those in that general category
10 of exclusion, as well, for the same reasons.

11 CHAIRPERSON YOUNG: Yes.

12 MS. SCHAFFNER: Okay, thank you.

13 CHAIRPERSON YOUNG: Okay. So, --

14 MS. OKUN: Mr. Chairman, before we move
15 on I have a minor correction on the master
16 documents list 2, the prosecution staff's direct
17 evidence.

18 CHAIRPERSON YOUNG: Okay.

19 MS. OKUN: That was actually submitted
20 on November 10th, not November 17th. Just so the
21 record's clear it was submitted by the due date.

22 CHAIRPERSON YOUNG: Okay. Can you lead
23 me to where you're referring to?

24 MS. OKUN: It's master documents, list
25 2, the entire list of staff's direct evidence.

1 It's items 1 through 149.

2 CHAIRPERSON YOUNG: Okay. But, it's
3 accepted anyway.

4 MS. OKUN: Right.

5 CHAIRPERSON YOUNG: It's just the date
6 you're correcting?

7 MS. OKUN: Right, I just wanted the
8 record to be clear that it was on time.

9 CHAIRPERSON YOUNG: Okay. All right.

10 MR. SEITZ: Mr. Chairman, I just have a
11 point of clarification.

12 CHAIRPERSON YOUNG: Of course.

13 MR. SEITZ: Thank you. My name's Jon
14 Seitz. I'm an attorney in San Luis Obispo. I
15 hope I just have to say this once. My residence
16 is at 350 Estuary Way in Grover Beach; and my
17 lawfirm is at 1066 Palm Street, commonly known as
18 Shipsey and Seitz. And I am the former District
19 legal counsel to the Los Osos Community Services
20 District.

21 The prosecution team designated the
22 entire administrative record regarding the
23 CalCities litigation. And if these documents that
24 are rejected in this list were in that particular,
25 if I remember, six volumes that were designated,

1 they're clearly within the possession -- and I
2 know that there's a number of newspaper articles
3 that are in that, and a number of other documents.

4 Am I assuming that you're excluding
5 their documents, too? Or if they are in the
6 administrative record of the CalCities litigation,
7 and they appear to be rejected here, are they, in
8 turn, now accepted because they were designated by
9 the prosecution team?

10 I just want to make sure I'm clear on --
11 because we have --

12 CHAIRPERSON YOUNG: I'm going to let
13 Sheryl --

14 MR. SEITZ: Thank you.

15 CHAIRPERSON YOUNG: -- kind of respond
16 to that.

17 MS. SCHAFFNER: Chairman Young can
18 correct me if I don't understand this correctly,
19 understand your intent correctly. But my
20 understanding is the intent was that any document
21 that was in the file is in the record through that
22 method of introduction into the record, because
23 they are in existence, identifiable and they're
24 there.

25 However, if they're incorporated by

1 reference and there was no way of confirming that
2 they are actually in the file because the location
3 wasn't added, they don't get added in by means of
4 that incorporation by reference. If they're
5 there, they're there. And they did come into the
6 record.

7 MR. SEITZ: So I have a clear
8 understanding here, if the document is in the
9 CalCities administrative record, and it's
10 reflected as being rejected here, the actual
11 outcome is that it's accepted into the
12 administrative record for these proceedings?

13 MS. SCHAFFNER: Yeah, the rejection is
14 through the motion to incorporation by reference.
15 But if it exists in the file, it is in the record.
16 So, you're correct --

17 MR. SEITZ: I still don't think I'm
18 getting the clarity that I'm trying to request
19 here.

20 The prosecution team designated the
21 CalCities administrative record, which is
22 approximately six volumes, I forget the exact
23 number, but it's a large number of volumes.

24 So my question is, my fear is that there
25 are documents that are in that administrative

1 record that have been offered by the prosecution
2 team without objection by the Los Osos Community
3 Services District.

4 And if they are -- my fear is that some
5 of those documents that are shown up here as being
6 rejected may well be in that CalCities
7 administrative record. I just want to make sure
8 that if they're shown up as rejected here in the
9 list, and they are, in turn, in the CalCities
10 administrative record, that they are, for lack of
11 a better word, not rejected.

12 MS. SCHAFFNER: You're --

13 MR. SEITZ: So that they are in the
14 administrative record for these proceedings. I
15 hope I'm making myself clear.

16 MS. SCHAFFNER: I think so, but just one
17 moment.

18 (Pause.)

19 MS. SCHAFFNER: Let me see if I can
20 clarify it for you.

21 MR. SEITZ: Okay.

22 MS. SCHAFFNER: The problem with the
23 motion you made for incorporation by reference was
24 without identifying the location in the file and
25 the portion you're relying on, we don't know --

1 you hadn't provided it as an attachment or in hard
2 copy or electronically to say, here it is, you can
3 put it in your record, we don't know for sure that
4 it's there. So we can't say we're incorporating
5 it by reference. That's why the regulation
6 requires that.

7 But if the prosecution team -- if it was
8 admitted into the record as part of a file, which
9 it sounds like it is, everything that's in that
10 portion of the record is not rejected. So the
11 answer to your question is correct.

12 MR. SEITZ: Okay, I just wanted to --
13 thank you.

14 CHAIRPERSON YOUNG: And so if what --
15 Mr. Seitz, if what Sheryl just said doesn't jibe
16 with the list, we will correct the list.

17 MR. SEITZ: Okay.

18 CHAIRPERSON YOUNG: Okay?

19 MR. SEITZ: I appreciate that; thank
20 you.

21 MS. SCHAFFNER: Yes, it sounds like we
22 may need at least a footnote to clarify that.

23 MR. SEITZ: Yeah.

24 MS. SCHAFFNER: Okay.

25 CHAIRPERSON YOUNG: Ms. Okun, do you

1 have any comments?

2 MS. OKUN: We can provide a copy of the
3 reference list of the CalCities record, a copy of
4 the administrative record index tomorrow if that
5 would be helpful.

6 CHAIRPERSON YOUNG: Mr. Seitz, would you
7 like that?

8 MR. SEITZ: Yes, thank you.

9 CHAIRPERSON YOUNG: Okay, fine. And
10 then we can maybe look at that and make sure that
11 those documents that you're concerned about are
12 coming in.

13 MR. SEITZ: Thank you.

14 CHAIRPERSON YOUNG: All right. Okay, so
15 to the Board, I have made that ruling, you know,
16 in advance on the documents. If anyone doesn't
17 object, then I would go ahead and we'll move on to
18 the next issue.

19 MS. SCHICKER: Wait a second, please.

20 We have another thing we need to say about --

21 CHAIRPERSON YOUNG: About those records?

22 MS. SCHICKER: Yes.

23 MR. SEITZ: And I guess -- I'm sorry to
24 keep interrupting here. This is the first time
25 that we have all we've seen, I think as of a week

1 ago, Ms. Okun's list of documents here for this
2 list.

3 But it says that certain documents, like
4 I'm just taking a look at page 18, document 269.

5 MS. SCHAFFNER: The staff documents or
6 the district's documents?

7 MR. SEITZ: No, the documents that are
8 listed in this document that was just handed to us
9 regarding the Chairman's rejection and acceptance
10 of documents.

11 MS. SCHAFFNER: You should have three
12 tables. There's a list one, list two, and list
13 three. And if you could zero in on which list
14 you're talking about?

15 MR. THOMAS: He's referring to list
16 one, --

17 MS. SCHAFFNER: Okay, thank you.

18 MR. THOMAS: -- page 18, document 269.

19 MR. SEITZ: Okay. Now, we may have had
20 a computer glitch, so we're not -- I'm not trying
21 to represent anything to the contrary. But we
22 submitted electronically on the date that we
23 submitted the documents, the ten copies here, I
24 burnt my computer up; I'm sure I burnt other
25 people's computers up, transmitting every document

1 electronically.

2 And I also submitted a CD with those
3 documents to the Regional Water Quality Control
4 Board on that same date.

5 And what I'm concerned about here is
6 that for example, if you take a look at page 9,
7 document 132, it's shown as red, and it is shown
8 as being not submitted.

9 I'm curious as to whether or not, how
10 that determination was made. Because it's our
11 belief -- we hired a professional server to do
12 these disks, you know, of documents. And we
13 submitted them.

14 And I had what I thought were assurances
15 that all those documents that were in those stacks
16 were also on this disk.

17 So I'm just curious to know how, like
18 document 132 shows not submitted. I grant you, we
19 probably -- you probably were unable to copy the
20 videotapes that are referenced in here, and I
21 understand that objection.

22 But I just want to make sure to certain
23 clarity here on these documents that say not
24 submitted and are actually documents and not
25 videotapes, how was that confirmed that they

1 weren't actually submitted?

2 MS. OKUN: I've got a copy of the CD
3 here. And I --

4 MR. SEITZ: Okay.

5 MS. OKUN: -- just checked it and
6 neither of those two documents are on there. Our
7 staff did go through and compare the CD to the
8 hard copies that were provided to make sure that,
9 you know, that there weren't some that were only
10 on the CD or only in hard copy, and they all
11 matched. And so the list of documents is up on
12 the screen now.

13 This particular document, number 269,
14 the August '04 transcript, I believe I do have a
15 copy of that. I forgot to check before I came
16 down here, but I think I do have it, and Ms. Marks
17 thinks that we have it, as well. And we can try
18 to verify that before tomorrow.

19 CHAIRPERSON YOUNG: Mr. Seitz, did
20 someone from your office cross-reference to make
21 sure that what was on the CD --

22 MR. SEITZ: That is --

23 CHAIRPERSON YOUNG: -- was what was in
24 the list?

25 MR. SEITZ: This is what I can represent

1 to the Chair. That my office, I believe,
2 submitted documents 1 through 30. And, of course,
3 we cross-referenced those. And I think they're
4 tabbed, individually tabbed for the record.

5 We also submitted a number of documents
6 and -- and believe me, I know that there was like
7 eight or nine bankers boxes that were in those
8 documents -- my office did not cross-reference
9 those documents to make sure that they were in.

10 But what we did was hire a professional,
11 I think San Luis Process Serving, for legal work,
12 to photocopy those documents for the record. And
13 also, at the same time, create a CD so that we
14 could both deliver electronically to the Regional
15 Water Quality Control Board Staff, and have a copy
16 for ourselves. Hopefully we can use it up here.

17 So my question really is, is I'm not
18 questioning whether or not they were submitted.
19 Believe me, I'm just questioning the methodology
20 of making that determination that they weren't
21 submitted, when the District went through some
22 extraordinary last-minute, under an extreme amount
23 of pressure, to get these documents before your
24 body, that they weren't actually submitted.

25 CHAIRPERSON YOUNG: Okay. That's a fair

1 question. And the question then that I would pose
2 back to you is did anyone then just check on what
3 the photocopy service did for you, just to make
4 sure they carried out your directions? And maybe
5 you didn't have time to do that, but, you know,
6 did anyone check?

7 MR. SEITZ: I can represent to the Chair
8 that as to those documents after 30, no one in my
9 office checked.

10 CHAIRPERSON YOUNG: Okay. Well, Michael
11 and Sheryl, --

12 MS. SCHAFFNER: I guess one observation
13 I would add, I think that we have the CD here.
14 And it's up on the screen; and if you'd like to
15 take, during a break, you know, examine the CD,
16 yourself, to see whether any of these things that
17 concern you, actually the way it's represented in
18 the chart matches up to what's on the CD, maybe
19 that would help. I don't know.

20 But what comes to my mind in this
21 discussion is just the difficulty of trying to put
22 into the record on the last day of the submittal
23 deadline such a huge volume of documents, and what
24 the purpose for those documents was, and how they
25 tie into the defense, it illustrates how helpful

1 it would be if the District could explain what
2 evidence they're relying on in their argument as
3 they present their case.

4 And that way the Board can pull out of
5 that massive volume of documents what's germane.
6 Because as it is it's just boxes holding down the
7 floor, unless there's some reason to think that
8 it's tied to an argument in defense.

9 And that's the part that's made it hard
10 to sort through on top of -- this just illustrates
11 that problem, I guess, is --

12 MR. SEITZ: And I don't disagree, but
13 it's one of the reasons why the District
14 continually requested a continuance. Because of
15 the large volume of documents that are associated
16 with these proceedings, and the tight time
17 schedule that the District -- and I know the Chair
18 granted us some exceptions, and I'm not trying to
19 argue that I don't appreciate that -- but the fact
20 of the matter is we requested a continuance of the
21 hearing date.

22 And when you ask a small District like
23 the Los Osos Community Services District to
24 prepare for what appears to be either a \$44
25 million or an \$11 million, depending on the high

1 and the low, what's in there, to respond to
2 damages at that level, and then we have these
3 timeframes that are extraordinary in nature for
4 the District to respond to.

5 And taking into account that the
6 Regional Water Quality Control Board Staff
7 actually submitted volumes by designating the
8 CalCities record, you've put an extraordinary
9 amount of pressure on a small District to
10 appropriately prepare and respond to the gravity
11 of this hearing.

12 And, I guess I'm maybe trying to renew
13 my motion to continue here, is that these are the
14 types of issues that should have been worked out,
15 and there should have been ample time for all to
16 work out, prior to conducting this type of
17 evidentiary hearing on such, what I consider,
18 extraordinarily short notice.

19 CHAIRPERSON YOUNG: Mr. Seitz, let's do
20 this. Do you have copies of those documents?

21 MR. SEITZ: They're in my office and on
22 my CD here.

23 CHAIRPERSON YOUNG: Okay, well, here's
24 what I think is fair and the way I would like to
25 approach this. If there are documents that you

1 want to use with witnesses or discuss or do cross-
2 examination with, you know, get them out and then
3 we can look at them. And we can deal with those
4 documents at that point in time.

5 But, you know, when I see the list --
6 folks, we have like 400 documents, that's a lot of
7 documents -- and, you know, we're not trying to
8 litigate and deal with everything that's happened
9 to Los Osos in the past 30 years.

10 And so there's some limited things we're
11 trying to deal with today, and I'm just trying to
12 make sure that the documents are really relevant.
13 And that is the test for admissibility into this
14 proceeding, is whether they're relevant to the
15 facts and issues that are at issue.

16 So, Mr. Seitz, let's look at the
17 documents if you've got them; and you want to use
18 them with witnesses, you can share them with the
19 prosecution staff. Let us look at it. And we
20 can, you know, rule at that point in time.

21 But, what I sense is you've got a lot of
22 boxes of documents that we're never even going to
23 talk about in this proceeding, except in the
24 abstract. And they're really there for an
25 appellate review process. And so --

1 MR. SEITZ: And, Mr. Chair, I agree with
2 your statement in its entirety. The reason why we
3 have these documents here is to create a
4 diminished rate of record on the chance or
5 likelihood, no matter how you want to take a look
6 at, that whatever decision is reached here today
7 is going to be appealed.

8 And, of course, when you create an
9 administrative record before an evidentiary
10 hearing such as this, it's taken for granted, and
11 I'll admit, we're not going to use every document
12 here to cross-examine witnesses with. But we
13 still have a vested interest in having those
14 documents in the record for the purposes of
15 arguing them potentially before a court. That's
16 why I think that we had this requirement to get
17 these documents submitted to this Board consistent
18 with your requirement that they be submitted on
19 the 17th. So that we would have them here; they
20 would be part of the administrative record
21 primarily for the basis of further court action.

22 (Pause.)

23 MR. McCLENDON: Mr. Chairman, may I
24 just --

25 CHAIRPERSON YOUNG: Of course.

1 MR. McCLENDON: Thank you.

2 MR. THOMAS: Would you identify
3 yourself?

4 MR. McCLENDON: Oh, I'm sorry. I'm
5 John McClendon.

6 MR. THOMAS: And what's your
7 relationship to this hearing?

8 MR. McCLENDON: I'm the Interim District
9 Counsel to the CSD.

10 Granted, it's a CEQA case, but I recall
11 a case from I think two years ago, 2003; it's
12 County of Orange v. Superior Court, and it was a
13 fight over an administrative record. And there
14 the court said very strongly that when fighting
15 over whether or not to admit materials in the
16 administrative record the proper way is to always
17 err on the side of over-inclusion, rather than
18 under-inclusion.

19 And there was another case called
20 Protect Our Waters, the POW case, where the court
21 rather humorously, but pointedly, made the same
22 point.

23 So I just wanted to bring that case law
24 to your attention.

25 CHAIRPERSON YOUNG: I appreciate that.

1 I think what I'll do, since perhaps these are
2 documents that you're not going to be relying upon
3 for the presentation of your case, why don't we
4 set aside, you know, for later determination, as
5 to what you want to get into the administrative
6 record for any appeal that might take place. I'm
7 not going to close the door on that, if you need
8 more time to go over those records.

9 I will, though, and I had asked this
10 earlier, for some showing of relevancy and
11 probative value, which still is going to be the
12 standard that I'm going to apply on all these
13 records. And as long as it has some relevancy,
14 then, you know, we'll reconsider that.

15 So, maybe we can get past that. We
16 won't exclude those that you are concerned about
17 that may not have shown up on the list.

18 MR. SEITZ: I hate to keep doing -- I
19 just want to make sure that, you know, my job here
20 is to create the administrative record, --

21 CHAIRPERSON YOUNG: Right.

22 MR. SEITZ: -- and to represent the Los
23 Osos Community Services District. We always had a
24 problem with that request for relevancy, not that
25 we don't understand it, but what our concern, and

1 again, it's the same reason why we keep requesting
2 a continuance, is that burden of identifying
3 documents and going through the relevancy issue
4 was only served on the Los Osos Community Services
5 District.

6 While on the same hand, the prosecution
7 team designates volumes from the CalCities case.
8 And it's just, it's difficult for me to sit here
9 and swallow that. That the burden wasn't placed
10 on both sides, when both sides have actually
11 submitted volumes of documents.

12 And I object to the thought that Los
13 Osos should now be placed in a position of going
14 through each document and providing a statement of
15 relevancy and so on and so forth, when the same
16 volumes of documents have been submitted by the
17 prosecution team and they're not under the same
18 burden.

19 And on that basis, and I continue to
20 believe this, that in order to have an appropriate
21 hearing here, this hearing needs to be continued
22 to allow the prosecution team and the Los Osos
23 Community Services District team to go through
24 that exercise.

25 I'm not a big fan of volumes and volumes

1 of administrative record; I'm a big fan of having
2 relevant documents. But how do we make those
3 determinations without having an equal time for
4 the prosecution time to sit down with their
5 documents, and the Los Osos Community Services
6 District going through their documents; and then
7 if there's going to be a fight over relevancy,
8 then we can at least bring it to this Board for
9 determination.

10 BOARD MEMBER SHALLCROSS: Mr. Chair.

11 CHAIRPERSON YOUNG: Yes.

12 BOARD MEMBER SHALLCROSS: Why can't we
13 do this. Why can't we go ahead with the hearing.
14 They can offer any documents they want, either
15 side. And if there's, you know, a relevancy issue
16 we can deal with it at the time.

17 And then what I would suggest is at some
18 point in the near future, both the prosecution and
19 the CSD, if they want other documents in the
20 administrative record, they work that out with you
21 and our counsel.

22 But there's no reason to hold up this
23 hearing just because of documents. And I agree, I
24 mean, I think it's onerous, but if documents
25 aren't relevant to this hearing, we don't need to

1 rule on their relevancy today.

2 CHAIRPERSON YOUNG: Well, I think that
3 was my point earlier that --

4 BOARD MEMBER SHALLCROSS: I know, but --

5 CHAIRPERSON YOUNG: -- there are
6 documents they're concerned about for the
7 appellate review --

8 BOARD MEMBER SHALLCROSS: Right.

9 CHAIRPERSON YOUNG: -- process that is
10 not going to really have a play today.

11 BOARD MEMBER SHALLCROSS: And what I'm
12 addressing is the CSD's contention that the burden
13 is only on them and not on the prosecution.

14 What I'm saying is the prosecution needs
15 to do that same job if they want these other
16 documents that aren't going to be presented today
17 or tomorrow, but they want it in the
18 administrative record, they're going to have to
19 show, just like the CSD, that they're somehow
20 relevant.

21 CHAIRPERSON YOUNG: I think before we
22 actually jump to that conclusion --

23 BOARD MEMBER SHALLCROSS: Okay, sure.

24 CHAIRPERSON YOUNG: -- I think my
25 understanding is, and, Sheryl, you'll have to set

1 me straight on this, that in these administrative
2 proceedings, because the agency's actions are
3 being targeted, that the agency's files
4 automatically come into the record.

5 MS. SCHAFFNER: That's correct. And
6 that's one thing I wanted to distinguish. I
7 wanted to speak to Mr. Seitz' concern about the
8 perception of a disproportionate burden.

9 This isn't a civil court proceeding.
10 This is an administrative proceeding. And it's an
11 administrative agency action. And it is arising
12 out of an administrative file, out of an
13 administrative permit, and out of an
14 administrative enforcement order.

15 And all of those elements that give rise
16 to this action are rooted in a file. And that
17 file is the basis of the proposed action. It is
18 inherently relevant, and the source of this
19 action. So, the file automatically comes into the
20 record on that basis.

21 It would be an unnecessary consumption
22 of time to go through and make that showing each
23 and every time, because it is the foundation of
24 what's at issue today.

25 What you are presenting, in theory in

1 most proceedings in this setting, would be a
2 defense to what the file -- what the agency is
3 asserting. And you would be presenting evidence
4 to support your defenses, to say why they were
5 incorrect, why you have an equitable defense, why
6 the facts are different than purported.

7 And you would be presenting documents
8 that aren't already in the record to support that,
9 while referencing documents that are already in
10 the record to support that.

11 To go beyond that into an entire realm
12 of other information that may -- or we don't even
13 know why it's being presented, I would argue,
14 isn't, by itself, a basis for saying that's unfair
15 or that the record needs to be continued. But the
16 continuance is a separate matter for Jeff to
17 handle.

18 MS. OKUN: Could I address the document
19 issue?

20 CHAIRPERSON YOUNG: Yes.

21 MS. OKUN: Looking through the responses
22 to the request to admit documents, it looks to me
23 like the rejected documents weren't rejected based
24 on relevance. They were rejected because they
25 weren't provided to the Board or to its staff. So

1 they can't be the basis for the Board's decision
2 because the Board's never seen them; its staff has
3 never seen them. And in many cases, based on the
4 description, we couldn't even tell what the
5 documents were.

6 So it's really an issue of what's in the
7 hearing record. And if either side wants to
8 present documents as the hearing goes on, I think
9 that's a separate issue then, whether the Chair
10 has rejected anything based on relevance, or
11 whether either side has been requested to make a
12 showing of relevance, because you did request that
13 information, but neither side did that. And the
14 documents were still admitted, the ones that were
15 provided.

16 CHAIRPERSON YOUNG: I think Mr. Seitz'
17 position was that they put everything onto the CD,
18 and so their understanding is it should be there;
19 it should be part of what was presented.

20 MS. OKUN: The CD is what's up on the
21 screen and --

22 CHAIRPERSON YOUNG: Okay.

23 MS. OKUN: -- Matt Thompson is here;
24 he's under oath. He was the staff person who went
25 through the CD and compared them to the hardcopy

1 documents. So, if anybody wants to ask him about
2 that process he's dying to answer your questions.

3 CHAIRPERSON YOUNG: Okay. The question
4 was posed as to what procedure was used. Matt, do
5 you want to tell us what you did?

6 MR. THOMPSON: Yes. On November 17th
7 and 18th we received six banker boxes full of
8 documents. On each document was -- on the top of
9 each box was posted the list of about 380 or 390
10 documents.

11 Also accompanying those six boxes was a
12 CD that contained a pdf version of everything that
13 was in those six boxes. I first checked the
14 pdf's, a copy of which -- I checked the CD, a copy
15 of which is posted here, and noted those that were
16 missing.

17 Mr. Seitz noted document number 132.
18 You can see from this list that 132 is missing.

19 I then compared the ones --

20 CHAIRPERSON YOUNG: And those notations
21 do match up, then, with the Bates stamp numbers on
22 the documents? Is that what you're telling us?

23 MR. THOMPSON: Correct. I went --

24 CHAIRPERSON YOUNG: Okay.

25 MR. THOMPSON: -- to the hardcopy -- I

1 then went to the hardcopy and verified that the
2 pdf -- the CD matched the hardcopy content, and
3 that's how we verified which documents were
4 missing.

5 CHAIRPERSON YOUNG: Well, here's a
6 question I have, Mr. Seitz, as I scan that list I
7 see 123 is not there, 121 is not there, 129 and
8 130. And, you know, we didn't create the
9 numbering system.

10 MR. SEITZ: I agree.

11 CHAIRPERSON YOUNG: So I don't know
12 what's going on. But, you know, if there are --
13 I'd like to get through this, but I want to give
14 you time, if you need it, and we can do that after
15 today or tomorrow, to make sure that, you know,
16 you feel you've gotten your documents into the
17 record, you know, that are relevant and you really
18 want to rely upon. I want to give you time to do
19 that.

20 MR. SEITZ: I thank you.

21 CHAIRPERSON YOUNG: Okay.

22 BOARD MEMBER SHALLCROSS: Can I ask
23 another question?

24 CHAIRPERSON YOUNG: Yes.

25 BOARD MEMBER SHALLCROSS: So if a

1 numbered document, say 132, is not on the CD,
2 you're saying that it also wasn't available in
3 hardcopy?

4 MR. THOMPSON: That is correct.

5 BOARD MEMBER SHALLCROSS: Okay, thank
6 you.

7 CHAIRPERSON YOUNG: Okay. And then this
8 kind of leads us right into the second request,
9 and the over-arching request by the CSD for a
10 continuance of this hearing.

11 And part of that is a claim by the CSD
12 that their due process rights may be violated in
13 the process of what has been set up today to
14 adjudicate the prosecution staff team's ACL.

15 And I should probably, at this point,
16 let the rest of the Board know, and then the
17 public, that I, prior to receiving the District's
18 written answer, which contained the third request
19 for a continuance, I did participate in two
20 meetings with both prosecution team and CSD
21 representatives and/or their lawyers, wherein they
22 asked me for a continuance of this hearing.

23 The first one took place October 25th or
24 26th, I believe. Mr. Briggs, do you recall? And
25 Mr. Bleskey was there and Mr. McClendon were

1 there. And Sheryl was not there, as our attorney,
2 but Steve Blum, another attorney with the State
3 Water Resources Control Board was on the phone.

4 Mr. Briggs, what date was that?

5 MR. BRIGGS: That was 10 --

6 CHAIRPERSON YOUNG: 10 --

7 MR. BRIGGS: 10/26.

8 CHAIRPERSON YOUNG: 10/26. And at that
9 time that was essentially two weeks after the
10 notice had been sent out for the hearing. And I
11 had reviewed a letter that was dated October 21
12 from Mr. Bleskey laying out a number of issues
13 that were of concern to the District. We
14 discussed the letter, and I had asked both Mr.
15 McClendon and Mr. Bleskey exactly what was needed
16 in terms of additional time for the preparation of
17 their case.

18 My chief concern was whether they needed
19 more time to get witnesses together or to get
20 documents together. And I think, if I recall
21 correctly, and I'm going to ask you also to put
22 your thoughts in on this, both sides, was that the
23 main issue was that Gary Grimm was not going to be
24 available to actively participate throughout the
25 preparation of the District's case.

1 And I had noted down that he was going
2 to be gone from October 25th to November 24th. Is
3 he here today, by the way?

4 MR. McCLENDON: (Negative head nod.)

5 CHAIRPERSON YOUNG: Okay. Is he still
6 employed by the District?

7 MR. McCLENDON: He returned from Europe
8 yesterday, we understand.

9 CHAIRPERSON YOUNG: Okay. All right.
10 And how many people in his lawfirm, do you know?
11 There's one?

12 MR. SEITZ: Yes, one.

13 CHAIRPERSON YOUNG: Okay. He must be a
14 really special guy. My concern was that what was
15 stated to me was the issue for Mr. Grimm's
16 involvement, and I believe Mr. McClendon had told
17 me this, that he wanted to prepare the District's
18 answer in the format of like a motion for summary
19 judgment, with a list of disputed and undisputed
20 issues.

21 And so my concern with --

22 (End Tape 1A.)

23 CHAIRPERSON YOUNG: -- that was that Mr.
24 Grimm could give directions to get that developed.
25 That I did express my preliminary take on what was

1 in the complaint, because that had already been
2 issued, that it appeared to be fairly
3 straightforward in terms of what the prosecution
4 team was alleging, that these were time schedule
5 date violations and basin plan discharge
6 prohibitions. And that the defense to those need
7 not be very complicated or elaborate.

8 And I had asked if, you know, more time
9 was needed for true preparation, and I was not
10 satisfied, really, what the response that I got
11 from this. I know the District has lots of
12 lawyers that it can rely upon, and has had them
13 from time to time. I know that Mr. Seitz has been
14 intimately involved with the District going back
15 for a number of years.

16 But I did extend the deadline for the
17 submission of the District's, and I think the
18 staff's further documents. Forget, I did not the
19 staff, just the District? I think I gave the
20 District some more time to get their answer in.

21 MR. BRIGGS: Right, we did not have an
22 extension.

23 CHAIRPERSON YOUNG: Right. There was
24 then a second request that was made to me, and
25 that took place, I believe, on November 9th. And

1 I think that's when we spoke with Mr. Seitz -- you
2 know what, before I shift to that, Mr. McClendon,
3 would you like to add anything -- well, before
4 we -- Mr. McClendon was present at the first
5 request.

6 MR. McCLENDON: Right.

7 CHAIRPERSON YOUNG: I just want to make
8 sure he can add anything to the discussion, or Mr.
9 Bleskey, if he wants to, about what we discussed.

10 MR. McCLENDON: Yes, Mr. Chairman. The
11 primary issue that I had was coming in as a brand
12 new Interim District Counsel; being told by the
13 those with institutional memory, like Mr. Seitz
14 and Mr. Buel, that Gary Grimm was our go-to
15 attorney for Regional Board and State Board
16 matters. This was his niche.

17 And having him gone in Europe for a
18 month-plus, right during this critical time, was
19 very troubling. You probably recall when you
20 questioned me, I acknowledged that Mr. Grimm had
21 offered to take his laptop, and from time to time
22 he'd be places where he could have web contact.
23 He could be out a pocket a day or so at a time.

24 So, with that, there was a certain
25 degree of optimism -- I'm being very candid

1 here -- that we could do a lot more interfacing
2 back and forth.

3 You were gracious in allowing us, I
4 believe, an extra two weeks extension to
5 accommodate the delays. The experience I ended up
6 having was it was a little more difficult to get
7 back and forth with Gary than we found. We ended
8 up basically dividing the labors, Mr. Seitz and I.
9 And I'm not sure that we actually were able to get
10 it to Gary to get his comments, to get them all
11 incorporated before we were able to file. And I
12 recall a general spanking on some of the stuff I
13 said from Gary.

14 And so we didn't have quite the ability
15 to go back and forth across the internet that we'd
16 anticipated.

17 MS. SCHAFFNER: Can I ask a quick
18 question, Mr. Chairman, --

19 CHAIRPERSON YOUNG: Yes.

20 MS. SCHAFFNER: -- an actual question.
21 Just to be clear that I'm recalling the correct
22 person, Mr. Grimm is the former Board Counsel for
23 the State Water Resources Control Board Office of
24 Chief Counsel that used to work for the Water
25 Board as an attorney, is that correct? The same

1 Grimm?

2 MR. McCLENDON: He's got a really low
3 Bar number.

4 MS. SCHAFFNER: Yeah, I believe he is,
5 yes. Thank you.

6 MR. SEITZ: Mr. Chairman, I just want to
7 add, if I might, a little bit to what Mr.
8 McClendon just said. I am the original attorney
9 for the Los Osos Community Services District.

10 One of the things that we did at the
11 very onset of facing the different challenges that
12 the District was going to face is attempt to hire
13 experts in each field that we thought that we were
14 going to have difficulty in.

15 And, of course, one of those was the
16 regulatory gauntlet that the District had to
17 hurdle. And we did hire Gary Grimm. I believe
18 that, and I'll leave Mr. Buel, who can testify to
19 this maybe better, because I was not actively
20 involved in those situations in which Mr. Grimm
21 was actively involved.

22 For example, I think Mr. Grimm was
23 actively involved in TSO-131. He was certainly
24 active in making presentations; and he was
25 certainly active, along with myself, in facing

1 regulatory challenges and litigations in hopes of
2 avoiding why we're here today, quite frankly.

3 He brings a certain amount of expertise,
4 I think, as your counsel has pointed out, in the
5 area of these types of proceedings in particular,
6 and water quality issues generally. And we
7 believe -- and I believe that the District's
8 inability to have Mr. Grimm here clearly affects
9 the District's ability to understand and address
10 the issues that are presented in the
11 administrative complaint. This is what Mr. Grimm
12 does for a living. That's why we hired.

13 Although I think Mr. McClendon and I
14 will probably do an adequate job, it certainly
15 will not rise to the level as if Mr. Grimm was
16 here in this background in this project, his
17 background with 00-131, and his ability to -- and
18 his expertise in these issues.

19 CHAIRPERSON YOUNG: Mr. Seitz, did Mr.
20 Grimm have a chance to review the ACL before he
21 left on his trip?

22 MR. SEITZ: I am not aware that when he
23 reviewed the ACL. I am relatively confident that
24 he did review the ACL complaint, though. I don't
25 want to --

1 CHAIRPERSON YOUNG: Did he draft up a
2 memo or anything? I mean did he take any time
3 to -- knowing that there was going to be a
4 hearing, that --

5 MR. SEITZ: Right.

6 CHAIRPERSON YOUNG: -- it was noticed
7 that way, I'm just wondering if he took any time
8 to try to put together his thoughts that might
9 direct the rest of you.

10 MR. SEITZ: I think that Mr. McClendon
11 can answer that. I can answer for what I received
12 on my emails at my office. He did respond to some
13 of my emails, but they were, you know, small
14 blurbs. They were like a paragraph or two.

15 What was curious is, of course, he was
16 normally sending them at 3:00 a.m. in the morning,
17 because I think that's European time, when he
18 could get next to a web thing; and we'd be sending
19 them out. Sometimes there'd be a day or two
20 later.

21 But I don't remember my office ever
22 receiving what you would classify as a long-term
23 memo.

24 CHAIRPERSON YOUNG: Okay.

25 MR. SEITZ: But maybe Mr. McClendon has

1 one here. I see he has a document.

2 MR. McCLENDON: Mr. Chairman, I --

3 CHAIRPERSON YOUNG: I don't expect you
4 to share anything that's confidential with --

5 MR. McCLENDON: No, this --

6 CHAIRPERSON YOUNG: I'm just --

7 MR. McCLENDON: -- attorney work
8 product --

9 CHAIRPERSON YOUNG: -- interested
10 because he had, there was two weeks, and knowing
11 there was a deadline coming --

12 MR. McCLENDON: Well, he --

13 CHAIRPERSON YOUNG: The notice went out
14 by the time we had our meeting October 26th, at
15 least that was about two weeks from when the
16 notice was sent out. I'm assuming that you would
17 have gotten him involved in the loop pretty
18 quickly.

19 But, go ahead.

20 MR. McCLENDON: I did receive a
21 confidential attorney/client memo addressed to me
22 and the General Manager, but not to Mr. Seitz --

23 CHAIRPERSON YOUNG: Okay.

24 MR. McCLENDON: -- on October 17th,
25 where he says he would like to provide some of his

1 initial thoughts and strategic considerations.
2 This, I believe he was running off to Europe, or
3 may have already even left by this date.

4 But at any rate, and again without
5 divulging any confidences, the two categories were
6 the petition for review with the State Board
7 that's held in abeyance and considerations
8 regarding that; and then there was the second
9 issue was some initial, as he put it, initial
10 thoughts on the ACL complaint.

11 Obviously one thing he didn't have
12 access to was any of the record, over in Europe.

13 CHAIRPERSON YOUNG: Right. Mr. Seitz
14 had mentioned that two things were kind of a
15 concern to him, and that was his expertise in
16 water quality issues and regulatory issues.

17 Can you expand upon that? What really
18 is it, in terms of this proceeding with the time
19 schedule violations, that you see, you know,
20 needing expertise in water quality issues?

21 MR. SEITZ: Well, I was hoping that the
22 Chair would take my comments broadly and not
23 narrowly. But, that's okay, I understand why it
24 would be taken this way.

25 I guess what I was trying to say is Mr.

1 Grimm's practice, as I understand it, is solely
2 related to Regional Water Quality Control and
3 State Water Resources Control Board issues. It's
4 that general expertise that he brings.

5 I mean, he, you know, he knows the code
6 sections; he knows these procedures; he knows the
7 game. And that's why attorneys specialize, of
8 course, is that they understand the intricacies,
9 the timings, when do you object, when do you make
10 particular types of arguments, when and how do you
11 object to document production. I mean it's just a
12 general thing that, you know, I'm sure your
13 prosecution staff has expertise in this area.

14 We know that when we started on this
15 project, that we were going to need expertise in
16 this area, and that's why we hired Mr. Grimm.

17 And the Board did retain Mr. Grimm, the
18 new Board did retain Mr. Grimm specifically to
19 represent the District, as I understand it, for
20 this particular hearing here today. And he's not
21 available.

22 I know this isn't a court of law, and I
23 know this is an administrative hearing, but it's
24 been my experience that courts often grant
25 continuances for the unavailability of counsel.

1 And I think -- and the reason why they do that is
2 because it protects the due process rights. And
3 if they have expert counsel, the judge or the
4 hearing officer is going to get a better
5 presentation; it's going to be much more narrow.
6 It's going to be much more -- hopefully more
7 narrow, hopefully more focused presentation to a
8 Board, because that's what they do.

9 So, I think that's my only comment in
10 response.

11 CHAIRPERSON YOUNG: Okay. I just wanted
12 to say that this Board has gone through lots of
13 hearings over the years. And we frequently get
14 lawyers, you know, representing parties that have
15 no expertise at all. I mean it is not a
16 prerequisite. It is helpful, and I do grant that.

17 But, you know, I do civil litigation;
18 I'm familiar, myself, with, you know, the Code of
19 Civil Procedure, and how intricate that is. But
20 there's a few statutes that apply in this arena.
21 And the hearing notice has reference to certain
22 time cutoffs that we noticed. And I think things
23 are pretty clear in that regard.

24 But, anyway, Sheryl, did you --

25 MS. SCHAFFNER: I actually just wanted

1 to ask about one more lawfirm that I see
2 referenced in your materials. There's a
3 McDonough, Holland and Allen, a very large,
4 reputable, competent firm in Sacramento, I see
5 represents the District in the litigation. I
6 don't know whether they were available to you in
7 this process.

8 I happen to be familiar with Harriet
9 Steiner and Stacy Sheston (phonetic) as being both
10 intimately familiar with water quality and
11 regulatory function. I don't know if they were
12 available to you or not.

13 MR. SEITZ: Let me respond. First of
14 all, I will send on your regards to Harriet and
15 Stacy, and thank you on their behalf.

16 We hired McDonough, Holland and Allen to
17 address certain issues that came up during the
18 prosecution. Again, that lawfirm, myself and your
19 staff worked feverishly to avoid where we are here
20 today.

21 They worked primarily on issues of
22 litigation, in fact solely on issues of litigation
23 that were before a court, on various motions,
24 hearings. And I think during my presentation I'm
25 going to go into that in a little more detail.

1 Gary, on the other hand, was hired for
2 his expertise in the regulatory area, and
3 providing assistance to the District before the
4 Regional Water Quality Control Board and the State
5 Water Resources Control Board. Harriet or Stacy
6 or Kimberly or Iris or any of those folks that
7 helped the District, to my knowledge never
8 appeared in front of a regulatory body regarding
9 any permitting process, time schedule orders,
10 things like that.

11 And I want to make sure everybody
12 understands here, Harriet and Stacy and McDonough
13 and Allen are certainly familiar with time
14 schedule order 00-131, I don't want to make any
15 dispersions there. But they were not hired to
16 address regulatory issues in front of regulatory
17 bodies. They were hired, once again, to represent
18 -- to assist me, essentially, in representing the
19 District before various courts.

20 CHAIRPERSON YOUNG: Okay, well,
21 certainly things are more relaxed and flexible in
22 this proceeding than if we were in Superior Court.
23 So, you know, there's a lot more leeway to do
24 different things and to continue things.

25 I want to get into the next --

1 MR. SEITZ: Mr. Chair, just so you know,
2 I withdraw that motion for continuance based on
3 the December 14th -- if you were going to get on
4 to our conversation -- I'm sorry, maybe I jumped
5 ahead.

6 CHAIRPERSON YOUNG: Well, I was going to
7 get to our discussion on the phone.

8 MR. SEITZ: Right.

9 CHAIRPERSON YOUNG: Because you did
10 state in your -- in something that was presented
11 to me, that this was now the third request for a
12 continuance. So if you're going to put that at
13 issue and raise that at some point, I think it's
14 fair that we, you know, kind of address what the
15 context was of that.

16 MR. SEITZ: Yes, and I apologize. I may
17 have gotten ahead of you. I recognize that I had
18 a separate discussion with the Chair and the
19 prosecution team requesting a continuance based on
20 this hearing being premature in light of the
21 December 15th Appellate Court hearing.

22 CHAIRPERSON YOUNG: Yes, Measure B.

23 MR. SEITZ: Measure B.

24 CHAIRPERSON YOUNG: You felt that the --

25 MR. SEITZ: Well, under the

1 circumstances, as I understand it, Measure B has
2 been dismissed from the Appellate Court, so I
3 believe that issue --

4 CHAIRPERSON YOUNG: Right.

5 MR. SEITZ: -- is moot. And all I'm
6 saying is I withdraw any --

7 CHAIRPERSON YOUNG: Okay.

8 MR. SEITZ: -- idea of continuance based
9 on --

10 CHAIRPERSON YOUNG: Okay.

11 MR. SEITZ: -- Measure B and the
12 Appellate Court.

13 CHAIRPERSON YOUNG: All right. And also
14 as part of that phone call you were also concerned
15 that the State Board kind of resolve its stand
16 with the state revolving fund loan, and I had
17 said, well, it looks like that hearing is going to
18 take place anyway before December 1st, so that's
19 going to get resolved.

20 And so --

21 MR. SEITZ: Mr. Chair, I do believe,
22 though, that there is another hearing set before
23 the State Water Resources Control Board.

24 CHAIRPERSON YOUNG: Well, that hearing,
25 from what I understand, is simply for the State

1 Board to potentially just reallocate money. So, I
2 think the State Board position has been made clear
3 to everybody where they stand on that revolving
4 fund loan.

5 But the point was we did have the
6 discussion; those were the two items that we
7 discussed, all of us, for about 30 minutes or so.
8 And again, based on that discussion, I did not
9 grant the continuance after that.

10 MR. SEITZ: And I agree with that. And,
11 again, I just renew my appreciation to the Chair
12 for hearing a very long discussion on a very
13 narrow issue.

14 CHAIRPERSON YOUNG: Okay. I think he
15 way I want to handle this with the request for the
16 continuance is to get through as much of the
17 hearing as we can at this point in time with the
18 witnesses. And we can take this back up again, if
19 the District feels, you know what, we really need
20 some more time. If we need to continue this, at
21 least we can, you know, consider that. The Board
22 will help me in that deliberation, the prosecution
23 team has got to weigh in on that.

24 And if you can, at that point,
25 articulate with some specificity exactly what you

1 need to do, then we'll look at it again. And I
2 have a feeling we're going to do that anyway for
3 the documents, till we get those resolved.

4 This proceeding may kind of take place
5 where we start to get through witnesses, cross-
6 examination, things of that nature, and we may
7 start to limit things down. And then get it
8 continued for more narrow issues that may need to
9 be addressed. So I'm quite willing to consider
10 that at that time.

11 MR. SEITZ: Thank you, Mr. Chair. As I
12 understand, the prosecution team is going to put
13 on their evidence, or their showing before the
14 Board. And after their presentation, and before
15 we put on our rebuttal, we would have the
16 opportunity to renew the motion for a continuance
17 basically? Is that the understanding?

18 CHAIRPERSON YOUNG: Well, I was thinking
19 after -- I want us to get through as much as we
20 can in the way we have laid it out. If we get to
21 the end of that time period, and you feel strongly
22 that you haven't been able to get something into
23 evidence, there's something else you want to
24 cover, you know, we'll consider it.

25 MR. SEITZ: I guess my guess is, I hate

1 to be picky, but we want to have a clear
2 understanding.

3 CHAIRPERSON YOUNG: Well, that's okay,
4 Mr. Seitz. As a lawyer I can appreciate
5 pickiness.

6 MR. SEITZ: We would like the
7 opportunity at the end of the prosecution team
8 presentation to renew our position as to having
9 Mr. Grimm here. Because obviously this is -- or
10 is that ruling now off the table?

11 CHAIRPERSON YOUNG: Well, let's go
12 ahead. You'll have the opportunity to renew the
13 motion.

14 MR. SEITZ: Thank you.

15 CHAIRPERSON YOUNG: And we'll take it up
16 at that point. And articulate as best you can
17 with specificity exactly how, you know, it's going
18 to help you. Okay?

19 MR. SEITZ: Thank you.

20 CHAIRPERSON YOUNG: Now, let's see what
21 else is on my list.

22 Okay, just lastly I know that there are
23 some witnesses that are under subpoena. And I
24 just want to make sure that those witnesses, if we
25 do continue this hearing tomorrow, that they show

1 up tomorrow. Is there anybody who's under
2 subpoena that can't show up tomorrow? Please
3 stand up or raise your hand if you cannot, because
4 I will expect anyone under subpoena to show up
5 tomorrow.

6 (No response.)

7 CHAIRPERSON YOUNG: Okay. All right.
8 Mr. Seitz and Mr. McClendon, are there any other
9 due process-type issues that you would like us to
10 consider at this point?

11 MR. SEITZ: I just have one.

12 CHAIRPERSON YOUNG: Go ahead.

13 MR. SEITZ: And in order for me to bring
14 this I would like to have the -- vanity -- turn to
15 page 9 of Ms. Okun's rebuttal brief.

16 CHAIRPERSON YOUNG: Okay.

17 MR. SEITZ: And this is paragraph 8.
18 And the reason why I bring this up is because it
19 does affect a major portion of our response, if
20 any, and probably the prosecution's team.

21 As we explained in our responsive
22 pleadings the Los Osos Community Services District
23 operates various specialized functions within very
24 specialized zones of benefit.

25 One of those zones of benefit is, I

1 think, what we call zone B, which is the fire
2 operations of the District. And in this response,
3 it says, first the complaint does not allege any
4 violations at the fire division system.

5 So, my first observation is, is it fair
6 for us to assume and for our residents to assume,
7 within the Los Osos Community Services District
8 that this Board will not seek or consider
9 penalties that would impact the District's fire
10 department?

11 CHAIRPERSON YOUNG: Ms. Okun or Mr.
12 Briggs, do you want to respond to that?

13 MS. OKUN: Actually that statement was
14 erroneous. The complaint does allege violations
15 at the fire division. It doesn't allege
16 violations at the Water District. The District
17 originally had four discharges, and the Water
18 District discharges were terminated at some time.
19 We didn't have enough evidence to allege any
20 violations because we don't know what date those
21 discharges stopped. But the fire division is
22 still discharging.

23 CHAIRPERSON YOUNG: Mr. Seitz.

24 MR. SEITZ: Well, so let me back up
25 then. Before we get on to the fire department,

1 can the Board provide our water customers in this
2 zone of benefit that the prosecution team will not
3 seek, nor will the Board consider fines that would
4 impact the District's ability to provide water
5 service within its water service jurisdiction?

6 MS. OKUN: What the Board's considering
7 is the assessment of fines. And the staff alleged
8 the discharges and the order, the time schedule
9 order that are the basis of those fines, part of
10 the District's defense is that it doesn't have the
11 money to pay those fines. But how it ultimately
12 allocates the fines among its ratepayers is up to
13 the District, not the prosecution staff.

14 CHAIRPERSON YOUNG: Mr. Seitz, how is
15 this a due process issue?

16 MR. SEITZ: Well, it's a due process
17 issue because it's a motion in limine. We need to
18 figure out on the run here precisely what it is
19 that is in the complaint.

20 And when you take a look at this
21 paragraph 8 here, and this is, you know, one of
22 the reasons why we continue to raise our
23 objections, is how fast this all came together,
24 and how there's a moving target as to what the
25 District is attempting to respond to.

1 First, we look at the complaint and we
2 say, okay, the water department isn't mentioned,
3 so our water customers can feel free that their
4 reserve account that we depend on to provide water
5 service to our residents isn't going to be subject
6 to the potential for being responsible for paying
7 whatever fines that may be enacted here.

8 Then we read this in number 8 and we see
9 that the fire department and our customers -- or
10 not our customers, but our clients, actually,
11 within the fire department that receive emergency
12 services, they don't have to have fear that their
13 reserves are going to be subject to the orders of
14 the Regional Water Quality Control Board to pay
15 fines.

16 And so from our perspective, we want to
17 have, and I think the Chair wants to have the same
18 thing, that is to have a very narrow issues here
19 presented to your Board. If we don't have to
20 worry about our fire department, then we don't --
21 when we haven't called CDF here, because I think
22 they'd have a lot to say about their ability with
23 their budgets, to respond to fines.

24 And I think maybe our water department
25 would love to be here if they could respond to

1 fines. But when you read these pleadings it seems
2 like we don't have to be concerned about our water
3 department responding to fines, and we don't have
4 to worry about our fire department responding to
5 fines.

6 CHAIRPERSON YOUNG: Let me ask you some
7 questions, Mr. Seitz.

8 Does the District own fire and water in
9 these departments? Aren't they under your
10 umbrella? Don't you own their assets?

11 MR. SEITZ: We view this complaint, and
12 this is one of the other things that's always been
13 a moving target for us, is the complaint addressed
14 solely at time schedule order 00-131.

15 Every time we take a look at the
16 pleadings we get -- I get confused. Maybe Mr.
17 McClendon is more omniscient than I am. But when
18 I look at this complaint, I say, okay, we're
19 worried about 00-131, and we're worried about
20 Regional Water Quality Control Board order 8313.
21 That is the prohibition zone.

22 And then we get mixed in here, because
23 within that prohibition zone, the District
24 operates four septic tanks. One for the first
25 department, one for the water department, one for

1 Vista del Oro and one for Bay Ridge Estates.

2 And it makes a big difference to us as
3 to -- I think you'll see it more in our
4 presentation, is what is being asked to be fined
5 here by the Regional Water Quality Control Board?
6 Is it these individual operations that the
7 District does not operate district-wide, but only
8 operates in regards to a particular zone of
9 benefit? Or is this much broader, are we just
10 looking at the enforcement of 00-131?

11 And every time I read these pleadings I
12 get more confused about that.

13 CHAIRPERSON YOUNG: Okay. Let me ask a
14 question of the prosecution staff. Are you
15 pursuing with testimony today and witnesses both
16 the basin plan prohibition violations, as well as
17 the time schedule order violations?

18 MS. OKUN: The complaint is pled in the
19 alternative. There's a time schedule order that's
20 based on violations of the basin plan prohibition
21 by these four facilities.

22 The way the complaint is drafted, we
23 calculated the \$10,000 per day penalty for all the
24 days that they've been in violation of the time
25 schedule order, and that was the amount we

1 alleged.

2 In the alternative the District was also
3 violating the basin plan prohibition at these
4 three facilities. But, again, those allegations
5 are against the District, not the facilities.

6 We will talk about the basin plan
7 prohibition because it's relevant to the
8 violations of the time schedule order, but our
9 recommendation is that penalties be assessed based
10 on the daily violations of the time schedule
11 order.

12 So, yes, we will be addressing both, but
13 we're not arguing that the Board should impose
14 penalties for the prohibition as opposed to
15 penalties for violation of the time schedule.

16 CHAIRPERSON YOUNG: Say that last part
17 again? Your recommendation is --

18 MS. OKUN: We will be discussing the
19 basin plan prohibition.

20 CHAIRPERSON YOUNG: Right.

21 MS. OKUN: But we are recommending that
22 the Board assess penalties based on the \$10,000-a-
23 day penalty and the time schedule order only.

24 CHAIRPERSON YOUNG: No, I understand.
25 Penalties for both, but we can only -- should the

1 Board decide on penalties, it would only be for
2 one or the other category, not for both.

3 But I think Mr. Seitz is somewhat
4 confused, and I don't know if it's a relevant
5 thing at this point, as to the divisions
6 underneath the CSD that it controls, and how an
7 enforcement action may or may not affect those
8 services.

9 I don't know how that information is
10 relevant at this point.

11 MR. SEITZ: If it please the Chair, can
12 I just renew this objection when I make my
13 presentation on how a community service district,
14 particularly the Los Osos Community Services
15 District is actually formed and operated with the
16 various zones of benefit, including the
17 prohibition zone, rather than hashing it out here
18 that may be a little more obtuse?

19 CHAIRPERSON YOUNG: Sure.

20 MR. SEITZ: Thank you. That's fine.

21 CHAIRPERSON YOUNG: Okay. Mr. Seitz,
22 any other issues that we should consider at this
23 point before we start?

24 MR. SEITZ: I guess -- no, I think
25 that's it. I thank the Chair for its patience --

1 CHAIRPERSON YOUNG: Okay. Should we
2 take a break at this point before we start, or --

3 MS. OKUN: Before we take a break, could
4 I ask a quick question?

5 CHAIRPERSON YOUNG: Sure.

6 MS. OKUN: We have Darrin Polhemus of
7 the State Board standing by in his office to
8 testify. And I'd like to give him some idea of
9 when we think we're going to get to him. We don't
10 intend to call him as a witness, but I gave him an
11 estimate that I thought that you would want to
12 talk to him sometime between 2:00 and 4:00.

13 He can be available later than that, but
14 I don't know about 7:45.

15 CHAIRPERSON YOUNG: Is Darrin there
16 right now?

17 MS. OKUN: Yes.

18 CHAIRPERSON YOUNG: Darrin?

19 MS. OKUN: Oh, no, he's not on the
20 phone.

21 CHAIRPERSON YOUNG: Yeah, okay.

22 MS. OKUN: I have his cellphone number
23 and --

24 CHAIRPERSON YOUNG: Okay.

25 MS. OKUN: -- two secretaries' phone

1 numbers.

2 CHAIRPERSON YOUNG: Well, Mr. Seitz and
3 Mr. McClendon, do you want to -- should we take a
4 break for a few minutes before we launch into
5 this? Because I would like, once we start with
6 both sides, I'd like that time just to roll. And
7 we'll break in between that.

8 MR. MCCLENDON: (Affirmative head nod.)

9 CHAIRPERSON YOUNG: Is that fine with
10 the prosecution team? Take a break for --

11 MS. OKUN: Right.

12 CHAIRPERSON YOUNG: -- ten minutes.

13 MS. OKUN: Right, but my question is
14 during the break can I call Darrin --

15 CHAIRPERSON YOUNG: Oh, of course.

16 MS. OKUN: --and ask him if --

17 CHAIRPERSON YOUNG: Yes, of course.

18 MS. OKUN: Do you still think before
19 4:00, or I'm not sure when you want to call him.

20 CHAIRPERSON YOUNG: Let me pull my
21 crystal ball out.

22 MS. OKUN: Excuse me?

23 CHAIRPERSON YOUNG: Ms. Okun, my crystal
24 ball, and -- I don't know. Yeah, probably before
25 4:00.

1 MS. OKUN: Okay.

2 CHAIRPERSON YOUNG: Yeah, I would say
3 maybe from 3:00 to 4:00 he should be online.

4 MS. OKUN: Okay, thanks.

5 CHAIRPERSON YOUNG: All right.

6 (Brief recess.)

7 CHAIRPERSON YOUNG: We are going to
8 resume our hearing. Please, everybody, take your
9 seats.

10 Mr. Seitz, is Mr. McClendon on his way
11 back in here? Okay. And Ms. Schicker, too? I
12 don't see her and I know she was sitting up there
13 with you.

14 (Pause.)

15 CHAIRPERSON YOUNG: All right. We are
16 going to start with witnesses called by the
17 Prosecution Staff. Still waiting for Mr.
18 McClendon, so --

19 MR. SEITZ: Mr. Chair, I'm told he'll be
20 here momentarily.

21 CHAIRPERSON YOUNG: Okay, well, we'll
22 wait for him.

23 (Pause.)

24 CHAIRPERSON YOUNG: Here he comes. And
25 how about Ms. Schicker, was she going to -- is she

1 coming?

2 MS. SPEAKER: Yes.

3 CHAIRPERSON YOUNG: Okay. Okay, folks,
4 we're going to start with the Regional Board
5 Prosecution Team case. And we're going to go for
6 two hours. If the Board has any questions that
7 they're dying to ask, go ahead. But we'll try to
8 get through this maybe without interruption.

9 MS. OKUN: I think our case was only
10 about 40 minutes. The rest of our time is for
11 cross-examination and rebuttal.

12 CHAIRPERSON YOUNG: Okay, and that's --
13 you're right about that. And you know that, Mr.
14 Seitz, that the time is divided up --

15 MR. SEITZ: Yes.

16 CHAIRPERSON YOUNG: -- like that, so.
17 Okay, everybody is present. Mr. Briggs.

18 MR. BRIGGS: Thank you, Mr. Chairman.
19 Making our initial presentation is Water Resource
20 Control Engineer Mr. Matt Thompson.

21 CHAIRPERSON YOUNG: You'll have to hold
22 on one second so that I can get my clock working.
23 Michael. There we go; always helps to turn on the
24 switch.

25 Okay, we're going to keep track. Does

1 this go up to 120? It doesn't, so why don't we do
2 this in 60-minute bites. And will you keep track,
3 also.

4 All right, go ahead, Mr. Briggs.

5 MR. BRIGGS: As I said, Mr. Matt
6 Thompson, Water Resource Control Engineer for
7 Regional Board Staff will be making our initial
8 presentation.

9 DIRECT TESTIMONY

10 MR. THOMPSON: Yes, good afternoon,
11 Chairman Young and Members of the Board. I'm Matt
12 Thompson.

13 The matter before you today is really
14 quite simple. The 2000 time schedule order for
15 Los Osos Community Services District specifies a
16 schedule for implementation of a Los Osos
17 Community Wastewater Project. The time schedule
18 order specifies liability of \$10,000 per day for
19 failure to comply with the schedule.

20 The District is over three years behind
21 on its compliance schedule. On October 3rd the
22 District suspended construction of its community
23 wastewater project. The District is wilfully
24 violating its time schedule order.

25 The Executive Officer issued an

1 administrative civil liability complaint on
2 October 6th in the amount of \$11,190,000. The
3 proposed administrative civil liability is
4 intended to compel the District to complete the
5 community wastewater project in a timely manner,
6 and to hold the District accountable for ongoing
7 water quality degradation resulting from project
8 delay.

9 Today we are recommending adoption of an
10 administrative civil liability order in the amount
11 of \$11,190,000. The matter before you today is
12 simply whether to assess liability and in what
13 amount.

14 In order to provide some background, I'm
15 going to discuss the Los Osos water quality
16 problems, and our history of enforcement.
17 However, please keep in mind what is not before
18 you today. This is not a hearing on whether the
19 prohibition was a good idea. Or whether the time
20 schedule order was necessary. Or even whether the
21 District should have chosen a different project
22 five years ago.

23 The issue before you is whether the
24 District violated its time schedule order,
25 although you have discretion to consider other

1 factors. In the alternative you can elect to
2 impose penalties based on the District's violation
3 of the basin plan prohibition.

4 Los Osos is a suburban community of
5 15,000 residents that uses septic systems for
6 waste disposal. Approximately one million gallons
7 per day is discharged from these septic systems
8 into a sandy groundwater basin, which is the
9 community water supply. Groundwater is shallow
10 and flows towards the Morro Bay National Estuary.

11 Many lots in Los Osos are too small for
12 conventional leach fields, therefore must use
13 seepage pits, which discharge directly to
14 groundwater, or with very little separation to
15 groundwater. These waste discharges have polluted
16 shallow groundwater with bacteria and nitrate.

17 Nitrate concentrations in shallow
18 groundwater have increased dramatically in the
19 last 50 years. The vertical bars on this chart
20 represent the population of Los Osos. The trend
21 lines represent the mean and median concentrations
22 of nitrate in shallow groundwater. You can see
23 the nitrate concentrations have increased in
24 lockstep with population growth.

25 Although nitrate concentrations

1 fluctuate somewhat with weather cycles, nitrate
2 concentrations are clearly trending upward over
3 time.

4 Los Osos groundwater has exceeded the
5 drinking water standard of 45 mg/L nitrate as
6 nitrate since the early 1980s.

7 This is the District's contour map of
8 nitrate concentration in shallow groundwater in
9 October 2004. I've highlighted areas where
10 groundwater exceeds the drinking water standard of
11 10 mg/L nitrate as nitrogen.

12 These darker highlighted areas show
13 where nitrate concentrations are 50 percent or
14 more greater than the drinking water standard. As
15 expected, these areas of highest concentration
16 correlate to areas with greatest septic system
17 density. Several water supply wells have been
18 shut down due to nitrate exceeding drinking water
19 standards.

20 But there is no dispute about the water
21 quality problems in Los Osos. Even the current
22 District acknowledges this problem must be solved.
23 At the November 16th State Board hearing, District
24 Director John Fouche stated that, we know we need
25 a sewer. Water quality is of the utmost

1 importance. That is not even a question. The
2 District does not dispute the need for a
3 wastewater system.

4 In order to understand how we got here
5 today we must first consider the decades-long
6 history of violation, enforcement and delay in Los
7 Osos.

8 In 1983 the Central Coast Water Board
9 adopted a resolution which amended the basin plan
10 and prohibited discharges of waste from septic
11 systems in the densest area of Los Osos, which is
12 now commonly known as the prohibition zone. This
13 prohibition effectively required Los Osos to build
14 a community wastewater system. That prohibition
15 became effective in 1988.

16 After many years of alternative
17 evaluation, public input and legal challenges, the
18 San Luis Obispo County Board of Supervisors voted
19 unanimously to proceed with the community
20 wastewater project in October 1995. The project
21 was scheduled to begin construction in 1997. And
22 included a treatment plant to be built on a site
23 outside of town, east of South Bay Boulevard.

24 However, the community decided during
25 the permitting process that it wanted the

1 treatment facility to be built inside of town. So
2 in November 1998 Los Osos voted to form a
3 Community Services District to replace San Luis
4 Obispo County as the governing body for community
5 services.

6 The District chose not to proceed with
7 the County's wastewater project and began anew the
8 process for project development. After several
9 years of alternative evaluations and countless
10 public meetings, the District developed a
11 technically, environmentally and financially sound
12 community wastewater project.

13 Meanwhile in 1999 this Water Board
14 issued cease and desist orders to the District for
15 its fire station, Bay Ridge Estate Subdivision and
16 Vista del Oro Subdivision, which are discharging
17 in violation of the basin plan prohibition.

18 The District decided to address these
19 discharges through installation of a community
20 wastewater system.

21 And lastly, in order to insure timely
22 construction of a wastewater system the Water
23 Board issued a time schedule order in 2000.

24 This history indicates that further
25 delay in constructing a wastewater treatment

1 system is unacceptable. The District stated in
2 its comments on the complaint that we are trying
3 to hold them responsible for community-wide
4 violations and violations that occurred before the
5 District was formed. That is not correct. The
6 complaint does not allege any violations prior to
7 September 2002.

8 The time schedule order includes
9 compliance dates for completion of vital project
10 components and specifies that if the District
11 fails to complete a task in compliance with the
12 time schedule order, the District shall be liable
13 in the amount of \$10,000 per day.

14 The District has completed most of the
15 vital project components to date. The District
16 completed and certified an environmental impact
17 report in March 2001. In June 2001 voters formed
18 an assessment district with 85 percent voter
19 approval to finance those portions of the project
20 not funded by the state revolving fund loan.

21 The District has completed its
22 wastewater system design. The District obtained
23 all permits in August of 2004. Permits were
24 delayed by a string of unsuccessful lawsuits.

25 The District and the State Board entered

1 the low-interest loan agreement that was specific
2 to the Tri-W site in August 2005. And finally,
3 nearly three years behind the time schedule order,
4 construction of the community wastewater project
5 began in August 2005.

6 Considering repeated alternative
7 evaluations by the District, we began warning the
8 District of penalties as early as December 2001,
9 with a letter stating that delays due to
10 reevaluating alternatives are not beyond the
11 District's ability to control.

12 We repeated those warnings in letters in
13 September 2003 and December 2004, in person at the
14 January 2005 District meeting, and in letters in
15 March and May of 2005.

16 In the May letter we stated that
17 delaying construction would clearly be within the
18 District's ability to control. If the District
19 violates the compliance schedule due to such
20 controllable delays, staff would recommend
21 enforcement of the time schedule order.

22 The point here is that we have clearly
23 and repeatedly warned the District that delays to
24 evaluate alternatives would result in enforcement
25 action.

1 In a recall election held September 27th
2 this year, Los Osos voters replaced the majority
3 of its District Directors with project opponents.
4 The voters also approved Measure B, which requires
5 the site of any new treatment facility to be
6 approved by the voters.

7 In spite of clearly stated consequences
8 for any delays, the District Directors and
9 representatives have stated that the District will
10 not build the plant at the current site with or
11 without Measure B. The District suspended
12 construction on October 3rd.

13 Just before the election the San Luis
14 Obispo County Superior Court ruled that Measure B
15 was invalid. That decision was appealed. Due to
16 a stay, Measure B was placed on the ballot. The
17 Court of Appeal was scheduled to hear the appeal
18 on October 26th. The District agreed to continue
19 the hearing for almost two months.

20 In the meantime, as we learned only this
21 week, on November 18th the trial court dismissed
22 the action at the request of the District. On
23 November 28th the Court of Appeal dismissed the
24 appeal at the request of the Measure B proponents.

25 Counsel was available to answer

1 questions about Measure B, but the bottomline is
2 the District cannot claim that Measure B prevents
3 it from moving forward with the project while
4 doing nothing to try to invalidate it.

5 In the days prior to the recall election
6 the recall candidates advertised their intent to
7 stop construction and relocate the treatment
8 facility. Candidates Chuck Cesena, John Fouche
9 and Steve Sennet distributed the contract with Los
10 Osos, which laid out their plans for their first
11 100 days in office.

12 It states that they: will seek legal
13 authority to review and cancel sewer construction-
14 related contracts.

15 Despite clearly stated consequences for
16 any delays, the District stopped construction of
17 the entire wastewater project with a letter to its
18 contractors dated October 3rd.

19 One director later stated that the
20 purpose of the suspension was: to get an
21 inventory, take a breath, and audit of our
22 situation. How many pipes are in the ground, how
23 many streets are torn up." End quote.

24 However, virtually no work has resumed.
25 And if their intent was to relocate the treatment

1 facility there was no reason to stop work on the
2 collection system.

3 The District argues that Measure B makes
4 it impossible for them to proceed with the
5 treatment facility and that they continued the
6 October 26th hearing as a professional courtesy,
7 and not due to pending settlement discussions. In
8 the meantime the District settled the case.

9 Although the District argues that
10 Measure B makes it impossible to proceed with the
11 treatment facility at the Tri-W site, its comments
12 suggest it will not proceed with the project, even
13 without Measure B.

14 At the October 20th District meeting
15 President Lisa Schicker states: We feel so
16 strongly and are committed to moving the project
17 out of town, that is our goal. We are not hiding
18 behind Measure B. We've all been very clear about
19 our goals to get this project out of the center of
20 town. That is just a non-negotiable."

21 This evidence demonstrates that Los Osos
22 Community Services District is wilfully violating
23 its time schedule order and the basin plan
24 prohibition.

25 As he repeatedly warned, the Executive

1 Officer issued an administrative civil liability
2 complaint for these violations on October 6th. As
3 explained previously the time schedule order
4 specifies \$10,000 per day penalty for failure to
5 comply with the schedule.

6 As of October 1, 2005, this penalty
7 amounts to \$11,190,000. Note that violations of
8 the time schedule order and consequent liability
9 continue to accumulate each day that the project
10 is delayed.

11 The primary purpose of the
12 administrative civil liability complaint was to
13 insure that the District resumes construction of
14 its wastewater project. In the letter
15 transmitting the complaint the Executive Officer
16 states: that if the wastewater project proceeds
17 immediately I am prepared to recommend that the
18 Water Board apply the assessed amount to project
19 costs." It is not too late for the District to
20 resume construction of the treatment facility at
21 the Tri-W site, or to resume construction of the
22 collection and disposal system."

23 Since issuance of the complaint we've
24 received about 126 letters and emails from the
25 public, most of them from Los Osos residents.

1 These comments are too numerous to detail here, so
2 we've posted them on our website and will only
3 summarize them here.

4 About half the letters request that you
5 do everything within your power to compel the
6 District to complete the wastewater project.
7 Requests for support for completion of the
8 wastewater project are based upon the fact that
9 current project is the least costly means of
10 resolving water quality problems in Los Osos; that
11 pollution of Morro Bay and groundwater resources
12 will continue until the community sewer is
13 complete; that there is no viable alternative plan
14 available; and that delays are wasting millions of
15 dollars. Many commenters say the penalties are
16 apparently necessary to get the District to
17 proceed.

18 The other half of commenters request
19 that you not assess monetary penalties and allow
20 the District to pursue an alternative project.
21 Requests for project delays are based upon the
22 objection to the in-town location of the treatment
23 facility, and a contention that moving the
24 treatment facility will reduce total project cost.
25 These commenters also generally believe that an

1 out-of-town location is environmentally superior.

2 First of all, the comments requesting
3 additional time to pursue alternative projects are
4 irrelevant to the issue before you, which is
5 simply whether to assess liability and in what
6 amount.

7 Secondly, even assuming cost savings or
8 aesthetic benefits by relocating the treatment
9 facility, these savings do not justify the
10 additional water quality damage and threat to
11 public health that will result from substantial
12 delays. Or the deliberate disregard of the basin
13 plan prohibition and other Water Board orders.

14 Comments requesting additional delay
15 reflect a misunderstanding of project development
16 time and associated costs. Based on the history
17 of this project, significant modifications such as
18 changing the treatment plant location, would
19 undoubtedly result in many years of delay. As
20 demonstrated by this chart, past delay has only
21 contributed to increased project costs.

22 Any modified project would be subject to
23 similar environmental permitting, appeals and
24 litigation, and associated cost increases. Any
25 modified project would likely be met with

1 community opposition due to additional costs or
2 from neighbors of any new location who may not
3 want the facility in their backyard, either. Or
4 who may never receive any benefit from the
5 facility. It is also likely that yet another
6 group pledging to develop a better and cheaper
7 project will appear.

8 We believe the current contractors' bids
9 were higher and there were fewer bids submitted
10 because of controversy surrounding the project.
11 We believe that ongoing controversy, the loss of
12 low interest financing, payment delays under the
13 current contracts and the uncertainty that the
14 District could fund contracts for a new location
15 will dissuade would-be bidders such that bids on
16 future projects would include a premium. That is
17 if bids could be secured at all. Clearly,
18 relocating the treatment facility will not
19 decrease project costs.

20 On November 14th the District submitted
21 a lengthy written response to our complaint which
22 is a part of your record. The District concludes
23 that you should reject the complaint and take no
24 action to fine the District. Continue the matter
25 until Measure B is resolved, and amend the

1 compliance dates of its time schedule order.

2 These conclusions are based on a series
3 of irrelevant, incorrect, or out-of-context
4 claims. We have provided you detailed responses
5 to these claims in our written rebuttal dated
6 November 28th, so I will not belabor our response
7 now. However, we are prepared to discuss our
8 responses later if you wish.

9 The District essentially states that its
10 Board is new; that it needs to reassess its
11 options with a fresh start, and must comply with
12 Measure B. The District urges you to help the
13 community and the District rather than penalize
14 it. And to work with the District to develop some
15 other ideas for a new project.

16 We ask you to instead consider whether
17 the District has helped or hurt the community with
18 its actions since receiving the complaint. And
19 whether it has worked with the Water Board towards
20 compliance.

21 Once a violation becomes critical enough
22 for the Executive Officer to issue a complaint for
23 administrative civil liabilities, most dischargers
24 take immediate action to put their best foot
25 forward before the hearing. They typically come

1 into this hearing explaining how they've attempted
2 to mitigate past violations, are back on track to
3 compliance, et cetera.

4 In such cases you have imposed only a
5 percentage of the maximum penalty, or have
6 suspended a significant portion of the penalty
7 contingent on timely steps towards compliance.

8 In this case, however, the District has
9 not only shunned this typical strategy, it has
10 actively sought to continue the pattern of
11 noncompliance. The District still has an
12 opportunity to resume its prior efforts towards
13 compliance and the community still has the
14 opportunity to support those efforts.

15 We urge you to insure they do so by
16 adopting the administrative civil liability order
17 before you today.

18 Thank you.

19 CHAIRPERSON YOUNG: Okay. Mr. Briggs,
20 anything else as part of your case?

21 MR. BRIGGS: Yes. We have questions --

22 CHAIRPERSON YOUNG: Yeah.

23 MR. BRIGGS: -- for Mr. Ed Moore at this
24 point.

25 MS. OKUN: Did you want to do the cross-

1 examination of Mr. Thompson or staff first, or
2 should we proceed with Mr. Moore?

3 CHAIRPERSON YOUNG: Proceed with who?
4 Mr.?

5 MS. OKUN: Mr. Moore, Ed Moore.

6 CHAIRPERSON YOUNG: Okay. He's one of
7 your witnesses?

8 MS. OKUN: Yes. He's our only other
9 witness.

10 MR. SEITZ: Mr. Chair.

11 CHAIRPERSON YOUNG: Yes.

12 MR. SEITZ: At least it would be my
13 preference that we get a chance to talk with Mr.
14 Thompson at this point. Otherwise we're going to
15 be sitting here taking notes. I think it's better
16 for us and I think for the prosecution that we get
17 to ask our questions after they make their
18 presentation, as opposed to trying to take notes
19 on everybody, and then trying to -- here's my
20 scribbles --

21 CHAIRPERSON YOUNG: Is that okay with --

22 MS. OKUN: Yes.

23 CHAIRPERSON YOUNG: -- you, Ms. Okun?

24 MS. OKUN: Yes.

25 CHAIRPERSON YOUNG: Okay. That just

1 means we have to do a little accounting here of
2 time with --

3 MR. SEITZ: Does our cross-
4 examination --

5 CHAIRPERSON YOUNG: Yes, --

6 MR. SEITZ: -- count towards our time?

7 CHAIRPERSON YOUNG: Oh, of course.
8 Yeah, cross-examination time goes to each of the
9 cases-in-chief.

10 MR. SEITZ: I just want to register my
11 objection at this point. This is a quasi-judicial
12 hearing, and limiting our ability to cross-examine
13 the prosecution's team by placing a time schedule
14 I think violates our due process rights.

15 CHAIRPERSON YOUNG: Mr. Seitz, they have
16 the same restriction on their time. You can raise
17 that issue, if you want, later.

18 MR. SEITZ: I intend to, --

19 CHAIRPERSON YOUNG: Okay.

20 MR. SEITZ: -- because the Regional
21 Water Quality Control Board Staff isn't being
22 subjected to an \$11 million fine, so.

23 Okay, I'm prepared to talk to Mr.
24 Thompson at this point.

25 CHAIRPERSON YOUNG: Okay. And we're

1 treating the District no differently than we have,
2 as far as I know, in history with how we handle
3 these proceedings.

4 MR. SEITZ: Mr. Chairman, I'm not really
5 questioning your integrity. I want you to
6 understand that, or the Commission. This District
7 is looking at huge fines. And to say, well, wait
8 a minute, if you really want to cross-examine what
9 Mr. Thompson -- not cross, I'd ask him questions
10 is a more fair way of saying that -- asking him
11 questions, but if you do so, our planned
12 presentation is going to be shortened.

13 It seems to me that we should have the
14 opportunity to explore the testimony of each of
15 the prosecution team's witnesses without it
16 impinging or impacting our ability to put on our
17 defense.

18 MS. OKUN: Mr. Chair, I have two
19 responses to that. One is that you asked the
20 District to estimate the amount of time it needed,
21 including cross-examination. And two hours was
22 the estimate they gave you.

23 Also, our procedures allow for
24 prehearing depositions and they didn't take any.

25 MR. SEITZ: That's -- I appreciate Ms.

1 Okun, and believe me, I respect her ability to put
2 on a case. The point of the fact is that when you
3 don't honor requests for continuances and you have
4 this truncated short period of time there is not
5 opportunity for depositions, number one.

6 And number two, I think if you take a
7 look at our response, we didn't -- we weren't
8 asked to put in time for cross-examination. I
9 think if you take a look at our response, we
10 didn't put in a timeframe at all.

11 Mr. McClendon, is that right?

12 MR. McCLENDON: (Affirmative head nod.)

13 MR. SEITZ: So we're not arguing here
14 the two-hour time limitation on our ability to put
15 on our case-in-chief. What we are arguing is that
16 we should not be put in a position of truncating
17 our case based on our cross-examination of the
18 prosecution's witnesses.

19 MS. SCHAFFNER: Mr. Chairman, --

20 CHAIRPERSON YOUNG: Yes.

21 MS. SCHAFFNER: -- if I might? The
22 request for the District to estimate the amount of
23 time needed did specifically include cross-
24 examination. And the District asked for two hours
25 and was given two hours.

1 With that said, that's entirely up to
2 the Chair whether he believes more time is
3 appropriate.

4 CHAIRPERSON YOUNG: What we'll do is
5 we'll keep track as we have always done with these
6 issues. Mr. Seitz, when we get to the end of
7 this, wherever we're at, then you can state a case
8 for continuance because you need more time for
9 whatever, we'll entertain it, we'll hear it.

10 MR. SEITZ: Thank you.

11 CHAIRPERSON YOUNG: You know, anyone
12 who's watched the Water Boards, and how this
13 Region handles things, regardless of the size of
14 the penalty, I'm sure if it was \$1 million, you
15 don't have the million dollars, it's a lot of
16 money.

17 And regardless of how high the millions
18 get, I mean it's kind of, you know, over the top.
19 So I can appreciate the concern, but we're going
20 to do this by keeping track of everybody's time
21 and make sure time is used efficiently and not
22 wasted.

23 And if there's some issue that needs to
24 be addressed that you feel strongly about, I'll
25 consider it.

1 MR. SEITZ: Thank you.

2 CHAIRPERSON YOUNG: Thank you. Okay,
3 you have --

4 MR. SEITZ: Okay, --

5 CHAIRPERSON YOUNG: Go ahead.

6 MR. SEITZ: So, if --

7 CHAIRPERSON YOUNG: Yes, you're going to
8 be able to cross-examine.

9 MR. SEITZ: Right.

10 CHAIRPERSON YOUNG: And when they cross-
11 examine we're taking off from their time.

12 MR. SEITZ: That's fair.

13 CHAIRPERSON YOUNG: Oh, yeah. Yeah.
14 Did you think this was one way?

15 MR. SEITZ: No, not at all.

16 CHAIRPERSON YOUNG: Okay, this is both
17 ways.

18 MR. SEITZ: I agree.

19 CHAIRPERSON YOUNG: They cross-examine,
20 their clock is coming down.

21 MR. SEITZ: I agree with that a hundred
22 percent.

23 CHAIRPERSON YOUNG: Yeah.

24 MR. SEITZ: So there's no argument; fair
25 is fair. I'm not asking for you to treat us

1 differently --

2 CHAIRPERSON YOUNG: Right.

3 MR. SEITZ: -- than you would treat the
4 prosecution team. And if you took my comments
5 that way, I apologize, because I --

6 CHAIRPERSON YOUNG: Okay.

7 MR. SEITZ: -- misstated them.

8 CHAIRPERSON YOUNG: Okay. Did you have
9 another comment? You were starting to --

10 MR. SEITZ: No, I just wanted to start
11 with Mr. Thompson.

12 CHAIRPERSON YOUNG: Okay, let's make
13 sure that -- we have 41 minutes and 27 seconds on
14 their clock. So we're going to start this back at
15 60. And we'll start with Mr. Seitz' examination,
16 cross --

17 MR. SEITZ: Thank you.

18 CHAIRPERSON YOUNG: -- cross-examination
19 of Mr. Thompson. Go ahead.

20 CROSS-EXAMINATION

21 MR. SEITZ: I'm going to try and work
22 backwards here just because I can probably read my
23 notes a little bit --

24 (End Tape 1B.)

25 MR. SEITZ: -- better. Mr. Thompson,

1 you made some type of representation that this
2 current Board is not helping the community. My
3 question to you is do you know what the -- based
4 on the recall, who did the community put into
5 office?

6 CHAIRPERSON YOUNG: Are you asking him
7 which new directors?

8 MR. SEITZ: No, I'm asking this of Mr.
9 Thompson.

10 CHAIRPERSON YOUNG: Okay.

11 MR. SEITZ: I'm trying to -- I was just
12 trying to go back through. He said you have to
13 ask yourself whether or not the actions taken by
14 the Board hurt the community. And I guess the
15 point I'm trying to get from Mr. Thompson in
16 response is the community elected the current
17 Board, is that correct?

18 MR. THOMPSON: Yes.

19 MR. SEITZ: Okay, thank you. Now, you
20 made a statement that fines will facilitate the
21 cleanup of the basin.

22 And I want everybody to understand here,
23 I believe the basin needs to be cleaned up, and
24 I'm not trying to do this.

25 But how, in this particular situation,

1 are fines going to facilitate the cleanup of the
2 basin?

3 MR. THOMPSON: I'd prefer to refer that
4 question to Roger Briggs.

5 MR. BRIGGS: If that's all right with
6 the Chair, --

7 CHAIRPERSON YOUNG: Actually, Mr. Seitz
8 is cross-examining this witness, so --

9 MR. BRIGGS: We collaborated on the
10 presentation and Matt Thompson simply presented
11 it. He's actually the junior person --

12 CHAIRPERSON YOUNG: Is that okay with
13 you, Mr. Seitz?

14 MR. BRIGGS: -- in terms of the
15 prosecution team.

16 MR. SEITZ: Yes. And as long -- I think
17 this is a fair procedure. I think that if Mr.
18 Thompson -- I'm probably going to call him Matt
19 because I know him -- but Mr. Thompson wants to
20 defer then I think Mr. Briggs should put on a
21 presentation in response and then allow me to
22 discuss it with him, or Mr. McClendon. It's fine
23 with me. I just don't want to be asking questions
24 of Mr. Thompson, and if he wants to defer, that's
25 fine. But I'd like to have Mr. Briggs answer the

1 questions at the conclusion of my presentation, my
2 cross-examination. Does that make sense?

3 MS. OKUN: The staff presentation was on
4 behalf of the entire prosecution staff, and it's
5 our general practice that when there are questions
6 from a discharger being addressed to staff,
7 they're answered by the staff person most
8 knowledgeable and most able to respond to the
9 question.

10 MR. BRIGGS: Some of them could be legal
11 questions, and of course, we'd like our counsel to
12 be able to answer those.

13 MR. SEITZ: Well, I'm just trying to
14 cross-examine Mr. Thompson, as what we were told
15 by the Chair we were going to have the ability to
16 do. And if he says he wants to defer, that's a
17 perfectly fine response with me.

18 CHAIRPERSON YOUNG: Okay.

19 MR. SEITZ: I'm not here to argue that.
20 I just want to think that if Mr. Briggs wants to
21 put on a brief presentation after I cross-examine
22 Mr. Thompson, that's fine with me, too.

23 CHAIRPERSON YOUNG: Okay, but I don't
24 think that's what Mr. Briggs is proposing to do.
25 I think he's simply trying to answer the question

1 that you would like to have from Mr. Thompson.

2 So.

3 MR. SEITZ: But Mr. Thompson made the
4 statement, that's the problem I'm having here.

5 CHAIRPERSON YOUNG: Yeah, but what
6 they're saying is that it's the joint statement of
7 the prosecution team. So, I'll give you the
8 opportunity. You can ask questions of Mr. Briggs
9 right now on this topic.

10 MR. SEITZ: Well, I --

11 BOARD MEMBER SHALLCROSS: Mr. Chair, --

12 MR. SEITZ: -- I'd be happy to come back
13 to Mr. Briggs and ask Mr. Briggs, but I'd just as
14 soon keep my train of thought relevant to Mr.
15 Thompson's testimony.

16 BOARD MEMBER SHALLCROSS: Mr. Chair.

17 CHAIRPERSON YOUNG: Yeah.

18 BOARD MEMBER SHALLCROSS: Was this a
19 statement, like an opening statement by the
20 prosecution, or was this actual testimony?

21 CHAIRPERSON YOUNG: This is testimony.

22 BOARD MEMBER SHALLCROSS: So Mr.

23 Thompson is the witness?

24 CHAIRPERSON YOUNG: Yes.

25 BOARD MEMBER SHALLCROSS: To everything

1 he told us?

2 CHAIRPERSON YOUNG: That's right.

3 BOARD MEMBER SHALLCROSS: Okay.

4 CHAIRPERSON YOUNG: But he's telling us
5 he's also relied upon other prosecution team
6 members to develop his testimony.

7 BOARD MEMBER SHALLCROSS: Yeah, I mean
8 that's the way we always do it. I don't know what
9 the problem is. You're going to get the answer
10 that you want. It doesn't matter who answers.

11 CHAIRPERSON YOUNG: Mr. Seitz wants to
12 cross-examine Mr. Thompson, and, you know, if he
13 is going to defer to Mr. Briggs, and you don't
14 want to ask Mr. Briggs at this point any questions
15 on that, but want to do it --

16 MR. SEITZ: Okay, --

17 CHAIRPERSON YOUNG: -- later, you have
18 the chance to call Mr. Briggs as a witness.

19 MR. SEITZ: That's fine. That's fine.
20 If Mr. Briggs -- I will withdraw my objection on
21 the basis that we can call Mr. Briggs. And I
22 guess if Mr. Briggs wants to answer the question
23 as opposed to Mr. Thompson, based on Mr.
24 Thompson's testimony, we'll live with it.

25 CHAIRPERSON YOUNG: Do you want --

1 MS. OKUN: I don't think he's proposing
2 to answer the question based on Mr. Thompson's
3 testimony. I think he's proposing to answer the
4 question based on his own knowledge.

5 I think that if the District has cross-
6 examination for staff, they can just do it all
7 now, as opposed to calling other staff members
8 later as witnesses.

9 CHAIRPERSON YOUNG: Well, Mr. --

10 MS. SCHAFFNER: Can I offer a
11 suggestion?

12 CHAIRPERSON YOUNG: Yes.

13 MS. SCHAFFNER: I'm not sure if the
14 prosecution team would want to do this, but if CSD
15 really wants to hear Mr. Thompson's response to
16 the question because he's the one who delivered
17 the comments of the prosecution team, they could
18 hear his response on their time. And if Mr.
19 Briggs wants to add to that, since they aren't
20 planning to use all their time, you could add to
21 that on his time. I don't know if they'd want to
22 do that.

23 And my understanding of what's presented
24 by the prosecution team is a collective summary of
25 evidence already in the record; no new evidence,

1 correct?

2 MS. OKUN: That's correct.

3 MS. SCHAFFNER: Okay.

4 MS. OKUN: And also, as Mr. Briggs
5 pointed out, if there are any legal questions it's
6 not appropriate for staff to answer those, --

7 MS. SCHAFFNER: Right.

8 MS. OKUN: -- on anybody's time.

9 MS. SCHAFFNER: Okay. And I just wanted
10 to clarify from the dialogue I heard between the
11 Board Members that this is not new evidence being
12 presented. It is a summary of existing evidence
13 in the record because the time for submitting
14 documentary evidence already passed. And this is
15 just a summary of that.

16 And if there's anything new here we
17 would want to have that pointed out, I suppose.

18 CHAIRPERSON YOUNG: Okay. Mr. Seitz,
19 the clock has not been running while we get this
20 kind of straightened out.

21 MR. SEITZ: Okay.

22 CHAIRPERSON YOUNG: Do you want to ask
23 Mr. Thompson any more questions?

24 MR. SEITZ: Oh, yes.

25 CHAIRPERSON YOUNG: Okay.

1 MR. SEITZ: My feeling is what we've
2 come upon is how will -- my question to Mr.
3 Thompson was in response to his statement that the
4 purpose of the fines was to facilitate the cleanup
5 of the basin.

6 And the question I've asked him -- which
7 lawyers don't like to ask open-ended questions
8 that they don't know the answers to, but I feel
9 that this is the opportunity that I'm going to
10 have -- is I want to ask Mr. Thompson how will
11 fines facilitate cleaning up the basin.

12 Now, if the deal is Mr. Briggs gets to
13 answer it, I guess we'll have to live with that.

14 CHAIRPERSON YOUNG: Is that all right?
15 Mr. Thompson, do you want Mr. Briggs to answer the
16 question?

17 MR. THOMPSON: Yes.

18 CHAIRPERSON YOUNG: Go ahead.

19 MR. BRIGGS: Thanks. It's imperative
20 that we have an enforcement program for our water
21 quality control efforts. If we didn't have an
22 enforcement program we could be assured that we
23 would have massive noncompliance. We've seen that
24 over and over again.

25 And as we said in our statement, part of

1 the reason for the penalty was to try to compel
2 compliance which would accomplish cleanup. Part
3 of the reason was for the violations that have
4 already occurred and are actually ongoing at this
5 moment. But our clock on the ACL stopped at time
6 certain before we issued the complaint.

7 But this Board has seen time and time
8 again that we need to have enforcement in order to
9 compel compliance. It's unfortunate; it would be
10 nice if that weren't the case, but it's absolutely
11 necessary in order to have an effective water
12 quality control program.

13 And I think Mr. Seitz may be saying that
14 the penalty, itself, does not clean up the basin.
15 However, the fact that there are penalties for
16 noncompliance, the idea is that that consequence
17 does cause dischargers to take actions for
18 cleanup.

19 MR. SEITZ: I feel in an awkward spot
20 here. I guess I'm going to address that. I want
21 to read from Mr. Briggs' staff report on July 9,
22 2004 to the Regional Water Quality Control Board:
23 Los Osos Community Services District has gone to
24 great lengths to address each and every question
25 and objection raised by project opponents. Los

1 Osos Community Services District has rigorously
2 and successfully responded to each appeal of
3 discretionary approval in each court challenge.
4 Project delays and noncompliance with time
5 schedule order are clearly beyond Los Osos
6 Community Services District's ability to control.
7 Assessment of penalties under order 00-131 would
8 result in bankrupting the Community Services
9 District and their responsibility for the
10 community wastewater project."

11 How does bankrupting the community
12 facilitate the cleanup of the basin?

13 MR. BRIGGS: First of all it's up to the
14 Board to determine the appropriate amount of
15 penalties. The District has certainly the ability
16 to provide evidence in terms of its ability to
17 pay. That's one of the factors that the Board has
18 to consider with penalties.

19 However, one of the things that we, as
20 Mr. Thompson said in our presentation, were
21 telling the District, that if they took a certain
22 action, that was to purposely delay or delay for
23 reasons that were within their control, that they
24 would be subject to substantial penalties. Huge
25 penalties.

1 And it was certainly our hope that the
2 District would realize that those penalties were
3 real and something that they should be concerned
4 about. And that they would take appropriate
5 actions, and not choose to incur the consequences
6 of those penalties.

7 Unfortunately, the District has decided
8 to take a course of action where they basically
9 caused us to follow through with what we said we
10 would do, which was issue penalties.

11 I view that as the District's choice.
12 Why the District would choose to bankrupt itself,
13 I don't know. I think that's a question for them
14 to answer.

15 MR. SEITZ: So, let me just ask this a
16 little different way. Does, in your opinion,
17 bankrupting the community facilitate the cleanup
18 of the water basin?

19 MS. OKUN: He's already answered that
20 question.

21 MR. SEITZ: I'm asking this as a leading
22 question, as a yes-or-no answer. I don't want to
23 argue with Mr. -- his response, but I want to
24 know, there's one statement that issuing fines at
25 any level is going to bankrupt the community and

1 it's not going to achieve water quality.

2 We have a statement by the prosecution
3 team that basically says fines will facilitate
4 cleanup of the basin.

5 My question is, as a leading question,
6 will bankrupting the community lead to the cleanup
7 of the groundwater basin?

8 MR. BRIGGS: I think part of the problem
9 is the context in which Mr. Seitz is looking at
10 that staff report. At the time we were looking, I
11 think that was July of 2004, is that correct -- we
12 were looking at the point in time in July when the
13 District was proceeding towards the project.

14 We were asked by the Board to provide a
15 status report on options that were available
16 through enforcement. We felt that with the
17 District moving ahead as quickly as they could
18 that it did not make sense at that time to impose
19 penalties. And as we said, bankrupting with fines
20 mammoth enough to bankrupt the CSD would certainly
21 not enable the District to proceed with the
22 project.

23 The circumstances have obviously
24 changed. The District has stopped the project
25 that would obtain compliance. And so we simply

1 followed through with what we said would happen if
2 they chose to delay.

3 MR. SEITZ: I take it from your response
4 then that bankrupting the community will not
5 achieve cleanup of the groundwater basin. And
6 I'll move on.

7 CHAIRPERSON YOUNG: That wasn't a
8 question, was it, Mr. Seitz?

9 MR. SEITZ: No, but it was a statement,
10 because I asked for a yes or no and I get this --

11 BOARD MEMBER SHALLCROSS: Isn't this
12 cross-examination? Why is he making statements?

13 CHAIRPERSON YOUNG: Well, you know, it's
14 all --

15 MR. SEITZ: I'm interjecting --

16 CHAIRPERSON YOUNG: Mr. Seitz, let me
17 say this. I think we up here appreciate that
18 assuming a number of things happened and
19 bankruptcy is faced, that it's going to complicate
20 things tremendously, okay?

21 I think that is reality. No one can say
22 that that's not something that we will probably
23 deliberate about.

24 MR. SEITZ: Okay.

25 CHAIRPERSON YOUNG: Okay?

1 MR. SEITZ: Thank you. By the way, me
2 saying thank you doesn't mean I withdraw my
3 statement.

4 Mr. Thompson, you talked about the
5 District entering into a contract with the state
6 revolving fund. Did you have an opportunity to
7 review that contract in preparation for your
8 testimony here today?

9 MR. THOMPSON: No, sir.

10 MR. SEITZ: Okay. There was a time
11 schedule that you had up there, I forget what
12 slide it is, but I'm wondering if you could
13 somehow -- the latest one is the one I'd really be
14 interested in. No, no, keep going, that one.
15 Thank you.

16 In 1983 the Regional Water Quality
17 Control Board adopted resolution 8313, and they
18 made a number of findings, and we'll probably
19 present this during our case-in-chief, regarding
20 the water quality in the Los Osos Community
21 Services District.

22 But yet the prohibition effective date
23 was, as pursuant to your chart, was five years
24 later. Based on that timeline and your
25 experience, why was there a delay in enforcing?

1 MR. THOMPSON: I think I obviously
2 cannot answer that question -- five years old.

3 MR. BRIGGS: Roger Briggs, the Regional
4 Board Staff. The Regional Board heard a lot of
5 testimony in the 1983 hearing regarding the severe
6 economic impact that a prohibition would have on
7 the community, and that the County project would
8 take five years by the County's estimate to
9 complete.

10 And even though the staff report and the
11 recommendation that the Regional Board had before
12 it called for an immediate prohibition, which was
13 kind of the norm in terms of this Regional Board
14 and other regional boards, the Regional Board
15 tried to be responsive to the concerns of the
16 community in terms of economic impact and the well
17 being of the community, and agreed that the
18 resolution would be that they'd adopt the
19 resolution but that it would be effective with a
20 time schedule. And there were dates in the
21 interim there for accomplishing the cessation of
22 discharges from the septic systems in 1988.

23 So it simply allowed the County the time
24 that the country said it would take to build the
25 project until 1988.

1 MR. SEITZ: And I take it the County did
2 not comply by 1988, is that --

3 MR. BRIGGS: That's correct, --

4 MR. SEITZ: I guess I'm --

5 MR. BRIGGS: That's correct.

6 MR. SEITZ: I guess I'm now back to Mr.
7 Briggs, Roger.

8 So, in 1988 the County did not comply
9 with what I'd typically call Regional Water
10 Quality Control Board 8313.

11 So, what happened in 1988 against the
12 County? What action was taken by the Regional
13 Board?

14 MR. BRIGGS: The Regional Board made the
15 prohibition effective in 1988. So there were no
16 more discharges allowed after that date. That was
17 the enforcement action that was taken, which was
18 pretty severe.

19 MR. SEITZ: And in 1995 the County votes
20 to proceed with the project. Am I back to Matt or
21 am I back to Mr. Briggs?

22 MR. BRIGGS: Depends on the question.

23 MR. SEITZ: Okay. When -- did the
24 Regional Water Quality Control Board ever issue a
25 time schedule order against the County to proceed

1 with the project, and at what point in time did
2 that occur?

3 MR. BRIGGS: My recollection is that the
4 Regional Board did issue a time schedule order to
5 the County and it was in -- I'm getting a little
6 help -- 1996. It was basically the same time
7 schedule order.

8 MR. SEITZ: So is it correct for me to
9 assume then between 1988 and 1996 there was a
10 moratorium on building within the prohibition
11 zone?

12 MR. BRIGGS: It's not a moratorium on
13 building, it's a discharge prohibition.

14 MR. SEITZ: Okay, thank you for the
15 distinction, a discharge. And that discharge
16 prohibition is in effect today?

17 MR. BRIGGS: Correct.

18 MR. SEITZ: So for seven years between
19 1988 and 1995 there was a prohibition in effect,
20 but no action by the Regional Board to compel
21 basin cleanup? Except for the discharge
22 requirement.

23 MR. BRIGGS: The Regional Board also
24 adopted cease and desist orders again, pretty much
25 a parallel action to the 1999 cease and desist

1 orders that Mr. Thompson described in the
2 timeline. And the prohibition was in effect,
3 which actually is one of the most severe
4 enforcement actions a Regional Board can take.

5 MR. SEITZ: But again, just so I have
6 this clear in my mind, for the record, to the
7 extent that there were cease and desist orders
8 between 1988 and 1996, those cease and desist
9 orders were not enforced?

10 MR. BRIGGS: We also had a time schedule
11 order in '97. And the facilities were subject to
12 the cease and desist orders, they were in effect.

13 CHAIRPERSON YOUNG: I think Mr. Seitz is
14 asking whether you took any additional enforcement
15 action during that time period between '88 and
16 '96, other than the issuance of the cease and
17 desist orders, is that correct, Mr. Seitz?

18 MR. SEITZ: That's correct.

19 MR. BRIGGS: We were in a very similar
20 mode to the mode that we had been in until the
21 first of October of this year with the Community
22 Services District. We were basically in the same
23 mode with the County. The County was being sued
24 and was having very similar -- running into very
25 similar obstacles to what the Community Services

1 District later ran into.

2 And so we had the same enforcement
3 stance, as long as the County was proceeding and
4 doing everything that we felt that they could do
5 to comply with the discharge prohibition, we
6 thought that the enforcement action that we had,
7 which I said was pretty stringent that there's a
8 discharge prohibition, was adequate.

9 CHAIRPERSON YOUNG: So, Mr. Seitz, the
10 answer is no.

11 MR. SEITZ: Yeah, I --

12 CHAIRPERSON YOUNG: They didn't do
13 anything other than issue the CDOs.

14 MR. SEITZ: Okay. Now, so I'll maybe
15 ask this question of Mr. Briggs. Did you have an
16 opportunity to review the State Water Resources
17 Control Board loan documents in preparation for
18 your testimony here today?

19 MR. BRIGGS: Which loan documents are
20 you referring to?

21 MR. SEITZ: The SRF -- thank you. The
22 SRF loan documents that were executed by the State
23 Water Resources Control Board and the Los Osos
24 Community Services District, commonly referred to
25 as the ISA agreement.

1 MR. BRIGGS: No.

2 MR. SEITZ: So it would be fair to say
3 that you're not familiar with that particular
4 clause in the ISA agreement that provides that in
5 the event the District is in default, the State
6 Water Resources Control Board has the ability to
7 take the project over and construct the project?

8 MR. BRIGGS: I have reviewed that.

9 MR. SEITZ: Is what I just said
10 essentially correct?

11 MS. OKUN: Objection, that calls for a
12 legal conclusion.

13 MR. SEITZ: No. I oppose the objection.
14 The question is what I said essentially is what is
15 in the document. I can pull the document.

16 MS. OKUN: The document speaks for
17 itself, so I would prefer to get the document out
18 and read it.

19 MR. SEITZ: Okay. So, let's -- and
20 there was a time schedule order for the County to
21 construct the project. I don't know whether this
22 is a question for Matt or a question for -- sorry,
23 Mr. Thompson or Mr. Briggs, but between 1996 and
24 1998 what happened to the County project?

25 MR. BRIGGS: Between '97 was the time

1 schedule order and '98, is that what you're --

2 MR. SEITZ: Right.

3 MR. BRIGGS: -- referring to?

4 MR. SEITZ: I think you said '96 was the
5 time schedule order, but I'm not going to hold you
6 to that. I just want to -- I thought your
7 testimony --

8 MR. BRIGGS: -- a correction. I believe
9 it was '97.

10 MR. SEITZ: '97, okay.

11 MR. BRIGGS: As I recall, the County was
12 trying to get their project through various
13 approvals including the Coastal Commission. I
14 think the Coastal Commission was one of the more
15 significant permits in terms of the amount of time
16 that it took.

17 MR. SEITZ: Did the Regional Water
18 Quality Control Board at that point when the
19 Coastal Commission -- when the County project was
20 before the Coastal Commission, did the Regional
21 Water Quality Control Board object to the actions
22 taken by the Coastal Commission to delay the
23 project?

24 MR. BRIGGS: Did we object to the
25 Coastal Commission delaying the project?

1 MR. SEITZ: Yes.

2 MR. BRIGGS: We thought the Coastal
3 Commission should approve the County permit, and
4 we appeared at that Coastal Commission hearing and
5 expressed that.

6 MR. SEITZ: Did the Regional Water
7 Quality Control Board take any action, and as I
8 say this, legal action -- let me back this up.

9 And I don't know if there's anybody here
10 who can testify to this, but did the Regional
11 Board have any legal objection to the actions
12 taken by the Coastal Commission related to the
13 Coastal Commission's actions in delaying the
14 project?

15 MS. OKUN: Mr. Seitz, could you clarify
16 the question? I don't know what you mean by --

17 MR. SEITZ: Sure.

18 MS. OKUN: -- did they take any legal
19 action.

20 MR. SEITZ: No.

21 MS. OKUN: Did they sue them, or were
22 there objections based on policy versus law, or
23 what?

24 MR. SEITZ: I'm going to say both. One,
25 based on policy. Again, I know that you've had a

1 turnover in legal staff, so I'm not -- I don't
2 know if Mr. Briggs can testify as to whether or
3 not the Regional Board objected to the actions
4 taken by the Coastal Commission based on policy.

5 MR. BRIGGS: As I said, we objected at
6 the hearing, and I don't recall if there was a
7 legal follow-up action.

8 MR. SEITZ: Okay. And then I think I'll
9 talk about time schedule order 00-131, a little
10 different time. Could you then sort of flip
11 through these, a couple where you have a picture
12 of Mr. Fouche and President Schicker. Yeah.
13 Okay, and then the next one. Sorry about that.

14 Okay. Is it your opinion that
15 individual Board Members can bind the Board to a
16 particular policy position as opposed to the
17 District Board taking action regarding policies?

18 MS. OKUN: Object, that calls for a
19 legal conclusion.

20 MR. SEITZ: No, --

21 MS. OKUN: And I think it also misstates
22 the testimony.

23 MR. SEITZ: Well, right here. We're
24 going to take a look at the testimony right here
25 in front of us on slide 15.

1 Is that the position of Ms. Schicker or
2 is that the result of action taken by the Board of
3 Directors instructing her to say that?

4 Or is that just an opinion of a Board
5 Member at a meeting?

6 CHAIRPERSON YOUNG: Well, you know what,
7 Mr. Seitz, why don't, you know, in your case you
8 can have Ms. Schicker testify and tell us. I
9 don't know if his opinion --

10 MR. SEITZ: Well, there --

11 CHAIRPERSON YOUNG: This says LOCSD
12 President Lisa Schicker. I take from that that,
13 as the President, she's speaking for the Board.
14 If that's not correct, you know, you can have her
15 testify and clarify that.

16 MR. SEITZ: Okay, well, let's move on --

17 CHAIRPERSON YOUNG: Okay.

18 MR. SEITZ: -- to the slide with Mr.
19 Fouche.

20 Mr. Chair, the reason why I'm bringing
21 this up, just so there's no -- we're playing our
22 cards face up -- is if this was testimony as to
23 why you should find the District -- the District,
24 and what you're predicating finding the District
25 on, it looks to me for all the world, is

1 statements made by individual Directors, and not
2 policy positions taken by a vote of the District.

3 And I'm just -- that's the point of my
4 questions here, is why are these slides being
5 offered for your review if it's not to have these
6 individuals who are making statements, you know,
7 with or without the authority of the Board.

8 But it seems to me that what you are
9 seeking here is to fine the District, not
10 individual Board Members, and you're predicating
11 that, or putting in evidence of fining the
12 District based on statements made by individual
13 Directors and not actions taken by the Board.

14 MR. BRIGGS: Mr. Chair.

15 CHAIRPERSON YOUNG: yes.

16 MR. BRIGGS: With this slide, Mr.
17 Thompson was simply reiterating a fact that this
18 is actually a point of agreement. That there's no
19 disagreement in terms of the need for a system to
20 solve the problem. So it was supposed to be a
21 point of agreement.

22 MR. SEITZ: Why don't you go back to the
23 one by Ms. Schicker.

24 BOARD MEMBER SHALLCROSS: Mr. Chair, --

25 CHAIRPERSON YOUNG: Yes.

1 MR. SEITZ: I want that -- that one is
2 clearly --

3 BOARD MEMBER SHALLCROSS: Aren't these
4 hearsay, anyway?

5 CHAIRPERSON YOUNG: Well, --

6 MS. SCHAFFNER: No, --

7 CHAIRPERSON YOUNG: -- hearsay is kind
8 of, there's a broader exception. And, you know,
9 if these are incorrect statements or statements
10 that have been taken out of context I think then
11 the District can, you know, address those
12 clarifications in their presentation.

13 But I mean, I read this, Mr. Seitz,
14 that, you know, the President of the LOCSD made
15 this statement, not -- an individual speaks,
16 representing the Board. So I don't take anything
17 more from that than this, and I'll be waiting to
18 hear what you have to say when you put Ms.
19 Schicker on and she can tell us.

20 MR. SEITZ: I just want to make this
21 point or this observation in response to all of
22 this. Is the Community Services District is
23 governed by specific code sections found in the
24 Government Code. And pursuant to those code
25 sections, the only way that the Board can take

1 action is by motion, resolution or ordinance.

2 In other words, Ms. Schicker, even as
3 the President of the Board, cannot take unilateral
4 action on her own without there being a motion, a
5 resolution or an ordinance. And I think that's
6 the point that I want to drive home here is --

7 CHAIRPERSON YOUNG: Mr. Seitz, this is
8 your opportunity to cross-examine witnesses. And
9 I know you want to get that explanation in, but
10 you'll have your opportunity to do that.

11 I just want to keep things moving the
12 way we had laid them out with examination, cross-
13 examination. So, do you have any more questions
14 for anyone on the prosecution team?

15 MR. SEITZ: I've concluded with my
16 questions at this time, except -- okay, no, I am,
17 I am.

18 CHAIRPERSON YOUNG: Okay. All right.

19 MR. BRIGGS: What was the time?

20 CHAIRPERSON YOUNG: 34.09. And I did
21 stop it, you know, kind of awhile ago as we got
22 into this a little bit, so we could get it kind of
23 straightened out. But that's where we're at.

24 All right. Any other witnesses, then?
25 We're going back to the prosecution staff's

1 witnesses.

2 MS. OKUN: Does the Board have questions
3 for staff before I call our witness?

4 CHAIRPERSON YOUNG: Let's see, Board
5 questions?

6 VICE CHAIRPERSON JEFFRIES: I have one
7 question --

8 CHAIRPERSON YOUNG: Mr. Jeffries.

9 VICE CHAIRPERSON JEFFRIES: -- for Mr.
10 Thompson.

11 EXAMINATION BY BOARD

12 VICE CHAIRPERSON JEFFRIES: You stated
13 the amount of the penalty. And can you reiterate
14 how that was calculated, and from what period of
15 time to what period of time? And is it for more
16 than one location, or just one location?

17 MR. THOMPSON: As you can see from this
18 chart, Mr. Jeffries, --

19 VICE CHAIRPERSON JEFFRIES: Can you
20 speak up, Matt, a little bit?

21 MR. THOMPSON: Yes. The penalty amount
22 of \$11,190,000 was based on the days the District
23 was out of compliance with the time schedule
24 orders schedule only.

25 VICE CHAIRPERSON JEFFRIES: Mr.

1 Thompson, I think my question was, and what I'm
2 trying to do is clarify how you got to that
3 particular number for all the people who are
4 sitting behind you, so they understand exactly how
5 those numbers were derived.

6 And my question was from what period of
7 time to what period of time. And I think there's
8 some confusion. Is it for the whole CSD? Is it
9 for three locations, four locations, one location?

10 Because when you were making that
11 presentation I noticed some of the folks in the
12 audience had kind of a puzzling look on their face
13 and they didn't really understand, that's the
14 reason I'm asking the question.

15 I have it here. I understand.

16 MS. OKUN: I think I can actually
17 explain that. I think it's a legal question. The
18 time schedule order isn't specific to one location
19 versus another location. It's to correct
20 violations of various prior orders that were
21 already in default based on different discharges.

22 The time schedule order just set forth a
23 schedule to the District, do this task by this
24 date; do the next task by the next date. And it
25 wasn't allocated between any specific locations.

1 So the way these violations were
2 calculated is that we looked at the first date
3 that was not met, which was the requirement I
4 believe to obtain all permits. And from the due
5 date to the date they acquired all permits, that's
6 how that was calculated.

7 There was a requirement to complete
8 construction that was last year. And from that
9 due date until we cut off the time clock in order
10 to issue the complaint, there were that many days
11 of violations.

12 And then we eliminated any overlaps
13 because it was a sequential schedule. So once
14 they got to task number five, and they were in
15 violation of task number four, we didn't charge
16 them for four and five on any day. There was one
17 per day.

18 VICE CHAIRPERSON JEFFRIES: Okay. Ms.
19 Okun, could I ask you an additional question?

20 MS. OKUN: Um-hum.

21 VICE CHAIRPERSON JEFFRIES: Is that on a
22 calendar day or is that a business day?

23 MS. OKUN: Calendar day.

24 VICE CHAIRPERSON JEFFRIES: Calendar
25 day. Thank you.

1 CHAIRPERSON YOUNG: Any other questions
2 of Matt? You have a question? Go ahead.

3 MR. THOMAS: On page 2 of the worksheet
4 you make reference to Water Code section
5 13350(e)(2). And that section allows or
6 authorizes the Board to assess a fine, assess
7 liability of \$10 per gallon.

8 I'm wondering why -- and the maximum,
9 you calculated the maximum. It says \$830,220,000
10 is the maximum fine. And I wondered why you
11 instead used a different section rather than that
12 section.

13 MR. BRIGGS: Well, as Ms. Okun said
14 earlier, it's in the alternative. And we chose to
15 rely on actually the lower amount that the time
16 schedule order violations generate.

17 MR. THOMAS: Why? I mean why, just
18 because it's a lower amount?

19 MR. BRIGGS: No, I don't think so. The
20 maximum liability under the time schedule order
21 is -- is it 32 million -- oh, I'm sorry.

22 We included the maximum liability for
23 the three discharges, which could run it up to a
24 maximum liability of almost 33 million. And I
25 guess we felt that that was sufficient in terms of

1 this action.

2 MS. OKUN: There are two different bases
3 to assess liability for violation of the
4 prohibition. It's either on a daily basis or a
5 per-gallon basis. And usually enforcement actions
6 are on a daily basis. We just didn't do that
7 calculation.

8 That amount, the 830 million, is not in
9 the complaint. So the Board can't assess
10 \$830,000,000 in this proceeding without reissuing
11 the complaint and renoticing it. It's just in
12 there for reference that the penalties actually
13 could be very much higher than \$11 million.

14 MR. THOMAS: Do you think, from a legal
15 perspective, that one of these Water Code sections
16 is more appropriate than another? Or more valid
17 than another, more defensible than another?

18 MS. OKUN: No.

19 MR. THOMAS: They're both equally
20 defensible?

21 MS. OKUN: Yes.

22 MR. THOMAS: And they're both equally
23 applicable in this case?

24 MS. OKUN: Yes.

25 CHAIRPERSON YOUNG: Mr. Shallcross.

1 BOARD MEMBER SHALLCROSS: So if I
2 understand this right on the two code sections
3 that you're arguing in the alternative, one of
4 them is on the -- would be a violation of the time
5 schedule order. And that would be based on the
6 fact that they violated the time schedule order,
7 and you go to whatever action it was they were
8 supposed to have done.

9 Now, the other one, as I understand, is
10 the basin plan violation. And that's where you
11 look at the entities, the septic tank systems?

12 MS. OKUN: Yeah, there's only one
13 entity. The entity is the District, but --

14 BOARD MEMBER SHALLCROSS: Okay, the --

15 MS. OKUN: -- we were alleging --

16 BOARD MEMBER SHALLCROSS: -- the
17 facilities.

18 MS. OKUN: Right, the facilities.

19 BOARD MEMBER SHALLCROSS: Whatever
20 facilities. So the --

21 MS. OKUN: So there were three
22 facilities; the daily maximum is \$5000 a day. So
23 for three facilities the daily maximum is \$15,000
24 a day, and we just counted days of discharge.

25 BOARD MEMBER SHALLCROSS: This is really

1 interesting because one is a violation of an order
2 by the Services District, and the other is a
3 violation of the basin plan, and yet you can only
4 argue in the alternative.

5 MS. OKUN: Arguably. And --

6 BOARD MEMBER SHALLCROSS: Oh, okay.

7 MS. OKUN: -- there's a reading --

8 BOARD MEMBER SHALLCROSS: But you are
9 only arguing in the alternative. Okay.

10 MS. OKUN: Yeah, there is a reading of
11 section 13308 that you can allege both the basin
12 plan violation and the time schedule order
13 violation, you just can't order the time -- or
14 allege the time schedule order violation and the
15 cease and desist order violations.

16 I think that in this case because the
17 penalties are very high, and there's, in our
18 opinion there was no reason to assess 40 million
19 versus 35 million, that there's no reason to -- it
20 was cleaner to take the more conservative reading
21 of the statute --

22 BOARD MEMBER SHALLCROSS: Right.

23 MS. OKUN: -- and have one less thing to
24 argue about.

25 BOARD MEMBER SHALLCROSS: I see, because

1 the action under those two code sections, the
2 action that the CSD would have to take to cure
3 their violation are completely different actions.

4 I mean they could have simply turned off
5 the septic systems and that would have cured that.

6 MS. OKUN: You can't really turn them
7 off; you have to --

8 BOARD MEMBER SHALLCROSS: Not that they
9 could, but --

10 MS. OKUN: -- stop using them.

11 BOARD MEMBER SHALLCROSS: -- not use
12 them.

13 MS. OKUN: Yeah.

14 BOARD MEMBER SHALLCROSS: And on the
15 other, to cure the violation of the time schedule
16 would be to continue building the plant. So, it's
17 sort of interesting that it would take two
18 completely separate types of actions, and yet
19 you're arguing it in the alternative.

20 CHAIRPERSON YOUNG: Well, they're kind
21 of related. I think that, you know, certainly the
22 easiest way to stop the discharge is to --

23 BOARD MEMBER SHALLCROSS: Quit
24 discharging.

25 CHAIRPERSON YOUNG: -- get the plant --

1 well, yeah, you know.

2 BOARD MEMBER SHALLCROSS: Yeah.

3 CHAIRPERSON YOUNG: Or pump out septic
4 tanks.

5 BOARD MEMBER SHALLCROSS: Right.

6 CHAIRPERSON YOUNG: Don't let the
7 effluent get into the ground. Because that's what
8 the problem was.

9 BOARD MEMBER SHALLCROSS: But the time
10 schedule order violation isn't based on --

11 CHAIRPERSON YOUNG: No.

12 BOARD MEMBER SHALLCROSS: -- the
13 continued basin plan violation.

14 CHAIRPERSON YOUNG: That's correct.
15 That's the way I read that.

16 BOARD MEMBER SHALLCROSS: Yeah. Okay.

17 CHAIRPERSON YOUNG: Okay, any other
18 Board questions? Okay.

19 Do you have another witness, Mr. Briggs?

20 MS. OKUN: Yes.

21 CHAIRPERSON YOUNG: Let me reset this.
22 And, Mr. Seitz, the clock's not running and we'll
23 do the same when the Board starts engaging in all
24 this discussion.

25 MS. OKUN: Mr. Ed Moore.

1 CHAIRPERSON YOUNG: That's all of our
2 time being here. Okay, the clock goes back to
3 what, 41.27. Okay.

4 Okay, I just need to get something
5 straight, now. Are we going to lose Darrin
6 Polhemus?

7 MS. OKUN: I checked with his secretary
8 and she said he's usually there until 5:00. And I
9 left a message that we thought we would get to him
10 by 5:00; I said between 3:30 and 5:00.

11 CHAIRPERSON YOUNG: Okay, so we just --

12 MS. OKUN: He has this cellphone number
13 and that hasn't buzzed.

14 CHAIRPERSON YOUNG: Okay. All right.
15 Go ahead, Mr. Briggs.

16 DIRECT EXAMINATION

17 MS. OKUN: Mr. Moore, could you state
18 your name for the record, please.

19 MR. MOORE: My name is Ed Moore; I'm the
20 Project Manager for Monterey Mechanical. We're
21 the general contractor at the Tri-W site for the
22 wastewater treatment plant.

23 MS. OKUN: And Monterey Mechanical is
24 the contractor to actually build the treatment
25 facility as opposed to the collection and disposal

1 systems?

2 MR. MOORE: That's correct.

3 MS. OKUN: How long have you worked in
4 the construction industry?

5 MR. MOORE: Twenty-five years.

6 MS. OKUN: On October 3rd of this year
7 did the CSD direct Monterey Mechanical to stop
8 work on the project?

9 MR. MOORE: Yes, they did. We received
10 a phone call from Mr. Buel at approximately 6:00
11 in the morning asking us not to go to work that
12 day. And subsequently we got a letter with more
13 specifics on what we were supposed to do.

14 MS. OKUN: And then did anything happen
15 between October 3rd and October 20th?

16 MR. MOORE: On October the 12th I
17 received a cellphone call from Mr. Dan Bleskey,
18 the Interim General Manager, indicating that our
19 contract was going to be terminated, and that he
20 was calling me as a courtesy to let me know. And
21 that he didn't want me to read that in the
22 newspaper the following day.

23 I contacted the President of our
24 company, Milt Burlson (phonetic) to let him know
25 that. And I also contacted Dillon Wade, the

1 resident engineer for Montgomery Watson who
2 confirmed that that was the case and they'd been
3 asked by Mr. Bleskey to write that termination
4 letter to Monterey Mechanical.

5 MS. OKUN: You said Mr. Bleskey is the
6 Interim General Manager. He's the Interim General
7 Manager for the District?

8 MR. MOORE: For the CSD, yes.

9 MS. OKUN: What was Montgomery Watson's
10 role in the project, or what is their role?

11 MR. MOORE: They were both the design
12 engineer and our dealings with them was the
13 construction manager.

14 MS. OKUN: On October 21st did the
15 District notify Monterey Mechanical to resume
16 work?

17 MR. MOORE: We received two letters on
18 the 21st. One indicated that we were supposed to
19 return to work. There was a second letter,
20 though, that also conditioned that return to work
21 that said that we had to have a preconstruction
22 conference. And that we also -- it was
23 conditioned on the resumption of funding by the
24 state.

25 MS. OKUN: And at that time did the

1 District tell you anything about whether the loan
2 would be funded?

3 MR. MOORE: No, they did not.

4 MS. OKUN: When was your next meeting
5 with Mr. Bleskey?

6 MR. MOORE: We actually met the
7 following day on the 23rd; it was a meeting that
8 they had termed the preconstruction conference.

9 At that time we indicated that if
10 funding was resumed that we'd be able to go right
11 back to work. And Mr. Bleskey indicated that that
12 wasn't the case, that there were special
13 conditions related to the Tri-W site. There
14 weren't any further discussions at that time.
15 There was a meeting set up on that date where we
16 ended up having a dinner meeting on the 28th with
17 Mr. Bleskey.

18 MS. OKUN: And what did Mr. Bleskey
19 request Monterey Mechanical to do at that meeting?

20 MR. MOORE: At the dinner meeting Mr.
21 Bleskey indicated the negotiations with the state
22 had gone well, and that it appeared that there'd
23 be a two-year suspension of the project.

24 He was wanting to know if we were
25 interested in what he termed standing down for

1 that two years where the District would release
2 our bond and allow us to basically demobilize. We
3 wouldn't be terminated, but we'd be in a, it was
4 called stand-down, but kind of a suspension mode.

5 MS. OKUN: Did Mr. Bleskey offer to
6 terminate the construction contract at that time?

7 MR. MOORE: No, we asked why that wasn't
8 going to be done, and he indicated that he
9 couldn't do that because the state wouldn't allow
10 it.

11 MS. OKUN: And what was Monterey
12 Mechanical's response to this stand-down proposal?

13 MR. MOORE: We indicated that we had
14 come to Los Osos to build the project, and that we
15 really weren't interested in anything else, other
16 than that.

17 MS. OKUN: Did you have any further
18 contact with him before November 8th?

19 MR. MOORE: I believe there was one
20 informal meeting with myself and the
21 representatives from Bernard and Whittaker in his
22 office.

23 MS. OKUN: And what happened at that
24 meeting?

25 MR. MOORE: He just indicated that -- he

1 solicited help from us to contact the state to
2 reinstate the loan. And he had indicated at that
3 time that he knew that my call to the president of
4 the company was then forwarded on, passed on to
5 the state, so they were aware that we had been
6 called and told that we were going to be
7 terminated.

8 CHAIRPERSON YOUNG: What date was that?

9 MR. MOORE: The date for which?

10 CHAIRPERSON YOUNG: That you got that
11 call.

12 MR. MOORE: I got that call on October
13 the 12th.

14 MS. OKUN: So it was before the October
15 28th dinner meeting?

16 MR. MOORE: Yes.

17 MS. OKUN: Okay. And then on November
18 8th Monterey Mechanical received a resume-work
19 letter from the District?

20 MR. MOORE: Yes, we did. It was also
21 conditioned, though. It said that we had to have
22 another meeting with Montgomery Watson and the
23 District to discuss restarting the work and what
24 the scope of the work would be at that time.

25 MS. OKUN: And you had that meeting on

1 November 8th?

2 MR. MOORE: We had the meeting on
3 November the 8th. At that time Mr. Bleskey
4 indicated that we would have to have a subsequent
5 meeting the following day to go over what our
6 revised scope would be at the Tri-W site.

7 MS. OKUN: On November 8th did Mr.
8 Bleskey say anything about whether the District
9 intended to construct the project at Tri-W?

10 MR. MOORE: Yes, he did. I asked during
11 the meeting if the District intended to build the
12 Tri-W site even if Measure B was repealed or found
13 to be illegal. And he indicated that they would
14 not build at Tri-W, even in the absence of Measure
15 B.

16 MS. OKUN: Did Mr. Bleskey say anything
17 about other funding options available to the
18 District if they lost the State Board loan?

19 MR. MOORE: He indicated that there were
20 no other options. That they had looked into
21 others, but at that time there were no other
22 options.

23 MS. OKUN: And then did you meet again
24 on November 9th?

25 MR. MOORE: Yes, we did meet with again

1 Montgomery Watson, at the meeting on the 8th
2 Whittaker and Bernard were also in attendance. On
3 the 9th it was just ourselves, Montgomery Watson
4 and the District.

5 At that time Mr. Bleskey went through
6 some different scenarios as far as what the
7 rescoping of our project would be, and indicated
8 that everybody wasn't at that meeting to make that
9 determination, that the state would have to be
10 involved in that.

11 He also -- we asked again then, because
12 at that time the District had voted on the
13 resolution and the proposal to the state, and I
14 had asked Mr. Bleskey it didn't seem that those
15 proposals lined up with the statements that he was
16 making in the meeting. Because he was indicating
17 that the site would not be built at Tri-W -- or
18 the treatment plant would not be built at Tri-W.

19 I asked if even if the Prop 218 vote was
20 taken did they still not intend to build at Tri-W
21 and he said that that was the case, the Board
22 would not build at Tri-W even if the Prop 218 vote
23 was successful.

24 MS. OKUN: And even if Measure B was
25 invalidated?

1 MR. MOORE: That's correct.

2 MS. OKUN: Have you received any
3 communications from --

4 CHAIRPERSON YOUNG: Excuse me, --

5 MS. OKUN: -- the District since
6 November 9th?

7 CHAIRPERSON YOUNG: Excuse me, Ms. Okun.
8 How many times did he make that statement to you?

9 MR. MOORE: At that meeting?

10 CHAIRPERSON YOUNG: I mean through your
11 discussions with Mr. Bleskey.

12 MR. MOORE: At each one of my meeting
13 with Mr. Bleskey --

14 CHAIRPERSON YOUNG: I mean where he
15 indicated that we're not going to build at Tri-W
16 regardless of Measure B, regardless of a 281 vote.

17 MR. MOORE: The comment about the 218
18 vote only happened on the November 9th meeting.
19 But at each one of our meetings I'd been asked to
20 ask Mr. Bleskey or the District that question, if
21 they intended to build at Tri-W, since that was a
22 great concern of ours.

23 And in each meeting that we had the
24 answer was always the same, that they would not
25 build at the Tri-W site.

1 CHAIRPERSON YOUNG: Okay.

2 MS. SCHAFFNER: Mr. Chair, if I might
3 ask?

4 CHAIRPERSON YOUNG: Yes.

5 MS. SCHAFFNER: Just to clarify, do you
6 have the dates, can you get the dates of each one
7 of those meetings off the top of your head?

8 MR. MOORE: It was November the 9th,
9 November the 8th; it was our dinner meeting on the
10 28th.

11 MS. SCHAFFNER: October 28th?

12 MR. MOORE: Yes. And there was another
13 meeting before that but I don't recall the date.

14 MS. SCHAFFNER: Before October 28th?

15 MR. MOORE: Yes.

16 MS. SCHAFFNER: Okay, thank you.

17 MS. OKUN: Do you have notes that you
18 could look at that have the dates in them?

19 MR. MOORE: I don't have all my notes
20 with me, no. But I do have notes that I could
21 refer to.

22 MS. OKUN: With you?

23 MR. MOORE: Not with me, no, I'm sorry.

24 MS. OKUN: Okay. What work has Monterey
25 Mechanical done at the site since October 3rd?

1 MR. MOORE: We followed the District's
2 direction in the October 3rd letter where we were
3 supposed to maintain security at the site. We've
4 also installed the SWPPI measures we were required
5 to do.

6 And the Coastal Commission permit
7 required that we do dust control on the sites; we
8 water the site twice a day.

9 But other than that, there's been no
10 work go on since then.

11 MS. OKUN: And the SWPPI measures are
12 the Storm Water Pollution Prevention plan
13 requirements under the construction permit?

14 MR. MOORE: That's correct.

15 MS. OKUN: Why hasn't Monterey
16 Mechanical regraded the site, the Tri-W site?

17 MR. MOORE: We've never been given
18 direction on what to do by the District. We've
19 sent, I believe it's three letters to the District
20 asking for clear direction on how we're supposed
21 to proceed. And we've never been given that
22 direction.

23 The last meeting on the 9th, at the end
24 of the meeting it was agreed that that meeting
25 would not be deemed a rescoping meeting because

1 the District was unable to give us any direction
2 on how we were to proceed.

3 And we made it clear at each of those
4 meetings that we were maintaining the standby
5 posture that we'd been asked to do on October the
6 3rd.

7 MS. OKUN: Thank you. I have no other
8 questions.

9 CHAIRPERSON YOUNG: Any questions by the
10 Board?

11 VICE CHAIRPERSON JEFFRIES: Yes, Mr.
12 Chair.

13 CHAIRPERSON YOUNG: Mr. Jeffries.

14 EXAMINATION BY BOARD

15 VICE CHAIRPERSON JEFFRIES: You
16 mentioned that you had a meeting and they wanted
17 to change the scope of your work. How did that
18 affect your contract you had with them? Did you
19 have your contract with the CSD directly, or
20 through Montgomery?

21 MR. MOORE: Our contract's with CSD.

22 VICE CHAIRPERSON JEFFRIES: Okay. Then
23 my question would be how did it affect your -- did
24 they give you a change list of the scope of work
25 they wanted you to do?

1 MR. MOORE: We had requested that, a
2 formal notification on what the changes would be,
3 and we never received that.

4 VICE CHAIRPERSON JEFFRIES: Is your
5 company contracted for the whole project, or just
6 a portion of?

7 MR. MOORE: We are only doing the
8 wastewater treatment plant at the Tri-W site;
9 we're not doing the collection systems.

10 VICE CHAIRPERSON JEFFRIES: Okay. So
11 you're just construction management for Tri-W
12 only?

13 MR. MOORE: We're the general
14 contractors; we'd actually be building the
15 facility.

16 VICE CHAIRPERSON JEFFRIES: Oh, okay.
17 So you do both, okay. Thank you.

18 CHAIRPERSON YOUNG: I think I saw some
19 letters. Were they attached to the prosecution
20 team's reply or rebuttal that came in?

21 MS. OKUN: From Montgomery Watson --

22 CHAIRPERSON YOUNG: Yes.

23 MS. OKUN: Yes.

24 CHAIRPERSON YOUNG: That's his company?

25 MS. OKUN: No. His company is Monterey

1 Mechanical. Montgomery Watson is the construction
2 supervisor that designed --

3 CHAIRPERSON YOUNG: Okay. In your
4 discussions with Mr. Bleskey or anyone else
5 connected to the CSD, did they indicate that they
6 were going to dismiss their complaint in the
7 Superior Court and work to get the appeal
8 dismissed?

9 MR. MOORE: There was never any
10 indication one way or the other.

11 CHAIRPERSON YOUNG: Okay. Thank you.
12 Ms. Okun. Let's see, we'll have cross-
13 examination.

14 MR. SEITZ: Thank you.

15 CHAIRPERSON YOUNG: Hang on one second
16 and we'll set our clock. Mr. Seitz, hold on.
17 31.25. Okay, now I've got to reset this; 34 on
18 that. Okay, go ahead. Go ahead, Mr. Seitz.

19 CROSS-EXAMINATION

20 MR. SEITZ: First of all you talked
21 about a number of letters exchanged, letters from
22 the District to you and letters from your company
23 to the District.

24 Did you bring those with you?

25 MR. MOORE: I did not bring the letters

1 with me, no. And to clarify, there's one letter
2 from the District to us on -- well, there's a
3 letter on October 3rd; there was a subsequent
4 letter that was sent to Milt Burlson.

5 But our letters always were returned to
6 Montgomery Watson, because that's the way the
7 contract was set up. So our letters were sent to
8 Montgomery Watson and then passed on to the
9 District.

10 MR. SEITZ: Okay, so those letters
11 weren't directly to the District. They required
12 Montgomery Watson as an intermediary to make sure
13 those letters got to the District?

14 MR. MOORE: That's correct, that's how
15 the contract required correspondence to go.

16 MR. SEITZ: So, have you given copies of
17 those letters to the prosecution team?

18 MR. MOORE: Yes, we have.

19 MS. OKUN: Just to clarify, we received
20 copies of three letters in the last -- this week.
21 And I have those with me if the Board wants to see
22 them. They're letters from the District to the
23 construction contractors, Monterey Mechanical as
24 well as the other two construction contractors.
25 They're in the record.

1 MR. SEITZ: I guess I'm willing to
2 accept that as long as the statement is that all
3 letters are in the record, and there aren't
4 records that are -- and I'm not saying this mean-
5 spirited or anything. I just want to have
6 assurances that all of the letters that have been
7 exchanged by Monterey Mechanical and the District
8 are in the record.

9 MS. OKUN: We don't have all the
10 letters. I have three letters, and I'd be happy
11 to have copies made at the break.

12 MR. SEITZ: I'll take a look --

13 CHAIRPERSON YOUNG: Mr. Seitz, --

14 MR. SEITZ: Huh?

15 CHAIRPERSON YOUNG: -- I don't care to
16 read any more letters, --

17 MR. SEITZ: Well, I do.

18 CHAIRPERSON YOUNG: -- myself, but if
19 you want to use them, get them introduced, that's
20 fine with me.

21 MR. SEITZ: That's fine.

22 CHAIRPERSON YOUNG: If they want to use
23 the letters and get them introduced through this
24 witness, that's fine, too.

25 MR. SEITZ: Well, I --

1 CHAIRPERSON YOUNG: I mean he can
2 refer -- the witness can refer to just a couple of
3 letters.

4 MR. SEITZ: I don't want to sound
5 argumentative, all I want to do is make sure that
6 the record has all the letters that he is
7 testifying to in the record. That's my only
8 reason to ask this question.

9 CHAIRPERSON YOUNG: Okay.

10 MR. SEITZ: Secondly, to your knowledge
11 did your company ever contact the state, the State
12 Water Resources Control Board?

13 MR. MOORE: I have no knowledge of that,
14 no.

15 MR. SEITZ: Okay. And by the way, at
16 this hearing hearsay is allowed, so if you heard
17 from your company that they contacted the state, I
18 believe that under the rules here it would be
19 admissible.

20 CHAIRPERSON YOUNG: Yeah, it would be.

21 MR. SEITZ: Is it --

22 MR. MOORE: I'm not aware of any
23 personnel in our company contacting the state
24 directly, no.

25 CHAIRPERSON YOUNG: And you didn't

1 overhear any conversations on the phone or --

2 MR. MOORE: Not a conversation with the
3 state, no.

4 MR. SEITZ: Okay. Let me see if I can
5 clarify. Then how about the State Water Resources
6 Control Board?

7 CHAIRPERSON YOUNG: Okay, Mr. Racano,
8 please, this is not the place for photographs.
9 Please don't do that again.

10 MR. MOORE: No, not the State Water
11 Resources --

12 CHAIRPERSON YOUNG: Yes, you.

13 MR. MOORE: -- Control Board.

14 MR. SEITZ: And lastly, I'm sure you
15 would agree that your company has an interest in
16 constructing -- a financial interest in
17 constructing at the Tri-W site?

18 MR. MOORE: Yes. As I stated earlier,
19 that's why we came here was to build the project
20 there.

21 MR. SEITZ: Okay.

22 CROSS-EXAMINATION

23 MR. McCLENDON: Mr. Moore, when you
24 spoke to Mr. Bleskey about the, as you put it, the
25 courtesy conversation, is that your words, a

1 courtesy call?

2 MR. MOORE: That was what Mr. Bleskey
3 deemed it, was that it was a courtesy call.

4 MR. McCLENDON: Were you aware of any
5 Board action? By that I mean the CSD Board
6 authorizing a termination of your company's
7 contract?

8 MR. MOORE: No, I was not.

9 MR. McCLENDON: Had you ever received
10 notification in accordance with the terms of that
11 contract under their termination provisions that
12 your contract was being terminated?

13 MR. MOORE: No, I have not.

14 MR. McCLENDON: Was it your belief that
15 Mr. Bleskey could unilaterally and without any
16 Board action whatsoever summarily terminate your
17 company's contract?

18 MR. MOORE: It was my understanding
19 based on that phone call, and then the follow-up
20 to Montgomery Watson to confirm that they'd been
21 asked to write a letter of termination to us that
22 someone must have authorized that termination.

23 MR. McCLENDON: But you're not aware of
24 any action that you can identify on the part of
25 the CSD Board that would have authorized the

1 termination of your company's contract. Is that a
2 correct statement?

3 MR. MOORE: Yes, it is.

4 MR. McCLENDON: Okay. Are you aware of
5 the fact that the State Board SRF loan folks on
6 October 13th informed the CSD that they were
7 withholding the second disbursement on the SRF
8 loan payment to the CSD Board on account of a call
9 that Monterey Mechanical had made to their office?

10 (End Tape 2A.)

11 MR. MOORE: I'm aware that loan payment
12 was held up, but it was not based on a phone call
13 from Monterey Mechanical.

14 MR. McCLENDON: So you would disagree
15 with the statement that was made by the State
16 Board to the CSD?

17 MR. MOORE: It wasn't -- that phone call
18 was not made by Monterey Mechanical personnel.

19 MR. McCLENDON: Do you know who made it?

20 MR. MOORE: It could have been made by
21 counsel.

22 MR. McCLENDON: Your lawyer?

23 MR. MOORE: Yes.

24 MR. McCLENDON: Thank you.

25 CHAIRPERSON YOUNG: Can we just take a

1 one-minute break? I think Mr. McClendon wants to
2 confer with Mr. --

3 CHAIRPERSON YOUNG: Sure. Okay, stop
4 the clock.

5 VICE CHAIRPERSON JEFFRIES: Mr. Chair.

6 CHAIRPERSON YOUNG: Yes.

7 VICE CHAIRPERSON JEFFRIES: I'd like to
8 ask Ms. Okun, I'd like to see those letters in
9 question.

10 CHAIRPERSON YOUNG: Do you have copies,
11 Mr. Seitz, of those letters?

12 MR. SEITZ: We certainly have those
13 records that were attached. I think we have three
14 letters, and they're kind of dark because they
15 were sent -- looks like they may have been sent
16 over the fax.

17 But what I'm not sure that we have is
18 the letters from the District to Monterey
19 Mechanical.

20 VICE CHAIRPERSON JEFFRIES: Ms. Okun,
21 are those part of the documents that I have
22 already?

23 MS. OKUN: We put the Montgomery Watson
24 letters in the record with our staff rebuttal. I
25 think that what Mr. Moore was talking about were

1 three letters that Monterey Mechanical wrote to
2 the District via Montgomery Watson. And I have
3 those. They're not in the record, but I have
4 them.

5 There were also letters from the
6 District to Monterey Mechanical at various times
7 saying stop work or start work with conditions.

8 VICE CHAIRPERSON JEFFRIES: Those are
9 the ones I want to see.

10 MS. OKUN: Those are -- okay. Those are
11 in the record, and I can --

12 CHAIRPERSON YOUNG: Yeah, and those are
13 part of the rebuttal documents, I believe.

14 MS. OKUN: The stop-work letters, I
15 believe, were in both our and the District's
16 original submissions.

17 VICE CHAIRPERSON JEFFRIES: Well, there
18 are some documents I have that are so dark I can't
19 read them properly.

20 MS. OKUN: Those are the Montgomery
21 Watson letters, and those were the best copies we
22 had.

23 VICE CHAIRPERSON JEFFRIES: They're a
24 blue background.

25 CHAIRPERSON YOUNG: Okay.

1 VICE CHAIRPERSON JEFFRIES: Hard to
2 read.

3 CHAIRPERSON YOUNG: Mr. Seitz, or Mr.
4 McClendon, did you want to resume?

5 MR. McCLENDON: A few more questions.

6 CHAIRPERSON YOUNG: Sure. Go ahead.

7 MR. McCLENDON: Do you know who Barbara
8 Evoy is?

9 MR. MOORE: I've seen that name on
10 correspondence. She's with the state, I
11 understand.

12 MR. McCLENDON: Yes. She's the, I
13 believe she holds the position of Chief of the
14 Division of Financial Assistance for the State
15 Water Resources Control Board.

16 Is it your testimony that you've never
17 had a conversation with Barbara Evoy?

18 MR. MOORE: Yes.

19 MR. McCLENDON: Are you aware of the
20 fact that Barbara Evoy claims she had a
21 conversation with you?

22 MR. MOORE: No, I'm not.

23 MR. McCLENDON: Thank you.

24 CHAIRPERSON YOUNG: Any other questions,
25 Mr. McClendon? Okay.

1 BOARD MEMBER PRESS: Mr. Chair.

2 CHAIRPERSON YOUNG: Yes, Dr. Press.

3

4 EXAMINATION BY BOARD - Resumed

5 BOARD MEMBER PRESS: Could we see the

6 letters to Monterey Mechanical?

7 MS. OKUN: To Monterey Mechanical?

8 BOARD MEMBER PRESS: To Monterey

9 Mechanical.

10 MS. OKUN: Let me put those up on the

11 screen.

12 BOARD MEMBER PRESS: Thank you.

13 CHAIRPERSON YOUNG: Now, these are not

14 in the record?

15 MS. OKUN: Yes, they are.

16 CHAIRPERSON YOUNG: They are, okay. Can

17 you tell us the document numbers?

18 MS. OKUN: Yes.

19 CHAIRPERSON YOUNG: The exhibit numbers.

20 (Pause.)

21 MR. BRIGGS: We'll be able to zoom in.

22 MS. OKUN: Actually the first one is not

23 scanned, but do you have the October 3rd letter?

24 We can make copies of the October 3rd

25 letter; we don't have a scanned copy of it that we

1 can put up.

2 What's the date of this one?

3 MR. BRIGGS: November 9th.

4 BOARD MEMBER PRESS: That's not actually
5 what I wanted to see.

6 MS. OKUN: No, that's -- no.

7 BOARD MEMBER PRESS: No. That's a
8 letter from Monterey Mechanical. I wanted the
9 letter to Monterey Mechanical, either the October
10 3rd or the October 12th letter.

11 CHAIRPERSON YOUNG: Mr. Moore, while
12 they're looking for that I've got a question for
13 you. Is part of your contract, do you know if you
14 have what would be called liquidated damages --

15 MR. MOORE: Yes.

16 CHAIRPERSON YOUNG: -- for each day that
17 you have been prevented from working or ordered to
18 stop working?

19 MR. MOORE: Well, there's liquidated
20 damages for when we don't meet the milestone dates
21 in the contract.

22 CHAIRPERSON YOUNG: Okay.

23 MR. MOORE: There's an interim milestone
24 date and then a final completion date for the
25 project.

1 CHAIRPERSON YOUNG: Okay, so that goes
2 against you if you don't complete. What about if
3 the District puts your work on hold or standby?
4 Do they owe you any money?

5 MR. MOORE: There's terms in the
6 contract to come to that amount, but it's not a
7 set amount.

8 CHAIRPERSON YOUNG: How is it
9 configured?

10 MR. MOORE: There's verbiage that allows
11 certain things to be included in that request for
12 compensation, and they're listed out in, I believe
13 it's section 15 of the contract. I don't have
14 them memorized, though.

15 CHAIRPERSON YOUNG: Okay. Has the
16 District told you that it's going to compensate
17 your company for those items?

18 MR. MOORE: No, they haven't. We have
19 had no discussions along that line.

20 CHAIRPERSON YOUNG: Okay.

21 MS. OKUN: We have a blurry copy of the
22 October 3rd letter, and we're looking for a
23 cleaner one that we can put on the overhead
24 projector. We'll just put it on the screen.

25 CHAIRPERSON YOUNG: You might blow that

1 up as much as possible.

2 MR. THOMPSON: Would you like me to read
3 the letter --

4 CHAIRPERSON YOUNG: Yes, please, go
5 ahead.

6 MR. THOMPSON: This is an October 3rd
7 letter from the Community Services District
8 General Manager Bruce Buel, although it was signed
9 by, I believe, Karen Vega for Bruce Buel.

10 To Milt Burlson of Monterey Mechanical
11 in Oakland. Subject line, suspension of work
12 pursuant to specification 15.1. Dear Milt: The
13 LOCSD Board, on October 1, 2005, ordered immediate
14 suspension of all work, pursuant to specification
15 15.1 of our contract, for up to 90 days. This
16 letter is LOCSD's formal notice to suspend work
17 subject to the following qualifications."

18 "First, contractor shall winterize all
19 work pursuant to the stormwater pollution
20 prevention plan into specifications in the
21 contract document. Two, contractor shall maintain
22 dust control as specified in contract document.
23 Contractor shall comply with all County permit
24 compliance requirements. Contractor shall provide
25 for security protection of materials and equipment

1 in staging areas. Lastly, contractor shall
2 maintain a standby posture until further notice.
3 LOCSD will provide further guidance under separate
4 cover. Thank you for your cooperation."

5 CHAIRPERSON YOUNG: Dr. Press.

6 BOARD MEMBER PRESS: Mr. Moore, could
7 you tell me if this letter, in your view, was a
8 stop-work order?

9 MR. MOORE: Yes, it was.

10 BOARD MEMBER PRESS: Would you expect
11 any other kind of letter representing the
12 District, the CSD, would it have to be signed by a
13 CSD Board of Directors to be more legal or did you
14 take it as the official stop-work?

15 MR. MOORE: That was the official stop-
16 work. We would take any correspondence from the
17 General Manager as being official District
18 correspondence.

19 BOARD MEMBER PRESS: To your knowledge
20 are there any requirements in your contract
21 stating that orders have to come from the District
22 and not the General Manager, the District Board of
23 Directors, excuse me?

24 MR. MOORE: No, there's not. The
25 correspondence is to come through Montgomery

1 Watson. And these letters were subsequently
2 passed on to us by Montgomery Watson.

3 BOARD MEMBER PRESS: But from the
4 General Manager?

5 MR. MOORE: Yes.

6 BOARD MEMBER PRESS: I see. Thank you.

7 CHAIRPERSON YOUNG: Any other questions,
8 Dr. Press? Mr. Hayashi.

9 BOARD MEMBER HAYASHI: Mr. Moore, what
10 happens at the end of 90 days? Is your contract
11 null and void?

12 MR. MOORE: That's a legal question, I
13 couldn't answer. There's no terms in that section
14 that say what happens after that 90-day
15 suspension.

16 CHAIRPERSON YOUNG: Do you go back to
17 work?

18 MR. MOORE: No.

19 BOARD MEMBER HAYASHI: I mean it says
20 that --

21 CHAIRPERSON YOUNG: It doesn't say you
22 don't go back to work.

23 BOARD MEMBER HAYASHI: Yeah, 15.1 --

24 MR. MOORE: 15.1 is a section in the
25 contract that talks about suspension and

1 termination. Originally there was wording in that
2 section that said after the 90 days we could
3 terminate the contract. But that was deleted by
4 addendum. So I honestly don't know after that 90
5 days what would happen; it's kind of open.

6 CHAIRPERSON YOUNG: I just have a
7 question for Mr. Seitz and Mr. McClendon. I
8 didn't appreciate it until the last few moments
9 here. Is it the District's position that a letter
10 such as this was not authorized by the District,
11 itself?

12 I mean you'll have to help me with that.

13 MR. McCLENDON: There have been -- and
14 it's a good question, I appreciate it, Mr.
15 Chairman. As mentioned earlier, the District acts
16 three ways, through motions, resolutions and
17 ordinances. And it's restricted statutorily to
18 that.

19 There have so far been -- there's been
20 one motion October 3rd, allowing for the temporary
21 suspension. That was two days after -- three days
22 after the new Board was sworn in, for a brief
23 timeout. That was done by motion.

24 Since that time, as you know, there have
25 been two resolutions that have been approved with

1 regard to the State Board SRF loan, and I think
2 those are before you, as well.

3 Other than that there has not been any
4 other motion for termination or anything of that
5 sort.

6 (Pause.)

7 MR. McCLENDON: Can I ask Mr. Bleskey
8 to --

9 MR. BLESKEY: The way construction
10 contracts normally operate, it --

11 CHAIRPERSON YOUNG: Yeah, Mr. Bleskey,
12 I'm really just trying to cut to the heart of this
13 document. Is it the District's position that this
14 was unauthorized?

15 MR. BLESKEY: No.

16 CHAIRPERSON YOUNG: Okay.

17 MR. BLESKEY: Because the General
18 Manager is the owner's representative, and that
19 was by motion when the contract was awarded and
20 funding was authorized and obligated. Those are
21 key.

22 The other thing is is that section 15.1
23 is entitled suspension of work, which is a
24 contractual remedy allowed by the contract,
25 approved by the state, reviewed by the Regional

1 Board Staff. That allows for suspensions when you
2 come to situations which are common whenever you
3 break the earth that need a timeout.

4 We had a situation where we had Measure
5 B. We were abiding by Measure B. We needed time
6 to assess the hydraulic implications on the system
7 as we evaluated which collection system that we
8 could construct and use in any circumstance.

9 CHAIRPERSON YOUNG: Okay.

10 MR. BLESKEY: And that's what that
11 clause provides.

12 CHAIRPERSON YOUNG: Okay. And I
13 understand that. I'm just trying to get to the
14 point as to what your position is with this
15 document. And I just want to make sure it was
16 authorized to be sent out as written?

17 MR. BLESKEY: Yes, sir.

18 CHAIRPERSON YOUNG: Okay. That's all I
19 wanted to clarify. Okay.

20 Any additional questions for Mr. Moore?
21 Okay. Ms. Okun?

22 MS. OKUN: No.

23 CHAIRPERSON YOUNG: And I think that,
24 Mr. Seitz and Mr. McClendon, you're finished with
25 this witness? Okay. Thank you, sir.

1 Okay. Go ahead. Any other witnesses.

2 MS. OKUN: We have no other witnesses.

3 CHAIRPERSON YOUNG: No other witnesses.

4 Okay. Well, you're down to 27.09, so an hour and
5 27 minutes on -- that was their clock. Yeah, an
6 hour and 27. So let me just check --

7 MS. OKUN: Do you want to take a short
8 break and try to get Mr. Polhemus on the line?

9 CHAIRPERSON YOUNG: Okay. Do we need to
10 ask him any questions?

11 MS. OKUN: We don't, but if the Board
12 has questions for him, this would be a good time.
13 Or I can see if he's available tomorrow.

14 CHAIRPERSON YOUNG: Okay. Does the
15 Board have any questions for Mr. Polhemus? He was
16 involved with the state revolving loan fund, and
17 he's available by teleconference in Sacramento.

18 BOARD MEMBER SHALLCROSS: Yeah, I think
19 we really haven't heard a whole lot of information
20 on that aspect. And I'm wondering if he might be
21 available tomorrow --

22 CHAIRPERSON YOUNG: Okay.

23 BOARD MEMBER SHALLCROSS: -- at some
24 point.

25 MS. OKUN: If we could take a five-

1 minute break I can --

2 CHAIRPERSON YOUNG: Take a five-minute
3 break --

4 BOARD MEMBER SHALLCROSS: I'd like to
5 hear more from, you know, from both sides, or at
6 least from the discharger.

7 CHAIRPERSON YOUNG: Okay, five-minute
8 break.

9 (Brief recess.)

10 CHAIRPERSON YOUNG: Okay, folks, please,
11 we're going to resume. And, Mr. Seitz, what we're
12 going to do at this point before we turn it over
13 to you, I wanted to call Bruce Buel to the stand,
14 ask him some questions, while this topic with
15 these letters and what Mr. Moore just told us is
16 fresh.

17 MR. SEITZ: Yeah.

18 CHAIRPERSON YOUNG: You'll have an
19 opportunity to ask him questions, also.

20 MR. SEITZ: I just wanted to just make a
21 quick observation. I just wanted to move all of
22 the slides that the State Water Resources Control
23 Board prosecution team has left up on the wall, to
24 make sure that they are included in the
25 administrative record, and the Chair agrees.

1 MS. OKUN: Yes, they are.

2 CHAIRPERSON YOUNG: Yes.

3 MR. SEITZ: Thank you.

4 CHAIRPERSON YOUNG: Yeah, they are.

5 Okay, Mr. Buel.

6 EXAMINATION BY BOARD

7 CHAIRPERSON YOUNG: Were you aware that
8 this letter was going out? Is that your signature
9 on the bottom, or is that --

10 MR. THOMAS: Could he state his name for
11 the record?

12 CHAIRPERSON YOUNG: Oh, yeah, go ahead.

13 MR. BUEL: I'm Bruce Buel, General
14 Manager, Los Osos Community Services District, on
15 administrative leave.

16 CHAIRPERSON YOUNG: Okay. And when did
17 you start with the Community Services District?

18 MR. BUEL: I was hired by the District
19 on November 16, 1999.

20 MS. SCHAFFNER: And when were you put on
21 administrative leave?

22 MR. BUEL: October 1, however also on
23 October 1 I was directed by the Board to issue
24 these three letters; you have a copy to Monterey
25 Mechanical. I was also directed by motion to

1 transmit letters to Bernard and Whittaker.

2 CHAIRPERSON YOUNG: And who gave that
3 instruction to you?

4 MR. BUEL: The Board of Directors. That
5 was by motion on October 1 at their meeting that
6 evening before they placed me on administrative
7 leave.

8 CHAIRPERSON YOUNG: Was that an open
9 session or closed?

10 MR. BUEL: That was open, the open
11 session portion of the agenda.

12 CHAIRPERSON YOUNG: Okay. Mr. Jeffries,
13 did you --

14 VICE CHAIRPERSON JEFFRIES: No, I think
15 I was -- I had some concerns because one of the
16 attorneys for the appellant is saying there's
17 only --

18 CHAIRPERSON YOUNG: You mean the
19 District.

20 VICE CHAIRPERSON JEFFRIES: District,
21 excuse me. There was only, I think, quoted three
22 ways of giving direction. And I know, being a
23 chair of a special district, there are other ways
24 of giving direction to a general manager. And it
25 doesn't have to be by motion; it doesn't have to

1 be resolution; and it doesn't have to be by
2 ordinance.

3 And can you give me some insight -- I
4 think you said it was by motion, and it was a
5 vote. Was it a 100 percent vote?

6 MR. BUEL: Yes. There was 100 percent
7 unanimous vote of the Board of Directors to direct
8 me to issue these three suspension letters.

9 VICE CHAIRPERSON JEFFRIES: And then I
10 see somebody signed that for you. Is that because
11 you were then placed on administrative leave?

12 MR. BUEL: No, sir. I had a planned
13 vacation. I actually drafted this letter in the
14 lobby of the St. Francis Hotel in San Francisco.
15 I had made arrangements with Karen Vega, who's my
16 administrative secretary, to appear at 8:00 a.m.
17 that morning.

18 I called Monterey Mechanical, Whittaker
19 and Bernard at 6:00 a.m., because they are
20 supposed to mobilize by 7:00. I wanted to give
21 them time to stand down.

22 And at 8:00 a.m. I dictated three
23 letters and directed my secretary to sign them on
24 my behalf.

25 VICE CHAIRPERSON JEFFRIES: Are you

1 under the impression with this letter that it's a
2 permanent work stoppage?

3 MR. BUEL: No, sir, I am not. My
4 belief, and I believe the Board's motion, was to
5 suspend construction activity, at least at that
6 time. As you know, subsequently Measure B has
7 been deemed valid, and at this point it would be
8 up to the Board to determine if they have the
9 ability to reactivate the contract with Monterey
10 Mechanical.

11 VICE CHAIRPERSON JEFFRIES: Okay.

12 CHAIRPERSON YOUNG: Mr. Buel, we heard
13 from Mr. Moore, and he had indicated that he had
14 been given direction by Mr. Bleskey that the
15 contract was going to be terminated. I think he
16 mentioned that on a number of instances.

17 Can you tell us what you know about
18 that? Did the Board at all or --

19 MR. BUEL: I apologize that I can't
20 answer that question. Since I wrote this letter
21 I've not been in any of the direct negotiations or
22 in communication with any of the contractors.

23 I have attended Board meetings, but only
24 the open session portion of those Board meetings.
25 I have not participated in any of the closed

1 session discussions.

2 CHAIRPERSON YOUNG: Okay, so basically
3 the date of this letter kind of highlights for us
4 when your knowledge of events going on with the
5 District really came to a conclusion, except what
6 the public would also know?

7 MR. BUEL: Indeed.

8 CHAIRPERSON YOUNG: Okay. While you're
9 here with us, I'm wondering if you can tell us
10 something about the operating and maintenance
11 expenses as they were projected for the Tri-W
12 plant once it was to be completed. Did you have
13 that for an annual basis, a monthly basis?

14 MR. BUEL: Actually, I apologize, I
15 cannot do that. The Montgomery Watson Harza
16 developed a O&M projection at \$2.5 million per
17 year for the entire system.

18 But to my knowledge there was not a
19 separate breakout for the treatment plant versus
20 the collection or the disposal works.

21 CHAIRPERSON YOUNG: Okay, but this is
22 operation and maintenance for the entire system?

23 MR. BUEL: Um-hum, that's correct.

24 CHAIRPERSON YOUNG: And that's the
25 facility and the collection system?

1 MR. BUEL: Yes, sir.

2 CHAIRPERSON YOUNG: Okay.

3 VICE CHAIRPERSON JEFFRIES: Mr. Buel,
4 while the Chairman is consulting with the
5 attorney, was this discussion or the direction
6 given to you, was that in an open session or
7 closed session?

8 MR. BUEL: It was open session; this was
9 an agenda item. This was the first formal
10 meeting of the Board. They had had a pre-meeting
11 before they were sworn in. The election was the
12 27th of September. The Registrar of Voters
13 certified the election results on the 29th. And
14 this meeting was a special meeting held on October
15 1; I believe it was a Saturday evening.

16 VICE CHAIRPERSON JEFFRIES: Have you
17 attended other Board meetings since that period of
18 time?

19 MR. BUEL: Yes, I've attended about half
20 of the additional Board meetings on my own. Now,
21 I did attend one meeting at the direction of the
22 District; the other meetings I've attended of my
23 own interest.

24 VICE CHAIRPERSON JEFFRIES: The meeting
25 that you attended on the request from the Board,

1 was that an open session or closed session you
2 attended?

3 MR. BUEL: Just the open session.

4 VICE CHAIRPERSON JEFFRIES: The meetings
5 that you attended and the one that you were
6 requested to be there, on the agenda was it
7 noticed on the closed session portion of that
8 agenda that they were going to be discussing the
9 contracts or the work stoppage?

10 MR. BUEL: I do not remember seeing that
11 item on any closed session agenda.

12 VICE CHAIRPERSON JEFFRIES: Okay, thank
13 you.

14 CHAIRPERSON YOUNG: Okay, what can you
15 share with us that you know about the Board's
16 position with respect to Measure B, and what their
17 intent was before the recall election took place?

18 I mean we know that they had a lawsuit
19 that had been filed. We know it was up on appeal.
20 But I'm interested to know what the individual
21 Directors, you know, the positions that they had
22 with it.

23 MR. SEITZ: Mr. Chairman, --

24 CHAIRPERSON YOUNG: Yes.

25 MR. SEITZ: -- I just want to raise a

1 little bit of an objection on ambiguity. I don't
2 know if you're talking about -- maybe Mr. Buel
3 knows, but whether or not we're talking about the
4 prior Board before the recall election, the Board
5 that was running for the recall, or the Board that
6 was appointed after the recall. All I'm asking
7 for is to make sure that --

8 CHAIRPERSON YOUNG: Okay. When Ms.
9 Schicker and Ms. Tacker were the two newer members
10 on the Board, with the three recent ones that were
11 recalled, when it was that Board constitution,
12 what were the discussions that were taking place
13 amongst the Board members with respect to
14 maintaining the lawsuit challenge and positions
15 that they might take depending on what happened
16 with the recall or the passage of Measure B?

17 Do you have any --

18 MR. BUEL: I do not believe the Board
19 discussed those in open session. I believe the
20 only discussion was retention of special counsel.
21 And I believe --

22 CHAIRPERSON YOUNG: Were you there in
23 closed session?

24 MR. BUEL: Yes. Up until October 1 I
25 have attended every closed session of the District

1 since November 16, 1999.

2 CHAIRPERSON YOUNG: Okay. Mr. Seitz,
3 you had a --

4 MR. SEITZ: I was just going to raise
5 the objection that you were asking for closed
6 session. Mr. Buel caught it, so --

7 CHAIRPERSON YOUNG: Okay. All right.
8 Any other questions from the Board? Mr.
9 Shallcross.

10 BOARD MEMBER SHALLCROSS: I just
11 wondered, are you going to be available tomorrow?

12 MR. BUEL: Yes, sir.

13 BOARD MEMBER SHALLCROSS: Okay.

14 CHAIRPERSON YOUNG: All right, thank
15 you. Mr. Thomas.

16 MR. THOMAS: Mr. Buel, you said that you
17 recall a \$2.5 million per year operation and
18 maintenance cost for the total facility
19 including -- for the facility and the distribution
20 system.

21 MR. BUEL: Um-hum.

22 MR. THOMAS: You have no feeling for how
23 that breaks out? Is it 50/50 or 70/30?

24 MR. BUEL: Tomorrow I can bring the
25 detail; what the engineer provided is an estimate

1 of energy, labor, materials; there's a number of
2 contingency requirements and replacement, an
3 obligation that we have under the installment
4 sales agreement.

5 So, what that would establish is those
6 classifications of OM&R costs into the future.
7 Now, some of those are more heavily leveraged
8 towards the treatment facility and some are more
9 heavily leveraged towards distribution and
10 disposal.

11 So, tomorrow I could provide a
12 guesstimate of how that would break out.

13 CHAIRPERSON YOUNG: Okay, I would
14 appreciate it if you would do that, if you could
15 bring the documents then, so that we have them if
16 we need to take a look at -- the District has
17 them?

18 MR. BUEL: Yes, well, most of my files
19 have been removed from my office, and the only
20 caveat is I would need Mr. Bleskey's permission to
21 access those files.

22 CHAIRPERSON YOUNG: Have they been
23 identified or marked, Mr. Seitz?

24 MR. SEITZ: I believe Ms. Schicker --

25 CHAIRPERSON YOUNG: Ms. Schicker has

1 them?

2 MR. SEITZ: -- is representing to me
3 that they're part of her presentation to the
4 Board, so if Mr. Buel's here -- I think he's going
5 to be because he's part of my presentation.

6 CHAIRPERSON YOUNG: Okay.

7 (Laughter.)

8 MR. SEITZ: He's sort of a multi-tasker
9 here. That you will probably get a chance to see
10 those.

11 CHAIRPERSON YOUNG: Good. Okay. Well,
12 we'll see you tomorrow, then, --

13 MR. SEITZ: Can I just ask Mr. Buel just
14 one question?

15 CHAIRPERSON YOUNG: Of course. Yeah,
16 and Ms. Okun, then you can ask him any questions.

17 CROSS-EXAMINATION

18 MR. SEITZ: Mr. Buel, you testified that
19 the \$2.5 million was for collection and treatment.
20 It also included disposal, did it not?

21 MR. BUEL: Yes, sir.

22 MR. SEITZ: It's all three operations?

23 MR. BUEL: I agree with that.

24 MR. SEITZ: Thank you.

25 CHAIRPERSON YOUNG: Okay. Wait a

1 minute, I think we have one more.

2 MS. SCHAFFNER: One quick clarifying
3 question. What was the name of that consultant
4 again, Mr. Buel, that prepared that estimate for
5 the District?

6 MR. BUEL: Montgomery Watson Harza.

7 MS. SCHAFFNER: Thank you.

8 CHAIRPERSON YOUNG: Okay, Mr. McClendon.

9 CROSS-EXAMINATION

10 MR. McCLENDON: Mr. Buel, is it fair to
11 say that you're not completely retired on
12 administrative leave, that you are actually taking
13 a moderate amount of work as a special projects
14 manager for our District?

15 MR. BUEL: I have agreed to provide the
16 District with any research that is requested. And
17 I actually end up working about two hours a day to
18 satisfy those requests.

19 MR. McCLENDON: Okay, and just a last
20 question. As a General Manager, would you have
21 ever terminated a contract without cause without
22 taking that to your Board for direction?

23 MR. BUEL: No, sir.

24 MR. McCLENDON: Thank you.

25 MS. SCHAFFNER: I'm sorry, Mr. Chairman,

1 can --

2 CHAIRPERSON YOUNG: Yes.

3 MS. SCHAFFNER: -- I have one more
4 question.

5 CHAIRPERSON YOUNG: Of course.

6 MS. SCHAFFNER: Earlier in your
7 testimony, I'm not sure if I heard you correctly,
8 you said that with Measure B being invalidated by
9 the courts, is that your understanding that the
10 current posture of Measure B is that it is no
11 longer valid, or that it is valid?

12 MR. BUEL: Well, this is hearsay because
13 the only thing I know is what I read in the
14 papers. The papers have alleged that as a result
15 of the District's action to dismiss the underlying
16 complaint and the appellant's action to withdraw
17 the appeal, that that holds the stay intact from
18 the Appellate Court.

19 And I'm not an attorney, and this is way
20 beyond my competence, so --

21 MS. SCHAFFNER: So, what you said was
22 you believe Measure B stands as a result of the
23 withdrawal from the litigation?

24 MR. BUEL: Um-hum.

25 MS. SCHAFFNER: Okay. And do you have

1 any, in your dealings with the District, have you
2 had any basis to have an understanding of what
3 they believe the status of Measure B is?

4 MR. BUEL: I have talked to Mr. Seitz
5 and asked his opinion. He also believed that it
6 was, at this point, standing. But I honestly
7 don't know if that was in John's role as counsel
8 to the District, or as an attorney at large.

9 MS. SCHAFFNER: Okay, thank you, sir.

10 CHAIRPERSON YOUNG: Okay, Ms. Okun, do
11 you have any questions?

12 MS. OKUN: No.

13 CHAIRPERSON YOUNG: Okay. All right,
14 thank you, Mr. Buel.

15 All right, where do I want to set this?
16 It's going to be Mr. Seitz and Mr. McClendon.
17 27.09, okay. You guys are on.

18 MS. SCHICKER: Chairman Young, --

19 CHAIRPERSON YOUNG: Yes.

20 MS. SCHICKER: -- and the Board, I'd
21 just like to start off with the introduction of
22 our presentation, please.

23 CHAIRPERSON YOUNG: Go right ahead.

24 MS. SCHICKER: Thank you. My name is
25 Lisa Schicker; I'm the President of the LOCSD

1 Board. And we have four to five presenters today
2 in our presentation. We're going to start out
3 with the attorneys, Mr. McClendon and Mr. Seitz;
4 followed by Mr. Bleskey, the Interim General
5 Manager; followed by Rob Miller, -- we have a
6 slide for the speakers --

7 (Cellphone ringing.)

8 CHAIRPERSON YOUNG: Someone didn't hear
9 me earlier.

10 MS. SCHICKER: And then followed by Mr.
11 Rob Miller, he's our District Engineer; --

12 CHAIRPERSON YOUNG: Okay.

13 MS. SCHICKER: -- followed by myself,
14 followed by Mr. Chuck Cesena. And then I'm going
15 to follow again at the end of the presentation.

16 I have a special request this evening.
17 We also have a Board meeting tonight following
18 this meeting. And you mentioned 7:45, and 7:00
19 would be a little better for us because we have a
20 long closed session meeting after that that we'll
21 be attending, and we have it televised and
22 agendized, and people are expecting to be there,
23 too. So, -- pardon? Can you also give us a
24 reading on the time? Our presentation is about an
25 hour long, maybe 40, 45 minutes --

1 CHAIRPERSON YOUNG: You're got an hour
2 and 26 minutes.

3 MS. SCHICKER: Okay, because we want
4 some time for rebuttal, as well.

5 CHAIRPERSON YOUNG: Yeah.

6 MS. SCHAFFNER: Yeah, that's right, that
7 time includes rebuttal and closing.

8 MS. SCHICKER: An hour and 20?

9 MS. SCHAFFNER: Yes.

10 MS. SCHICKER: Okay.

11 MS. SCHAFFNER: Thank you.

12 MS. SCHICKER: Okay, and then I'd like
13 to state for the record and disclosure, disclosure
14 about any Director who's speaking today. We're
15 all speaking as individuals. We have no right to
16 speak on behalf of the Board. All opinions and
17 views expressed are our own, not to be imputed to
18 be that of the District.

19 So, that's just how it has to be because
20 of the way the District operates.

21 CHAIRPERSON YOUNG: Okay, then I have a
22 question for you, Ms. Schicker. Is anyone
23 authorized to speak on behalf of the Board?

24 MS. SCHICKER: The only way the District
25 is authorized to speak is through motion,

1 resolution or ordinance, as a Board. And we have
2 our District counsel to represent us, as well.

3 BOARD MEMBER SHALLCROSS: And so you
4 didn't authorize anyone to speak for the Board?

5 MS. SCHICKER: We're all speaking as
6 members of the Board, that's all we can do; that's
7 the way we're organized.

8 BOARD MEMBER SHALLCROSS: No, it's not.
9 The Board could have authorized someone to speak
10 for them. And my question --

11 MS. SCHICKER: And that would be --

12 BOARD MEMBER SHALLCROSS: My question is
13 did you do that?

14 MS. SCHICKER: Well, that would be Mr.
15 McClendon, then.

16 CHAIRPERSON YOUNG: Okay.

17 BOARD MEMBER SHALLCROSS: Okay.

18 CHAIRPERSON YOUNG: All right.

19 VICE CHAIRPERSON JEFFRIES: Mr. Chair, I
20 also have a question.

21 CHAIRPERSON YOUNG: Go ahead.

22 VICE CHAIRPERSON JEFFRIES: I believe
23 you have four or all five of your Board members
24 here now?

25 MS. SCHICKER: Yes, that's true. We

1 agendized a special meeting so we could all
2 attend. And we're not allowed to take any action.

3 VICE CHAIRPERSON JEFFRIES: So this
4 meeting is noticed?

5 MS. SCHICKER: Yes, it is.

6 VICE CHAIRPERSON JEFFRIES: So you could
7 take action today because you do have --

8 MS. SCHICKER: No. We can't take action
9 because we agendized it as a special meeting with
10 no actions to be taken.

11 CHAIRPERSON YOUNG: Okay.

12 MS. SCHICKER: That's how we did it so
13 we could all attend.

14 CHAIRPERSON YOUNG: Okay. All right.
15 I'll resume the clock. Here we go. Go ahead.

16 MR. McCLENDON: Thank you, Mr. Chair --

17 MS. OKUN: Excuse me, if the Directors
18 aren't speaking on behalf of the District, and
19 only the District's lawyers are speaking on behalf
20 of the District, it seems to me that the Directors
21 should be part of the public comment period.

22 CHAIRPERSON YOUNG: Well, --

23 BOARD MEMBER SHALLCROSS: I think they
24 can be called as witnesses.

25 CHAIRPERSON YOUNG: Yes.

1 BOARD MEMBER SHALLCROSS: I'm not sure
2 who should -- if she's just speaking for herself
3 now, as a witness? Is that what you're doing
4 right now?

5 MS. SCHICKER: Mr. Shallcross, we have
6 prepared, very diligently we have practiced for
7 this presentation. We have parts and pieces all
8 allocated and our time has been done. We're ready
9 to go. We would really just --

10 BOARD MEMBER SHALLCROSS: That's fine,
11 can you answer my question?

12 MS. SCHICKER: What is your question,
13 sir?

14 BOARD MEMBER SHALLCROSS: Are you
15 speaking for yourself right now?

16 MS. SCHICKER: Yes, I am.

17 BOARD MEMBER SHALLCROSS: Only.

18 MS. SCHICKER: I'm speaking -- we have a
19 presentation to make to your Board.

20 CHAIRPERSON YOUNG: But that could be
21 problematic because, I mean I need to know -- they
22 spoke on behalf of the prosecution team as an
23 entity, so are you speaking as a member of the
24 public right now?

25 MS. SCHICKER: I am the President of the

1 Board; I am -- generally I am a spokesperson for
2 the Board when it comes to the press. Would that
3 be enough to allow me to speak and do the
4 presentation today? I've practiced, I'm prepared,
5 we're ready to go.

6 CHAIRPERSON YOUNG: Well, are you
7 speaking on behalf of the Board when you give this
8 presentation? Or is this as a witness? Mr.
9 Seitz, it's a little --

10 MR. SEITZ: Maybe I can just hopefully
11 clarify this, although I doubt it. First of all,
12 I think that just as these individuals up here
13 we've heard testifying for the prosecution team,
14 and I assume that there's no formal Board action
15 by this Board or any other board designating them
16 to speak on behalf of the whole Board, as the
17 prosecution team.

18 My feeling is that the speakers that are
19 coming up here are speaking as part of the defense
20 team.

21 CHAIRPERSON YOUNG: Okay.

22 MR. SEITZ: But they want to make it
23 clear for the record that there has been no motion
24 with a document says, okay, you can read this
25 document, or you can do this or say this.

1 I believe that for my purposes is that
2 you can take what they are saying as officers of
3 the District. And being on the defense team.

4 Our whole issue before, I know this may
5 sound confusing, and I think Mr. Buel in his
6 dialogue with Mr. McClendon pointed it out, the
7 managers have certain inherent authority. I mean
8 you don't have to say sign this letter, go to the
9 Board and say sign this letter, make sure that's
10 okay with the Board to sign that letter. A
11 manager works as the administrative arm of a
12 Board. I mean that's the way it works.

13 The question is on material substantive
14 issues, if a Board forms a contract can the
15 General Manager terminate the contract. And our
16 position is the answer is no, unless the contract
17 says the manager can terminate the contract, which
18 is what we typically call, as lawyers, the equal
19 dignities rule. You terminate under the same form
20 that you formed the document.

21 So our position is just this. That when
22 individual Board members speak for the Board in
23 these hearings regarding the formation of this
24 complaint, just because Ms. Schicker says
25 something or Mr. Fouche says something it

1 shouldn't be imputed to the Board as Board policy,
2 that that was the key policy that triggered this
3 ACL complaint, because it simply wasn't Board
4 action. It wasn't the Board speaking for the
5 Board, it was individuals speaking for themselves.

6 Now, maybe that's a distinction without
7 a difference, but the reality is that, you know,
8 when somebody says you've breached the contract
9 with the contractors, because Joe Bob -- I don't
10 think there's a Joe Bob in here, hopefully there's
11 not -- who happens to be a director said that.

12 It's just the same as you folks. You
13 folks can't impose a penalty on your own -- I
14 assume this is the case, is that individual Board
15 members sitting before us can't take action on
16 behalf of the Board as individuals, you need to
17 get to a Board meeting, following the Brown Act,
18 take action.

19 I think that's a difficult -- I know
20 that there's a fuzzy line in there, and I'm not
21 saying it's perfectly black and white. But the
22 District's position is that only the Board can
23 terminate these contracts.

24 CHAIRPERSON YOUNG: Okay, and I
25 understand that. I think we do understand that.

1 But I just want to make sure that if any of the
2 individual CSD Board Members are going to be
3 speaking, that they are speaking as Board members;
4 and that they are authorized to speak as Board
5 members. And whatever they tell us is going to be
6 consistent with Board policy.

7 MR. SEITZ: Well, --

8 CHAIRPERSON YOUNG: And that, you know,
9 I'm not going to hear later that well, you know,
10 that's not what it was, you heard something that,
11 you know, is not what you think it is.

12 MR. SEITZ: I think the best way to
13 handle that, as a practical matter, is everybody
14 is sworn in under penalty of perjury.

15 CHAIRPERSON YOUNG: Correct.

16 MR. SEITZ: So, I don't want to speak
17 for the Chair here, but I think when they begin
18 their testimony, are you speaking on behalf of the
19 District or are you speaking as an individual
20 would be the question the Chair would want to ask
21 them so that there'd be absolute clarity at that
22 time.

23 CHAIRPERSON YOUNG: Okay. And just so
24 you know, our staff doesn't represent the Board.
25 If they did represent us, we probably may not have

1 had this hearing because they'd have inherent
2 power to carry this out on their own. So, there
3 is a big distinction there.

4 MR. SEITZ: I agree.

5 VICE CHAIRPERSON JEFFRIES: Mr. Chair,
6 before you go --

7 CHAIRPERSON YOUNG: Mr. Jeffries.

8 VICE CHAIRPERSON JEFFRIES: -- with this
9 presentation I'd like to make a correction. We're
10 not under the Brown Act, we're under the Bagley-
11 Keene --

12 MR. SEITZ: I know.

13 VICE CHAIRPERSON JEFFRIES: -- Act.

14 MR. SEITZ: I know, and I --

15 VICE CHAIRPERSON JEFFRIES: Just for --

16 MR. SEITZ: -- appreciate the
17 difference.

18 CHAIRPERSON YOUNG: Okay. All right.
19 Ms. Schicker, we'll restart the clock and, as the
20 CSD President, go ahead and give us your
21 presentation.

22 MS. SCHICKER: Thank you very much, Mr.
23 Young.

24 DIRECT TESTIMONY

25 MS. SCHICKER: I'd like to start out by

1 just explaining briefly the organization of the
2 presentation. We kind of have a three-pronged
3 approach. Some of the things have been touched on
4 already in some of the cross-examination. But the
5 three prongs are this:

6 The ACL complaint is not timely or
7 consistent with enforcement policy.

8 CHAIRPERSON YOUNG: Could you speak a
9 little louder so all can hear?

10 MS. SCHICKER: Sure, is this better?

11 CHAIRPERSON YOUNG: Yes, that's better.

12 MS. SCHICKER: Okay. The first point of
13 our presentation will be that the ACL complaint is
14 not timely or consistent with enforcement policy.
15 And our attorneys will handle that part of the
16 presentation.

17 The complaint is not applied
18 appropriately to regulatory standards or
19 requirements.

20 And thirdly, the complaint should
21 consider actions by the CSD to comply with the
22 regulations and to abate pollution.

23 Here's the list of speakers that we've
24 already gone over.

25 And this is a summary to our response.

1 And this is where Mr. McClendon will begin.

2 MR. McCLENDON: Good afternoon, Mr.
3 Chairman and Members of the Board. My name is
4 John McClendon. I will be handling this with Mr.
5 Seitz, taking a bifurcated approach here similar
6 to those of you who are attorneys, in a common
7 tort situation you typically bifurcate. And you
8 look at first, liability, is there culpability
9 here, causation. And then secondly, only if you
10 establish that then you go to the issue of what
11 are the damages, what is the liability.

12 And -- louder? Okay. I'll pull it
13 closer. I would hope -- I was going to use a
14 horrific example from World War II to start off,
15 but I don't think I need to do that. I just want
16 to cut to the chase here and say that what I think
17 I'd like us to all agree on at the get-go here is
18 that whatever our disagreements are, we can have
19 consensus on it's wrong to punish the innocent.
20 And it's wrong to punish them hugely. The
21 culpability has to be demonstrated here.

22 I think in the common law the old saying
23 was it's better for ten guilty to go free than for
24 one innocent to be punished. And certainly
25 there's a proportionality issue in that, as well.

1 So I would urge you to please keep an
2 open mind on part one of this. And listen
3 carefully to see if there is that requisite
4 culpability in what has gone on here.

5 In that regard I'll start with the time
6 schedule order from October 27, 2000. I think
7 you've seen this before. In paragraph 13 of that
8 order it says, at the end of it, this is where it
9 establishes the \$10,000 per day penalty. It says,
10 "Furthermore, because the Board does not intend to
11 punish or redress previous violations, this order
12 provides that the Board may extend the time for
13 compliance for delays beyond a reasonable control
14 of the CSD."

15 Immediately after that was issued, a
16 timely petition to the State Board was filed in
17 November. And one of the -- in fact, the first
18 reason for filing it was saying that the project
19 delays alleged are beyond the reasonable control
20 of the petitioner.

21 I would like to point out that ever
22 since the year 2000 this staff and this Board has
23 been commendably fair in not punishing the
24 innocent. Granted this CSD wanted, from the get-
25 go, to contest the time schedule order. However,

1 there appears to be, -- and again I'm new at this,
2 I've just been with the Board two months today --
3 but there was some sort of an agreement, a tacit
4 agreement that forward progress was being made;
5 the time schedule order would not be enforced.

6 And, for example, I think you've seen
7 this before, in July 9th of 2004 where you do your
8 quarterly updates at this Board on seeing how was
9 the CSD progressing, you looked at the fact that
10 the time schedule order was long since overshoot.
11 But you said, "Los Osos CSD has gone to great
12 lengths to address each and every question,
13 objection raised by project opponents. Los Osos
14 CSD has rigorously and successfully responded to
15 each appeal, discretionary approval and each court
16 challenge. Project delays and noncompliance with
17 the time schedule order are clearly beyond Los
18 Osos CSD's ability to control. Assessment of
19 penalties under order 00-131 would result in
20 bankrupting the CSD and the responsibility for the
21 community wastewater project would likely revert
22 to San Luis Obispo County. Such action is not
23 likely to result in a resolution of water quality
24 problem at Los Osos in a timely manner."

25 Going on, --

1 CHAIRPERSON YOUNG: Excuse me, what was
2 that document, again?

3 MR. McCLENDON: That was your report
4 July 9, 2004, staff agenda report.

5 CHAIRPERSON YOUNG: So that was the
6 staff report?

7 MR. McCLENDON: Yes.

8 CHAIRPERSON YOUNG: To the Board?

9 MR. McCLENDON: Yes, to --

10 CHAIRPERSON YOUNG: Okay, thanks.

11 MR. McCLENDON: Yes. You also looked at
12 the idea of what the CSD had been asking for for
13 quite some time, because we knew we were long
14 since beyond the deadlines on the time schedule or
15 the milestones.

16 You looked at revising the time schedule
17 order. And apparently this was turned down. But
18 even in turning it down you said, quote, "Current
19 delays are caused by the fact that the Coastal
20 Commission took over permitting authority for the
21 project from San Luis Obispo County. And the
22 permit approval timeframe is unknown."

23 So as of July 2004 you were still
24 consistently on this path of saying they're moving
25 forward, there's no culpability, there's no

1 liability.

2 All that changed apparently on October
3 29th when it became known that a draft ACL
4 complaint was being prepared by -- I'm sorry,
5 thank you, September 29th when it became known
6 that a draft ACL complaint was being prepared the
7 morning after the election. You've seen that in
8 our papers.

9 In that it doesn't mention the temporary
10 suspension that was mentioned by Mr. Buel on
11 October 1st. However, the worksheet does allude
12 to the temporary suspension.

13 Then since that time, and this is one of
14 the reasons why we had a real difficulty in
15 feeling like we're shooting at a moving target,
16 we're not really sure is it something that
17 happened prior to October 6th, which triggered the
18 time schedule order issuance, or is it something
19 after that. Because we're talking a whole lot
20 about what happened afterwards.

21 Arguably that maybe is the business of
22 another time schedule order, and ought to be
23 something for continuance.

24 But it's questionable what it is that
25 happened after October 6th that creates

1 culpability. And we've seen a lot, and I think
2 Mr. Seitz was pointing to this, and I'm glad for
3 the questions we had just before we started here
4 about on what basis are these Directors speaking.

5 And let me just clarify this. This
6 Board is operating as an adjudicatory body, like
7 judges. And the California Supreme Court has said
8 the doctrine -- this is County of Los Angeles v.
9 Superior Court of Los Angeles County, 1975 Supreme
10 Court case, quote, "The doctrine which precludes
11 judicial delving into the subjective mental
12 processes of individual legislators is a corollary
13 of the related legal principle which establishes
14 that the validity of a legislative act does not
15 depend on the subjective motivation of its
16 draftsman, but rests instead on the objective
17 effect of the legislative terms."

18 The Supreme Court went on and said, "The
19 validity of legislation does not turn a legal
20 legislative motive, the mental processes of
21 individual legislators become irrelevant to the
22 judicial task. Hence, we do not appear into these
23 subjective subjects -- subjective realms."

24 CHAIRPERSON YOUNG: Could I just ask
25 you, are we dealing with legislative acts of the

1 CSD?

2 MR. McCLENDON: Well, that's the issue.
3 What are the acts of the CSD? How have they
4 acted? Under the code that governs them, and it's
5 in my papers. I could find the code section, if
6 you'd like. It says that a Board only acts one,
7 as a quorum; and two, when a quorum approves
8 something by motion, resolution or ordinance.

9 And so according to what the courts have
10 said, it doesn't matter what people said in the
11 heat of campaign, it doesn't matter the statements
12 that are made, what matters is what have they
13 done. What actions have they taken.

14 This is picked up again in a case called
15 Ensign (inaudible) Realty Corporation v. City
16 Council, the City of Livermore, a 1977 case.

17 CHAIRPERSON YOUNG: And is that also
18 dealing with legislative acts of that
19 administrative agency or board?

20 MR. McCLENDON: Let me find the quote
21 here.

22 MS. OKUN: Could you find the cite while
23 you're at it, I didn't get the title of the
24 case --

25 MR. McCLENDON: Oh, sure. It's

1 68CalAp.3d, 467. It says, "As often as not,
2 members of administrative bodies make decisions
3 for unarticulated reasons. Often the discussions
4 at a public hearing are guided by the direction
5 taken by members of the public who speak. These
6 discussions may or may not include what is
7 significant to a given member of the agency.
8 There are a host of reasons why the utterances of
9 councilmen at public hearings cannot be said to
10 encompass the totality of their thought processes.
11 It would be manifestly nonproductive to require
12 that once a councilman started discussing the
13 merits of a decision that he was being called upon
14 to make, he must set forth all of his opinions on
15 the subject under discussion. Such an inhibiting
16 factor would lead inevitably to silent council
17 meetings. The members of the public would lose
18 the benefit of open discussion of the public
19 business. Conversely, public statements made by
20 members of the city council to the effect that
21 their decision is based upon considerations of
22 public health, safety and welfare cannot make the
23 decision valid if it is, in fact, arbitrary or
24 unreasonable. The decision of the city council
25 must be found reasonable or unreasonable based

1 upon its effect in light of the facts as they
2 exist relevant to that decision."

3 So what courts say is we don't go into
4 the realm of psychiatrists; we don't start trying
5 to understand the psychology, the mentality of
6 what goes on in the thought process or the
7 political agendas or all of that. We're looking
8 at what have they done.

9 Here, what we have is we have, as you
10 know, the temporary suspension which barely 13
11 days later, I believe, tried to be lifted. The
12 day after it was lifted, or news got out that we
13 were talking about lifting it, I received a letter
14 from the attorneys fighting the Measure B lawsuit
15 saying, quote, "Because Measure B was successful
16 it is now law and fully applicable to Community
17 Services District activities. In particular,
18 Measure B terminates construction contracts for
19 construction of a sewage treatment plant at the
20 Tri-W site under their own terms. Please be
21 advised that our clients, Case and Al Barrow, are
22 fully prepared to enforce Measure B if the
23 District takes action contrary to its spirit and
24 provisions. Accordingly, we ask that the District
25 terminate the existing contracts and refrain from

1 further construction activities related to the
2 Tri-W site. Doing so will avoid yet another
3 lawsuit requesting injunctive relief."

4 So here's this District caught between
5 Measure B, and nobody's denying that there was a
6 lot of campaign statements that were made out
7 there, but within ten days after that October 3rd
8 letter, they're trying to restart the project.
9 They get this saying, you're going to get sued on
10 that. They're caught between a rock and a hard
11 spot.

12 What happened --

13 CHAIRPERSON YOUNG: Mr. McClendon, how
14 could they restart the project? They weren't
15 going to have funds from the State Water Board. I
16 mean --

17 MR. McCLENDON: We didn't know that at
18 that time.

19 CHAIRPERSON YOUNG: That was cut off.
20 Did the District really think that they could
21 adhere -- excuse me, Mr. Bleskey -- did the
22 District really think it could adhere to Measure B
23 and not be in violation of the State Water Board
24 loan?

25 MR. McCLENDON: Well, the --

1 CHAIRPERSON YOUNG: Is that what the
2 District was --

3 MR. McCLENDON: The District was
4 wrestling with that. This was a new Board. We
5 had initially --

6 CHAIRPERSON YOUNG: Well, whether it's a
7 new Board or not, there's attorneys advising the
8 Board on the contract --

9 MR. McCLENDON: Right.

10 CHAIRPERSON YOUNG: -- and the
11 agreement.

12 MR. McCLENDON: Right.

13 CHAIRPERSON YOUNG: And so I'm assuming
14 that they're getting competent legal advice as to
15 how to conduct themselves. And from what I
16 understand, you've told me Al Barrow's group is
17 kind of threatening the District that they're
18 going to go after the District.

19 MR. McCLENDON: Right, um-hum.

20 CHAIRPERSON YOUNG: Now, did it make any
21 difference if the Regional Water Quality Control
22 Board, a state agency, had an order in effect that
23 was prescribing certain conduct? How did that
24 play into this?

25 I'm jumping the gun here a little bit,

1 but your presentation is raising a lot of
2 questions in my mind.

3 MR. McCLENDON: Okay.

4 CHAIRPERSON YOUNG: You know, so -- you
5 don't have to answer.

6 MR. McCLENDON: Oh, okay.

7 CHAIRPERSON YOUNG: Okay.

8 BOARD MEMBER SHALLCROSS: Excuse me.

9 CHAIRPERSON YOUNG: Mr. Shallcross.

10 BOARD MEMBER SHALLCROSS: I think
11 there's something that's confusing me, maybe you
12 can straighten me out. You keep referring to the
13 CSD and really what you're referring to is the CSD
14 Board, because the CSD is bigger than the Board.

15 The CSD can do, as far as I can tell, as
16 far as I know, the CSD can act in another way, the
17 people of the CSD can enact an initiative. That
18 initiative was Measure B. That was an action by
19 the CSD.

20 Now, these folks, it sounds to me,
21 clearly thought that they had to follow that, or
22 at least were threatened into following it. But I
23 think we have to look at the action of the people
24 of the CSD in passing Measure B in the first
25 place, as a triggering act here.

1 CHAIRPERSON YOUNG: You can respond to
2 that if you want to.

3 MR. McCLENDON: Okay. Well, that would
4 be one way to look at it. I mean you could punish
5 the CSD for the sins of the voters, I suppose.
6 The voters voted to adopt this thing. It was a
7 narrow vote.

8 The CSD is in a position where they're
9 saying, okay, it's now part of our law of our
10 district. It's part of our code. Our code makes
11 any violation of the code a misdemeanor. We have
12 the case that came down in the same sex marriage
13 case, Lockyer v. State of California in 2000,
14 where the Supreme Court made it very very clear
15 that elected officials do not have the discretion
16 to simply assume that a voter initiative is
17 invalid, that that is strictly the purview of the
18 courts, strictly the purview of the judiciary.

19 BOARD MEMBER SHALLCROSS: Yeah, I
20 understand that. I think you're missing my point.
21 Let me ask you this. Could the CSD Board have
22 passed an initiative like Measure B saying it's
23 illegal to build on this site. Or the other part
24 of it, which is the people will have to vote on
25 any future site. Could the Board have done that

1 on its own without the people voting on it?

2 MR. McCLENDON: Well, that's the \$64
3 question. It was up before the court, the Court
4 of Appeal, I believe.

5 BOARD MEMBER SHALLCROSS: Well, see what
6 you're trying to argue is because the voters of
7 the CSD voted this thing -- this is what it sounds
8 like to me, correct me if I'm wrong -- then
9 anything the Board did based on that is okay. And
10 I'm saying that's fine, but it was the people of
11 the CSD who voted it in in the first place, is the
12 action that to me seems like a much more
13 compelling argument that the time order has been
14 violated.

15 You know, whether the Board went along
16 with that or not, it was up to them. They felt
17 they had to, I can understand that, if that was
18 the law. But just because the people pass a law
19 that violates an order doesn't make them the
20 innocent voters.

21 MS. SCHICKER: May I interrupt for just
22 a minute. We have a presentation that's going to
23 be covering all these points if we could only get
24 to it.

25 BOARD MEMBER SHALLCROSS: Good.

1 MS. SCHICKER: I'd really like to keep
2 moving.

3 BOARD MEMBER SHALLCROSS: Okay.

4 MS. SCHICKER: I'm going to be my
5 timekeeper for my group, because we don't want to
6 lose our time --

7 CHAIRPERSON YOUNG: Ms. Schicker, I
8 stopped your clock, so don't worry.

9 MS. SCHICKER: Oh, okay --

10 CHAIRPERSON YOUNG: -- not eating into
11 yo time --

12 (Parties speaking simultaneously.)

13 BOARD MEMBER SHALLCROSS: And, you know,
14 we're allowed to ask questions, okay.

15 MS. SCHICKER: No, I know that, I know
16 that. I'm trying -- we just have all this great
17 information to share with you, and we're just
18 waiting to get to it.

19 CHAIRPERSON YOUNG: Okay. All right,
20 I'm going to resume the clock.

21 MR. McCLENDON: Let me just go to the
22 two actions that you can show, no question about
23 it, these are the two resolutions. You have them
24 in your packet. This is what the Board has
25 officially taken a position on.

1 And the Board took a position saying we
2 want this sewer built; we want to do it. The
3 State Board has said as long as Measure B is out
4 there, you can't build it at Tri-W. That's the
5 State Board holding that position, the presumption
6 of its validity unless it's proven invalid.

7 We've said that we want the SRF loan
8 contract; we want to build there. What we didn't
9 get the second time -- we'll get into this in a
10 bit -- is there was an impossibility in
11 performance in one of the points that was given on
12 the second version of the state's offer.

13 I'll turn to the slides here now. I'm
14 running late, I know. Okay, this is what goes
15 into, under your own requirements, goes into
16 assessing fines. The liability, economic benefit,
17 beneficial use, base amount, adjustment for
18 conduct and other factors, staff costs, ability to
19 pay, checks against statutory limits.

20 Next slide. Okay, what goes into
21 assessing fines, what are the standards, number of
22 reportable raw sewage spills, --

23 (End Tape 2B.)

24 MR. McCLENDON: -- number of beach
25 closures, number of monetary fines and average

1 amounts, number of TSO and number of violations
2 resulting in monetary fines, average fine for TSO
3 violation, average length of a TSO issued. And
4 these are things the Board needs to know to assure
5 consistency and effective enforcement.

6 Do we have another slide there?

7 This is from your staff report. A
8 complaint would be issued based on discharges in
9 violation of the TSO 00-131, the waste discharge
10 order and cease and desist orders.

11 The difference between a separate ACL
12 order and the TSO is that separate ACL orders
13 provide somewhat more flexibility in the amounts
14 of the penalties. That's from your 7/04 report.

15 Okay, here the points are CSD has never
16 created any delays in the project. We argue that
17 the temporary timeout was in a contract approved
18 by the state, and I believe it had Regional Board
19 oversight on it, they had seen a copy. That we'd
20 been excused from all previous impediments as
21 beyond our control.

22 If the previous delays that were excused
23 as beyond the control of the CSD, how are they now
24 resurrected and fines assessed retroactively.
25 Delays since October 1 are beyond the control of

1 the CSD. And we never said, as I said earlier, no
2 to the SRF loan. They said no when they added a
3 condition which was completely impossible to
4 perform.

5 CHAIRPERSON YOUNG: Excuse me, Mr. --

6 BOARD MEMBER SHALLCROSS: I've got a
7 question on the last slide. Can you put it back
8 up?

9 MR. McCLENDON: Sure.

10 BOARD MEMBER SHALLCROSS: I know you
11 might think this is a fine point, I'm beating a
12 dead horse, but I think that horse is going to
13 come around a couple more times before this
14 hearing is over.

15 The point number one, the CSD never
16 created any delays to the project. Are you
17 talking about the CSD Board or the people of the
18 CSD?

19 MR. McCLENDON: There's no question that
20 the adoption of Measure B has thrown a major
21 wrench in this project --

22 BOARD MEMBER SHALLCROSS: I'm just
23 asking if you're talking about the Board there or
24 are you talking about the people --

25 MR. McCLENDON: I'm talking about the

1 CSD Board --

2 BOARD MEMBER SHALLCROSS: Okay, that --

3 MR. McCLENDON: -- and what they --

4 BOARD MEMBER SHALLCROSS: I'd really,
5 yeah, I'd really appreciate it if you'd make that
6 clear, because the Board didn't, you know, when
7 the people vote that's not an action of the Board.
8 When the Board --

9 MR. McCLENDON: Right.

10 BOARD MEMBER SHALLCROSS: -- does
11 something that's an action of the Board. And
12 there's a difference.

13 MR. McCLENDON: Correct.

14 BOARD MEMBER SHALLCROSS: Even though
15 both of them can be legally binding.

16 MR. McCLENDON: Correct.

17 BOARD MEMBER SHALLCROSS: Okay, thanks.

18 MR. McCLENDON: Thank you. Thank you
19 for the clarification.

20 Okay, again from your July '04 staff
21 report, it says noncompliance is clearly an
22 action, it's clearly beyond the control of the
23 CSD's ability. This is what I read earlier, the
24 penalties would result in bankruptcy; it would not
25 result in resolution of the water quality problems

1 we have.

2 Before I turn it over to -- how much
3 time do I have, am I running late?

4 MS. SCHICKER: Yes.

5 MR. McCLENDON: I'm running late. Maybe
6 I'll save this for closing.

7 What I'd like to do is have Jon Seitz,
8 who has been at the helm of the CSD as District
9 counsel, I think, since its birth, and he will
10 cover the second half of the issue of liability.

11 MR. SEITZ: That must mean I'm dead if
12 I've -- first of all, can we see, Lori, if my
13 slides will pop up on the -- I think we've already
14 kind of proved, shown, Matt, that we can get them
15 up.

16 MR. THOMPSON: Do you want them now
17 or --

18 MR. SEITZ: Yeah, if they'd just have
19 the index up there it would be great.

20 Okay. You're going to have to slide
21 them over to where they start with number 1.

22 MR. THOMPSON: It's a separate folder.

23 MR. SEITZ: Okay. Thank you. That
24 works great.

25 The purpose of my testimony here today

1 is to provide evidence to this Board as to why
2 fines will not achieve water quality.

3 Before I start I want to start with
4 where there is agreement. Now, the Board Chair
5 issued a number of questions to the respective
6 parties, and both sides answered them. And
7 through my interpretation this is where we found,
8 I think, absolute agreement in response to those
9 questions.

10 First, the SRF funds are not available
11 to pay the fines. We know that. I think both
12 sides agree to that.

13 Second, the Los Osos Community Services
14 District Board cannot unilaterally impose
15 assessments to pay fines. I think there's
16 absolute agreement between both the prosecution
17 team and our team that that's the case.

18 The second one is are members of the
19 assessment district ultimately responsible for
20 payment of fines. This has been the key that I
21 know I've been burning a lot of time on why I'm
22 trying to figure out, is it the fire district
23 that's going to pay fines? Is it the water
24 department that's going to pay fines? Is it the
25 drainage department that's going to pay these

1 fines? I think this ought to become clearer.

2 Because it says, are members of the
3 assessment district ultimately responsible for
4 payment of fines? The assessment district is the
5 prohibition zone, I mean, in the question.

6 And the answer to that is how can they
7 be responsible when you think about this, that the
8 assessment district is made up of both developed
9 properties and undeveloped properties. And that
10 is to say that the undeveloped properties are not
11 violating 8313. They're not discharging to the
12 groundwater table. It's an impossibility.

13 So, we'll start off with when this all
14 began in 1998, and this is before my time. I
15 suppose we can't blow these up, but this is K-98.
16 I gave you all my exhibits and I tabbed them.
17 This is exhibit number 1 if you want to follow
18 along.

19 And basically what it says, when you go
20 down there, is that the District assumes all of
21 the obligations of the Country within CSA, I
22 think, 9. And I'm going to get to that, what's
23 there. And also accepted some responsibility to
24 try and comply with Regional Water Quality Control
25 Board 83-13, again State Water Resources Control

1 Board 84-13.

2 And this is what the community enacted.
3 The community -- I don't know who drafted this. I
4 can tell you I probably would think I'd do it a
5 little bit different, but that's what ended up on
6 the ballot for our residents to vote on. And they
7 approved it overwhelmingly.

8 We can go to the next slide. Okay, I'm
9 sorry, go to 3.

10 CHAIRPERSON YOUNG: Mr. Seitz, this was
11 a different vote than --

12 MR. SEITZ: This is --

13 CHAIRPERSON YOUNG: -- recent one?

14 MR. SEITZ: -- the one we --

15 (Parties speaking simultaneously.)

16 CHAIRPERSON YOUNG: Yeah, so here you
17 have property owners --

18 MR. SEITZ: Yeah, property owners --

19 CHAIRPERSON YOUNG: -- that even didn't
20 live in the District.

21 MR. SEITZ: No, actually that is a
22 registered voter vote, much the same way we elect
23 our Board. It wasn't a property owner vote. And
24 I hope if you have questions about Prop 218, I
25 think I'm somewhat, maybe like 70 percent, of an

1 expert on Prop 218. I could answer your
2 questions.

3 But, this is what we ended up with. And
4 this shows you the various zones of benefit that
5 were operated by the County. Now, if you take a
6 look at that dark area, that sort of consumes it
7 all. That is zone B, and that's the fire, the old
8 fire district operated by the County. This is the
9 only service that was provided by the District at
10 its formation that was provided District-wide. It
11 was the only service that all the residents
12 enjoyed from the actions of the Board, is that
13 area that is shaded.

14 Now, it includes -- it's clear, it
15 includes all of the other A, Bs and Cs, but it's
16 only those areas, that each of those areas that is
17 marked out or separate zones of benefit, with
18 specific functions, and separate and specific
19 financing or modes of gaining.

20 And so when you take a look at -- and I
21 hope I have this -- if you take a look at that
22 chart -- I know I've got so many papers up here,
23 I'm hoping that Bruce can hopefully explain this,
24 I think zone E, which is as you can see right
25 there says drainage, street lighting, septic tank

1 maintenance. I think that's Vista del Oro.
2 That's what was in your -- it's just that little
3 zone right there, it's just E. And it works on a
4 separate budget. It's not a District-wide budget,
5 it's a budget for E.

6 To go to F down there, I think that's
7 what, --

8 MS. SCHICKER: Bay Ridge.

9 MR. SEITZ: Bay Ridge, thank you.
10 that's Bay Ridge. And if you take a look over on
11 the thing there, the District operates drainage,
12 street lighting, septic tank maintenance, open
13 space maintenance. It's that area that is the
14 only area that -- those two areas are the only
15 things that we provide area-wide sewer service to.
16 And that is operating septic tanks for these
17 subdivisions that were approved by the Regional
18 Water Quality Control Board at some point in time.
19 I assume that you were around then; maybe I could
20 be a little bit wrong there, but by some
21 regulatory agency other than the District.

22 Now, if you go there you see zone A up
23 there. That's the District's water department;
24 it's not District-wide. And as you'll see in a
25 minute, it's a real configuration. G is drainage,

1 and you can see we have two drainage
2 responsibilities in there.

3 Subsequent to us forming this District
4 and having these little areas of operation that
5 have their own independent budgets, we did
6 petition LAFCO and we took over solid waste, as I
7 think I said in my pleadings.

8 So you take a look at how a special
9 district operates, especially this one, the only
10 things that we provide on a District-wide basis to
11 all of our residents is fire and solid waste
12 collection.

13 If I could see the next slide --

14 BOARD MEMBER SHALLCROSS: Mr. Chair.

15 CHAIRPERSON YOUNG: Mr. Seitz, --

16 MR. SEITZ: Yes.

17 CHAIRPERSON YOUNG: -- I'm going to stop
18 the clock because Mr. Shallcross has a question.

19 BOARD MEMBER SHALLCROSS: Yeah, what
20 you're talking about now goes only to the
21 alternative of the basin plan violation, is that
22 right? The claims on the basin plan?

23 MR. SEITZ: Right. Well, I'm going to
24 show the basin plan up here.

25 BOARD MEMBER SHALLCROSS: No, no, I'm --

1 the prosecution is arguing in the alternative.

2 One is the time schedule order violation, --

3 MR. SEITZ: Right.

4 BOARD MEMBER SHALLCROSS: -- one is the
5 basin plan violation. So, what you're talking
6 about here is relevant to that.

7 MR. SEITZ: Right, just so I'm not -- so
8 nobody is misguided here, we believe the
9 alternative is defective on its face. When you
10 talk about the alternative, whether or not we're
11 talking about the time schedule order in the
12 alternative, there's no worksheet data on the
13 alternative. The worksheet is based solely on the
14 TSO violation, and not the individual things.

15 So I just wanted to show you how this
16 all kind of melds together, and why I believe that
17 the remedy that staff, your staff is asking you to
18 implement will not move us any closer to water
19 quality issues on the basin plan.

20 So, let me see the next slide.

21 CHAIRPERSON YOUNG: Could I ask a
22 question, Mr. Seitz?

23 MR. SEITZ: Sure.

24 CHAIRPERSON YOUNG: Did my questions
25 that I had posed to both sides, did it trigger

1 this --

2 MR. SEITZ: No.

3 CHAIRPERSON YOUNG: -- response? Okay.

4 MR. SEITZ: No, no, I was making this
5 response --

6 CHAIRPERSON YOUNG: Independently.

7 MR. SEITZ: -- independently. It just
8 sort of fit really nicely into it.

9 CHAIRPERSON YOUNG: Okay. Because I
10 just want to share with you what my thought
11 process was --

12 MR. SEITZ: Sure.

13 CHAIRPERSON YOUNG: Okay. I just wanted
14 to know what would be the practical effect if
15 there's a fine that's assessed, and what happens.
16 Who's responsible for it? Is it the individuals?
17 Is it the District, itself?

18 I wasn't thinking beyond that like the
19 complexities of the CSD, you've got fire and water
20 and --

21 MR. SEITZ: No, but --

22 CHAIRPERSON YOUNG: -- solid waste. I
23 didn't even consider that.

24 MR. SEITZ: No. I put this together --
25 I was tasked with the job, so to speak, of

1 explaining to the Board, your Board, how a
2 District operates.

3 Because when I first saw that
4 administrative complaint, the one thing that
5 jumped out at me clear as day, that it was meant
6 to address a corporate agency like a city or a
7 county that gets bed taxes, gets sales taxes, has
8 what we typically call in the business a general
9 fund that oversees all of the operations of a
10 city.

11 And generally speaking, and this is just
12 my guess, that when you fine a city you are
13 actually getting paid through a general fund.
14 You're not getting paid -- they're not taking the
15 fire department money and saying, here's the fire
16 department money. They're looking at the finances
17 of a corporate agency as opposed to a special
18 district.

19 And that's what I want to present to you
20 so you have an understanding of how this all fits
21 together. If you take a look up on this next
22 slide, this is a picture of the District.

23 If you go on the outside, that's the
24 entire District. If you take a look at the white
25 stuff in the inside that line, that's the

1 prohibition zone. The outside of the District, or
2 the orange is the wastewater management zone, but
3 it is not within the prohibition zone.

4 So the prohibition zone isn't District-
5 wide. The prohibition zone is a subzone of the
6 District.

7 So when you say tax the residents, or
8 tax the ratepayers, well, two things I want to
9 bring to your attention. One is, of course, the
10 people in the orange aren't violating the
11 prohibition zone because they're not in the
12 prohibition zone.

13 Secondly, when you take a look at the
14 prohibition zone, itself, there are folks in the
15 prohibition zone that have undeveloped property.
16 And they're not violating the prohibition zone.

17 Thirdly, which even makes this more
18 complicated, is that you have property owners
19 within the prohibition zone that are living there,
20 and then you have renters in there. And your
21 action, from a lawyer's perspective, would say
22 it's in rem, because it's the property owners that
23 are violating the prohibition, not necessarily
24 anybody else.

25 And of course, those folks that are not

1 operating septic tanks aren't violating the
2 prohibition.

3 Next slide. Okay, this is my favorite
4 one. And the reason why is this thing actually
5 overlies the prohibition zone. And if you take a
6 look at the purple, that's the zone A I showed you
7 on the first map. That's the Los Osos Community
8 Services District water department.

9 The orange is the CalCities Water
10 Department, which is a completely independent,
11 PUC-operated water district that operates within
12 the prohibition zone.

13 If you take a look at the, it's off to
14 the left there, sort of a, I don't know, reddish
15 color, that S&T, a mutual water company that
16 provides water within the prohibition zone.

17 So, you don't have what you would
18 typically think about a public agency or corporate
19 agency where you have a city that's providing
20 water to everybody in the city, sewer to everybody
21 in the city, police department to everybody in the
22 city, land use to everybody in the city and all
23 that stuff.

24 These districts operate on completely
25 different principles. And not only that, as I

1 pointed out to you in my papers, they're
2 enterprise funds. You can't take your water
3 department money and say, oh, I'm just going to
4 transfer these over to the sewer department. You
5 have to operate under the law, under Prop 13. And
6 I quoted you the code sections. You have to
7 operate each of these departments, each of those
8 zones as independent zones in independent
9 operations.

10 That's why I disagree with the
11 prosecution's team is that you can't consider
12 these as businesses. That's exactly what they
13 are. We derive our income from these little zones
14 that we operate. And then we, in turn, manage
15 those zones.

16 So, when they say the business model
17 doesn't apply, it applies in spades to this
18 special District and how it operates.

19 So, I wanted to bring that to your
20 attention. And now if we can go to the next
21 slide. And what I want to do here is there's a
22 reserve -- yes, this is it, if you can -- yeah.

23 This is -- what this shows you right
24 here is how we allocate property taxes to our
25 special zones. We do, as I think you can see up

1 there, and Mr. Buel maybe can help me with this,
2 because I'm --

3 CHAIRPERSON YOUNG: Would you like him
4 to come to the witness stand?

5 MR. SEITZ: Sure.

6 CHAIRPERSON YOUNG: Mr. Buel.

7 MR. SEITZ: Okay, what was our property
8 tax intake for last year?

9 MR. BUEL: Around 1.4 million.

10 MR. SEITZ: Okay. And where does that
11 property tax money go?

12 MR. BUEL: Well, the Board has
13 historically apportioned that amongst the funds
14 and the percentages are up there on that sheet.
15 This is derived historically from the share of the
16 property tax that went to Fund 200, and that's the
17 Bay Ridge Estates area; Fund 300 is our fire fund;
18 and Fund 700 is Vista del Oro.

19 So what the Board historically has done
20 is to take the dollars that were available from
21 property tax and distribute on that formula. The
22 one exception is the last column labeled 800, that
23 is drainage. And the Board annually has allocated
24 a flat amount of \$25,000 to the drainage fund to
25 assist in paying for those costs.

1 MR. SEITZ: And the drainage projects
2 that we operate, they are related because it's the
3 ponding water that we drain, is that not correct?

4 MR. BUEL: That is correct. We operate
5 four pumps in specific geographic areas which
6 actually were shown on your screen about five
7 minutes ago.

8 MR. SEITZ: And that ponding water
9 occurs in the prohibition zone, does it not?

10 MR. BUEL: Yes, all four of the pumps
11 service areas that are in the prohibition zone.

12 MR. SEITZ: Okay, and so the reality is
13 if we stop funding the drainage we would not be
14 draining the very surfacing water that everybody's
15 been complaining about, is that not correct?

16 MR. BUEL: That is correct.

17 MR. SEITZ: Okay.

18 VICE CHAIRPERSON JEFFRIES: Mr. Chair.

19 MR. SEITZ: And --

20 VICE CHAIRPERSON JEFFRIES: Before you
21 go on, I'd like to ask Mr. Buel, because he
22 alluded that the Board appropriates the funds from
23 the property tax. You kind of led me to believe
24 that this was done by statute, some government
25 statute.

1 What Mr. Buel's testifying, if I'm not
2 correct, that the Board allocates this either on
3 an annual basis or a periodic basis or when they
4 do their budget or whatever, is that not true?

5 MR. SEITZ: It's part true, and let me
6 see if I can clarify it for you. The District,
7 you'd have to really understand pre-Prop 13 and
8 how this all worked.

9 VICE CHAIRPERSON JEFFRIES: I do --

10 MR. SEITZ: The District gets --

11 VICE CHAIRPERSON JEFFRIES: I understand
12 it very clearly.

13 MR. SEITZ: Okay, very good.

14 VICE CHAIRPERSON JEFFRIES: Being a
15 Mayor of a city that was on both, okay?

16 MR. SEITZ: Okay, good.

17 VICE CHAIRPERSON JEFFRIES: And I also
18 chair a special district, so I understand
19 districts.

20 MR. SEITZ: Okay, good. This District
21 receives, when we took over from the County we
22 received the property tax allocation that the
23 County had to our particular District, okay.

24 And what we are showing you here is,
25 yes, we did receive property taxes. And the

1 property taxes that we received, I want to show
2 you, because I thought there'd be some concern
3 here where the property taxes go. And they go
4 towards fire protection from the zone B that I
5 showed you on the big map. And that's historic
6 from the County, I believe, Bruce, is it not?

7 MR. BUEL: No, sir. There was a
8 different allocation that the County had.

9 MR. SEITZ: What was that -- do you
10 remember what that allocation --

11 MR. BUEL: Yes. Of the available funds
12 the water department got about 20 percent. And
13 that's not up here because the District Board in
14 2001 determined that the property taxes shouldn't
15 subsidize water service to a small area of the
16 community.

17 MR. SEITZ: So they were transferred
18 over to the fire department?

19 MR. BUEL: That is correct. A hundred
20 percent of the property taxes previously disbursed
21 to the water fund were transferred to the fire
22 fund.

23 MR. SEITZ: Okay. And how much revenue
24 do we receive from the residents within the
25 prohibition zone to provide sewer service there?

1 MR. BUEL: Zero currently, Jon.

2 MR. SEITZ: And that's because we don't
3 operate a --

4 MR. BUEL: That's correct, as you know,
5 we have an assessment. There's 5226 properties in
6 the prohibition zone, and they pay an assessment
7 of about \$225 a year. But that's totally
8 dedicated to the debt service on the bond that was
9 issued in 2002.

10 MR. SEITZ: That's what you consider to
11 be a restricted fund?

12 MR. BUEL: Yes, sir, that is a
13 restricted fund.

14 MR. SEITZ: Thank you. Okay, so if we
15 can go on to the next slide, please. We can go on
16 to the next one, I'm sorry, that one I'm not going
17 to bother with. The next one. There's a recap I
18 want to see if we can get to --

19 CHAIRPERSON YOUNG: Mr. Seitz.

20 MR. SEITZ: Yes.

21 CHAIRPERSON YOUNG: Michael Thomas had a
22 question.

23 MR. SEITZ: Sure.

24 MR. THOMAS: I have a question; it's not
25 related to what you were just talking about with

1 Mr. Buel. But it has to do with the complexity
2 that you were describing --

3 MR. SEITZ: Yes.

4 MR. THOMAS: -- of the CSD. You said
5 that the CSD is committed to building a wastewater
6 treatment facility?

7 MR. SEITZ: I -- I have -- first of all,
8 let me just point out something. I'm stumbling
9 here a little bit because I really don't know how
10 to answer that question.

11 You have to understand, at the same time
12 that Mr. Buel was put on administrative leave, for
13 lack of a better word, I joined him. And so I
14 have not attended Board meetings, I've not been
15 there.

16 MR. THOMAS: Someone else could answer.

17 MR. SEITZ: Yeah, I just feel, you know,
18 we have in our pleadings that they are, but I
19 don't -- I can't --

20 MR. THOMAS: That's fine. That's
21 testimony, and that's fine.

22 MR. SEITZ: All right.

23 MR. THOMAS: So the CSD is committed to
24 building a wastewater treatment facility. The CSD
25 has testified to that before the Board.

1 MR. SEITZ: Yeah, right.

2 MR. THOMAS: So let's say that the CSD
3 does build a wastewater treatment facility and at
4 some point in the future when it's built and it's
5 operating there's a major spill.

6 MR. SEITZ: Okay.

7 MR. THOMAS: And the Regional Board
8 Staff responds to that by issuing a complaint and
9 recommending a fine to the Board.

10 MR. SEITZ: Can we go back to the slide
11 where I showed the prohibition zone? Next one
12 over, I think. There you go. Okay, there we go.

13 It's a long answer but I think --

14 MR. THOMAS: I haven't asked the
15 question yet.

16 MR. SEITZ: Oh, I thought you said if
17 there was a spill and --

18 MR. THOMAS: If there is a spill, --

19 MR. SEITZ: Okay.

20 MR. THOMAS: -- and the Board Staff
21 recommends a fine, a major fine, --

22 MR. SEITZ: Sure.

23 MR. THOMAS: -- to the Board. What
24 would your argument be? Would it be we're not
25 responsible because the CSD is a complex system?

1 MR. SEITZ: No, not at all. Because at
2 that point in time you make one assumption, and
3 that is that there is a wastewater treatment plant
4 sewering the prohibition zone that generates
5 revenue.

6 You know, just like you pay for your
7 sewer charges at home. You get income in and you
8 have reserves, especially under the SRF agreement,
9 there's a pretty severe reserve --

10 MR. THOMAS: Why would you not --

11 MR. SEITZ: -- what we --

12 MR. THOMAS: I understand there's funds
13 available then, so you would be able to --

14 MR. SEITZ: Sure.

15 MR. THOMAS: Where does the complexity
16 argument go?

17 MR. SEITZ: The complexity is today is
18 we don't have a wastewater treatment project to
19 leverage fines because there's no ongoing
20 operation.

21 The only income we receive is from those
22 operations that I've listed up there, which is the
23 fire department, the water department. And what
24 are you saying? You're saying that the people in
25 the water department should pay because -- for all

1 the folks in the prohibition zone? Because they
2 can't get a sewer.

3 Or are you saying the people in the fire
4 department should pay a fine because the people in
5 the sewer are violating 8313?

6 MR. THOMAS: It's a question of where
7 you get the funds.

8 MR. SEITZ: Yeah, exactly. And what
9 you're hurting. Now, I don't think there's any
10 intention on this Board to bankrupt the fire
11 department. I don't think there's any intentions
12 on this Board to bankrupt the water department.

13 And that's the complexity of the issues
14 when you take a look at a special district,
15 everybody automatically thinks city, general fund.
16 These revenues pouring in, discretionary spending.
17 And believe me, they don't have a lot of it, so
18 I'm not -- people, especially the Mayor over here,
19 are going to know that, but --

20 MR. THOMAS: You've answered my
21 question.

22 MR. SEITZ: Okay. So, I had a --

23 CHAIRPERSON YOUNG: Mr. Seitz, --

24 MR. SEITZ: -- fund balance sheet --

25 CHAIRPERSON YOUNG: My question --

1 MR. SEITZ: Sure.

2 CHAIRPERSON YOUNG: -- then becomes to
3 this, essentially what you're arguing is that this
4 Board really has no remedy to enforce --

5 MR. SEITZ: No.

6 CHAIRPERSON YOUNG: -- the time schedule
7 order for violations --

8 MR. SEITZ: No, I --

9 CHAIRPERSON YOUNG: -- at this point in
10 time.

11 MR. SEITZ: -- think that if you ask me
12 that question I can answer that question for you.
13 But, am I saying that you don't have remedies?
14 The answer is no. What I'm telling you is that
15 the remedies that staff has presented to you today
16 don't work.

17 CHAIRPERSON YOUNG: Okay, you're going
18 to one of the mitigation factors, that's really
19 ability to pay.

20 MR. SEITZ: Ability to pay, but not only
21 that I think what you have to take a look at is
22 where is this money coming from, and what kind of
23 havoc are you going to cause if you leverage an
24 \$11 million fine on this District. There isn't,
25 a) between all of those funds \$11 million in

1 reserve. And the extent that you are saying,
2 well, take the money out of reserves. You're
3 going to see in a minute here there's \$29,000 in
4 one account; \$39,000 in another account.

5 Those reserves are for catastrophes. A
6 fire engine breaks. Where do you go? You go to
7 that department's reserves, and you don't have it.
8 So, --

9 CHAIRPERSON YOUNG: Okay.

10 MR. SEITZ: I'm hoping I can get to
11 the -- if we can find the summary of reserves.

12 CHAIRPERSON YOUNG: Well, you know what,
13 Mr. Seitz, --

14 MR. SEITZ: Yeah.

15 CHAIRPERSON YOUNG: -- I think your
16 point is understood about the complexity issue.

17 MR. SEITZ: Okay.

18 CHAIRPERSON YOUNG: I don't know if you
19 need to spend too much more time on that. I think
20 that is pretty clear.

21 MR. SEITZ: Okay.

22 CHAIRPERSON YOUNG: And I think we're
23 aware that because the plant has not been built
24 there's difficulty with getting any more money out
25 of the ratepayers at this point.

1 MR. SEITZ: Okay, then I want to go to
2 the next issue I was asked --

3 CHAIRPERSON YOUNG: Okay.

4 MR. SEITZ: -- to talk on just very
5 briefly is time schedule order 00-131.

6 There is this, I don't know if it's a
7 rumor, a myth, or an analysis, but everybody
8 thinks that 00-131 and that time schedule order
9 was an order that was agreed to by the District.
10 And that was our timeline and we gave it to the
11 Board, and the Board happily stamped it.

12 What I want to tell you is I sat at
13 meetings with Mark DeSuzzi (phonetic), at open
14 public meetings where he came to the Board over a
15 period of time and said, this is what they're
16 asking, we can't meet it. This is what we're
17 asking, we can't meet it. Maybe we're at a point
18 where we ought to compromise and come up with it.

19 It was, as any other time schedule
20 order, it was a negotiated time schedule order,
21 the time schedules that were in there. It was not
22 something the District handed to the Regional
23 Board and they approved it.

24 I was not, though -- I'm going to
25 testify to this -- I was not intimately involved

1 in those negotiations. I was a witness at public
2 meetings, I can tell you that's what I saw.

3 Secondly, it's -- further, why would we
4 have filed a petition to hold it in abeyance if we
5 were so hunky-dory with it and everything that's
6 in there. So sort of keep in mind to the extent
7 that you've been led to the thing that this is our
8 timeframe, we agreed to it, and that's just the
9 way it is. That is not really how it happened
10 from a practical perspective.

11 And now it's Lori's turn to cross-
12 examine me, so.

13 CHAIRPERSON YOUNG: Hold on one second.
14 Okay. You're down to 47 minutes.

15 MR. SEITZ: Okay, but is there going to
16 be cross or not?

17 CHAIRPERSON YOUNG: Oh, yeah, yeah.

18 MR. SEITZ: Okay.

19 CHAIRPERSON YOUNG: You have plenty of
20 time, but I've got to now switch the clock because
21 they're going to be eating up their clock asking
22 you questions.

23 Ms. Okun.

24 MS. OKUN: I'm just going to address my
25 questions to the whole panel because there were

1 two lawyers testifying, and I don't know if they
2 object to being cross-examined, but anyone who
3 wants to answer should feel free.

4 CROSS-EXAMINATION

5 MS. OKUN: There was some testimony that
6 the --

7 CHAIRPERSON YOUNG: Could you speak up,
8 Ms. Okun, so we can all really hear you loud and
9 clear.

10 MS. OKUN: There's some testimony that
11 the State Board Staff reviewed the construction
12 contracts and approved them.

13 Did anyone from the State Board ever
14 represent that stopping progress on the
15 construction would not violate the State Board
16 loan agreement?

17 MR. SEITZ: I had no communication at my
18 office to that effect.

19 MR. BLESKEY: Mr. Chair, I can offer on
20 that -- I can answer that question if you'd like.

21 CHAIRPERSON YOUNG: Anybody at your
22 table can answer that question.

23 MR. BLESKEY: I can answer that
24 question.

25 CHAIRPERSON YOUNG: And you're Mr.

1 Bleskey.

2 MR. BLESKEY: Yes, sir.

3 CHAIRPERSON YOUNG: Okay.

4 MR. BLESKEY: The contract language, as
5 provided by the ISA, with the construction
6 contracts incorporated by reference, provides for
7 changes. And --

8 MS. OKUN: Well, that wasn't my
9 question. My question was did anybody at the
10 State Board ever say that it wasn't a violation of
11 the loan agreement to stop the construction
12 progress for a timeout?

13 MR. BLESKEY: To say that it was a
14 violation of the contract?

15 MS. OKUN: Did they say that it was not
16 a violation of the State Board --

17 MR. BLESKEY: No, they said that it was.
18 But it is a contractual remedy plain as day, in
19 language written by them.

20 MR. BRIGGS: Doesn't that language refer
21 to site conditions such as archeological finds?

22 MR. BLESKEY: No. Let me read the
23 chapter and verse on that in the ISA. It's
24 actually under the notifications clause.

25 By the way, knowing contracts this well

1 makes you really not invited to parties, but --
2 I'll try to be brief.

3 CHAIRPERSON YOUNG: Mr. Bleskey, just
4 thinking, before when we allowed Mr. Briggs to
5 answer for Mr. Thompson, it was because Mr.
6 Thompson had made some statements; this was on
7 cross-examination.

8 Mr. Seitz doesn't have any knowledge. I
9 think the question, itself, that was posed to him.
10 So, I didn't want to open this up.

11 MR. SEITZ: But I think Ms. Okun's
12 questions are going to issues that I didn't
13 testify to. But we're perfectly willing to --

14 CHAIRPERSON YOUNG: Right.

15 MR. SEITZ: -- respond to them.

16 CHAIRPERSON YOUNG: But I think maybe
17 Mr. Bleskey should be your next witness after
18 maybe they're done cross-examining you. Not that
19 you don't have the time to do it, but --

20 MR. BLESKEY: Actually I'll be going
21 over these and can answer those --

22 CHAIRPERSON YOUNG: Okay.

23 MR. BLESKEY: That's actually what I'll
24 be talking about.

25 CHAIRPERSON YOUNG: Right.

1 MS. OKUN: Well, maybe it would make
2 more sense for them to finish their presentation
3 before we start cross-examination, because it
4 seems like they're doing a package presentation.

5 CHAIRPERSON YOUNG: That's up to you.

6 MS. OKUN: I would rather do that.

7 CHAIRPERSON YOUNG: Okay, are you
8 finished asking questions of Mr. Seitz?

9 MS. OKUN: I'd rather hold all the
10 cross-examination until they're finished with
11 their presentation --

12 MR. SEITZ: Mr. Chairman, --

13 MS. OKUN: -- because it sounds like
14 they're going to address some of this.

15 CHAIRPERSON YOUNG: Okay.

16 MR. SEITZ: Could I just make a
17 recommendation that maybe we consider adjourning.
18 It is 6:20. I think that the expectation -- I may
19 be wrong on this, I'll let Lisa talk to it -- but
20 the expectation of the Community is that they're
21 going to have a meeting at 7:00.

22 MS. SCHICKER: We can -- what I asked is
23 you had mentioned 7:45. If we could adjourn at
24 7:00 or 7:15, that would be great. We have people
25 waiting but we can make a call and we'll start at

1 8:00 instead of 7:00. We'd like to finish our
2 presentation if we could. But if --

3 CHAIRPERSON YOUNG: When did you notice
4 this Board meeting tonight? Was that just last
5 night?

6 MR. BLESKEY: Yes, sir; and we do have
7 the ability to call. It's a special meeting, and
8 we structured the notice as such that it's
9 predicated on the adjourning of this meeting, one
10 hour later, and we have communications.

11 CHAIRPERSON YOUNG: Did anyone from the
12 Water Board give you any indication that we would
13 be adjourning at any specific time?

14 MR. SEITZ: We thought you folks were
15 civil. I'm just being, I'm being a little
16 flippant there, but you know, typically courts
17 close at 4:35. I mean this is fine with me, I'm
18 flexible. But I was not under the expectation
19 that we were going to --

20 CHAIRPERSON YOUNG: Actually, your CSD
21 goes into the wee hours of the morning and I
22 figure stopping by 7:45 was early for you guys.

23 (Laughter.)

24 CHAIRPERSON YOUNG: So I didn't think
25 anything of it. But, --

1 MR. BLESKEY: We've provided for any
2 anticipated change that your Board may need.

3 CHAIRPERSON YOUNG: Okay, let me just
4 check in here. We can stop at 7:15. Gary, you
5 say no? Why don't we just go down the line.

6 BOARD MEMBER SHALLCROSS: Yeah, I mean
7 we're going to 7:45. You know, normally on a case
8 like this, we go to 11:00, 12:00 in some cases.
9 So, we're only stopping at 7:45 for one reason,
10 and that's because we're losing our quorum. And
11 that's the only reason.

12 If you guys, you know, -- notice a
13 hearing or notice a meeting, thinking you're going
14 to get out of here at a certain time, I don't
15 think that's good. I mean, first of all, you
16 should have come and asked someone at the Board
17 and said, what time do you think we're going to
18 get out of there, rather than just basing it on
19 your experiences in the past.

20 MR. SEITZ: Yeah, that's fine. I'm
21 raising the issue as a matter of convenience, not
22 as a matter of --

23 BOARD MEMBER SHALLCROSS: We were hoping
24 to get through this tonight. We're not.

25 CHAIRPERSON YOUNG: Let me just check in

1 with the rest of my Board. Russ, do you want to
2 continue to 7:45 or stop at 7:15?

3 VICE CHAIRPERSON JEFFRIES: No, I want
4 to go as long as we possibly can --

5 CHAIRPERSON YOUNG: Okay.

6 VICE CHAIRPERSON JEFFRIES: -- because
7 what it'll do is just -- I don't want to --

8 MS. SCHICKER: That's perfectly fine,
9 7:45 is great. Let's go.

10 CHAIRPERSON YOUNG: Okay. All right.

11 VICE CHAIRPERSON JEFFRIES: But I want
12 to ask Mr. Seitz a question before we go on.

13 CHAIRPERSON YOUNG: Go ahead.

14 VICE CHAIRPERSON JEFFRIES: Mr. Seitz,
15 don't leave.

16 (Laughter.)

17 VICE CHAIRPERSON JEFFRIES: I was trying
18 to recollect when you made a statement that -- on
19 the time schedule, that there's been hearsay or so
20 forth that the time schedule was the CSD's time
21 schedule.

22 MR. SEITZ: Yes.

23 VICE CHAIRPERSON JEFFRIES: And I was at
24 that meeting when they came forth with that time
25 schedule. And it was the CSD's time schedule.

1 And I think I asked a question, are you sure that
2 this time schedule is adequate.

3 And I can ask Mr. Buel, because I think
4 he's the one that presented that time schedule to
5 this Board. And I think at that particular time I
6 Chaired this Board. And I wanted to be assured
7 that we didn't have any delays, that we gave them
8 enough time, and that the time schedule would meet
9 the requirements, but yet give them enough time to
10 do it in case there was delays.

11 Because I've been through this before,
12 not only with Los Osos, but my former life as a
13 mayor. And I understand how government moves,
14 slowly, mysteriously, and some people don't
15 understand why.

16 So, I don't want you to have the idea
17 that it was our Board or our staff time schedule.
18 But that's what you were kind of alluding to.

19 MR. SEITZ: No, what I was trying to
20 allude to -- and thank you for correcting me --
21 was that time schedule was a compromise through
22 negotiations. and wasn't that the District did
23 not have the luxury of saying the Board saying to
24 the District, write down what you think you need
25 and then we'll come in here and we'll approve it.

1 That's what I'm trying to point out, is
2 that --

3 VICE CHAIRPERSON JEFFRIES: But, Mr.
4 Seitz, --

5 MR. SEITZ: Yes.

6 VICE CHAIRPERSON JEFFRIES: -- this
7 Board is the one that approved it.

8 MR. SEITZ: I agree.

9 VICE CHAIRPERSON JEFFRIES: The staff
10 only recommended that we approve it. We're the
11 ones that make the final decision.

12 MR. SEITZ: I agree.

13 VICE CHAIRPERSON JEFFRIES: And the
14 question was asked to the CSD at that particular
15 time, is this an appropriate time schedule. And
16 the answer was yes.

17 If there was any question at that
18 particular time they could have raised it, and we
19 could have either accepted it or not accepted it.
20 But what you kind of put out there to the general
21 public --

22 MR. SEITZ: Yes.

23 VICE CHAIRPERSON JEFFRIES: -- was it
24 wasn't your time schedule. Well, I just want to
25 correct you, it was your time schedule.

1 MR. SEITZ: Okay. Since I wasn't at
2 that meeting I'm certainly happy to accept,
3 without challenge, your testimony as to what
4 occurred --

5 VICE CHAIRPERSON JEFFRIES: We can ask
6 Mr. Buel.

7 MR. SEITZ: Well, doesn't matter to me
8 one way --

9 VICE CHAIRPERSON JEFFRIES: Okay.

10 MR. SEITZ: -- or the other. My point
11 that I was trying to make is that that time
12 schedule order was negotiated, as opposed to the
13 District giving a time -- and the only reason why
14 I want to say this, and the facts bear it out, if
15 that was the hunky-dory -- sorry, I don't want to
16 be flippant -- if that was such a time order that
17 was agreed to by the District there would have
18 been no reason to have filed a request to the
19 State Water Resources Control Board to hold it in
20 abeyance.

21 So, I just want to -- I don't want to be
22 contradictory, and I certainly don't want to be
23 argumentative with the Board. But if I mis-
24 testified I'm glad I was corrected.

25 MS. OKUN: Can I just say one thing to

1 correct the record on the procedure of the State
2 Board petition?

3 CHAIRPERSON YOUNG: Yes.

4 MS. OKUN: The District didn't request
5 the State Board to hold the time schedule order in
6 abeyance. What they did was file a petition to
7 challenge the time schedule order. And rather
8 than pursue that challenge they agreed to hold
9 their petition in abeyance.

10 The Regional Board doesn't have any
11 ability to agree or disagree to that. So
12 basically this is -- it's like a lawsuit that was
13 filed that's just been sitting there.

14 The time schedule order has never been
15 put in abeyance; it's never been stayed. And the
16 State Board has never ruled on or considered the
17 petition because the District asked them not to.

18 So the abeyance refers not to the time
19 schedule order, but to the petition.

20 MR. SEITZ: And I agree with that.

21 CHAIRPERSON YOUNG: Could I just ask Mr.
22 Buel if anything that Ms. Okun just said, or Mr.
23 Jeffries had said, you would correct in any way?

24 MR. BUEL: Thank you, Mr. Chairman. I'm
25 Bruce Buel with LOCSD. I think it's important for

1 the record to note that the District objected to
2 the proposal to impose a time schedule order.

3 We requested that your Board not adopt
4 that order. But we did concur with the timeline
5 by Board order. And I'd like the record to note
6 that it's consistent with the state revolving fund
7 time deadlines, the milestones that were built
8 into the state revolving fund loan at that time.

9 CHAIRPERSON YOUNG: So the State Water
10 Board had its own requirements?

11 MR. BUEL: That's correct. Our --

12 CHAIRPERSON YOUNG: Is that -- okay.

13 MR. BUEL: -- Board had gone to the
14 State Water Resources Control Board to resurrect
15 the loan that had previously been assigned to the
16 County.

17 In doing so, the State Water Resources
18 Control Board not only assigned the new loan, or
19 transferred the loan to the District, but they
20 created a timeline that we were obligated to
21 follow.

22 And in the discussion with your staff
23 that is the same timeline that was published in
24 time schedule order 00-131.

25 CHAIRPERSON YOUNG: Okay, thank you.

1 All right, where are we?

2 Mr. Bleskey, --

3 MR. BLESKEY: Yes, sir.

4 CHAIRPERSON YOUNG: Okay.

5 MR. BLESKEY: We just have one little
6 slide for you.

7 CHAIRPERSON YOUNG: Okay. The clock is
8 resuming right now.

9 MR. BLESKEY: Chairman Young, Members of
10 the Board, first of all, thank you for having us
11 here and listening to what we have to say. I hope
12 I can bring my experience to bear in doing what
13 the right thing is.

14 I've got 29 years of experience in civil
15 service. I'm a Professional Engineer in the State
16 of California; a water treatment plant operator
17 level III. Served as a surveyor. I've got six
18 and a half years of active duty in the Civil
19 Engineer Corps, 17 years in the Reserves. I've
20 had Command over units that now are in Iraq.
21 Organizations, over 650 construction crews
22 supporting the Fleet Marine Force.

23 I've planned, constructed, sited
24 hundreds, literally hundred and hundreds of miles
25 of pipeline roads, airfields, warehouses, water

1 treatment plant facilities, you name it. I've
2 been out there doing it with folks for a long
3 time.

4 Some of my expertise and my interests
5 are seismic lifeline engineering; survivability of
6 water facilities in seismic events. I'm a Federal
7 Warrant Level II Contracts Officer. I've been an
8 expert witness, both for the federal government
9 and others in front of the Tenth Circuit Court for
10 the appeal of government contracts.

11 And that's my experience, and we're
12 going to start. The first thing we'd like to
13 start is we're going to be talking about some of
14 the things regarding local control and our
15 contract.

16 (The following video was played:)

17 "What the local community wants. That
18 is a prerogative of the local
19 government. If you have a problem with
20 the project, this has only happened
21 twice in the six years I've been here,
22 where people have tried to use this
23 Board to get around their own local
24 government's decision. Only twice. No
25 comments. So, the remedy is about local

1 government, not before this Board."

2 MR. BUEL: So what we have here is on
3 September 27th the Los Osos Community Services
4 District changed its government.

5 What I'm going to be speaking about is
6 just -- there's one thing I'm going to be speaking
7 about and that's addressed in the post-elections
8 contract actions. I'm not going to be talking
9 about the pre-election actions of the state
10 revolving fund and those things that happened that
11 led up to the events of September 27th.

12 that means I'm not going to be talking
13 about the proper securitization of the loan or the
14 state's failure to enact security, other than
15 insisting on revenues for a future construction
16 project that was in peril due to a recall and an
17 initiative that would have re-sited that project.

18 There were about --

19 BOARD MEMBER SHALLCROSS: Now, you said
20 you're not going talk about those things.

21 MR. BLESKEY: That's right.

22 BOARD MEMBER SHALLCROSS: Okay.

23 MR. BLESKEY: That's what I'm not going
24 to talk about. But I'll answer questions.

25 Or about the state's failure to provide

1 even the minimum reasonable oversight. And this
2 all has to go with the issues that are post-
3 election in dealing with contracts. And I'm not
4 going to talk about -- we wouldn't even be here
5 today if even the minimum oversight, and what I
6 would expect to be reasonable oversight, would
7 have occurred prior to the election.

8 So, we have a number of periods here.
9 We have three contracts out there. One that was
10 encumbered by Measure B, and that's the Tri-W
11 contract. To build at that site would have either
12 initiated a temporary restraining order or some
13 type of legal action, and that influenced the
14 contract decisions that needed to be made.

15 However, the ISA by the SRF that was
16 approved and pretty much in language created by
17 the state and all the construction contracts which
18 are incorporated by reference into that document,
19 the ATA, and just about every other -- and
20 including the language of Measure B, there were
21 contractual remedies compatible with Measure B
22 that would have allowed the entire project to move
23 forward, including the relocation of that
24 treatment plant.

25 This project is scoped not as a

1 treatment plant and pipes; it's scoped as a
2 system. And when you have a situation that's
3 provided for in the ISA where a component of the
4 system, and this happens all the time, has to be
5 relocated, you have language there. If it was not
6 the state's intent to provide that contractual
7 remedy, then why did they put the language in the
8 contract.

9 So, on 9/27 we had an election, and we
10 pretty much know the outcome of that. On October
11 3rd the prudent thing to do was initiate a
12 suspension, not a termination, not a stop notice,
13 as according to section 15.1 in the construction
14 contracts, to assess what work on the collection
15 system could continue and was compatible with any
16 site out of town. That was a good engineering
17 decision, and also a good business decision, and
18 it utilized the tools available and approved by
19 the state.

20 On October 3rd or 4th we were notified
21 of a lawsuit regarding seeking a remedy to restart
22 the work at the Tri-W site. With that in mind,
23 and considering that on 6 October the ACL was
24 issued, contractually we were looking at already
25 restarting the work.

1 Now, we hadn't gotten that out yet to
2 our contractors, and I'm specifically referring to
3 the collection contractors at that time. Because
4 we kind of got busy because we were going to be in
5 court.

6 How that influenced us was twofold. One
7 is on Tri-W we knew that we faced court action.
8 On the collection system we wanted to get going.
9 We weren't quite ready to get going. But when we
10 were noticed with that hearing it would not have
11 been prudent, and it would have been a waste of
12 taxpayers' money to start the contractor up,
13 demobilize them, and start again if we had some
14 type of an order preventing us from building at
15 Tri-W.

16 So, we went on Friday, October the 7th,
17 in San Luis Obispo County Superior Court, and we
18 addressed that challenge to restarting at the Tri-
19 W site. And the CSD, in light of Measure B's
20 still being considered the law of the land, the
21 work at the Tri-W site was allowed to not start.

22 On October 10th we had, with the
23 cooperation of Bernard Construction and Whittaker
24 contractors, we went in and they already had
25 looked at what areas of the collection system, as

1 designed, could be constructed through January so
2 that we could maintain progress on the collection
3 system.

4 Keeping in mind, something we don't have
5 up here, is we had two schedule paths. The
6 critical path was the collection system. That's a
7 720-day duration. The treatment plant is a 550-
8 day -- I think it's what, 720 or 730 for the
9 pipes, 550 days for the treatment plant. But the
10 entire schedule was front-loaded.

11 However, -- and that had to do with
12 getting the most work in the dirt to make the most
13 progress, which is not prudent construction
14 contracting. However, you're going to find that
15 when it comes to scheduling that 180 days of
16 float, if you challenge that in court, and it's
17 been my experience innumerable times, float goes
18 to who gets it first.

19 So with the changes clause in the
20 contracts and the float available, the start of
21 that treatment plant could have been delayed 180
22 days and still finished on time. The state SRF
23 folks have not chosen to use those contractual
24 remedies.

25 On October 11th initially when we were

1 looking at, at the staff level we were considering
2 the termination -- because of Measure B we were
3 considering the termination of the Tri-W project.

4 Termination isn't just something that
5 we can go into and shut a contractor off. Anybody
6 that knows, when you get into a termination,
7 you've got a changed condition on the contract.
8 Doesn't matter what the reason is. But even if
9 you want to terminate it for convenience, you have
10 to enter into negotiations, full and open, with
11 that contractor. To do otherwise is not fair and
12 reasonable, and it's not in good faith.

13 All those things were going through our
14 mind when we notified -- when I made a courtesy
15 call to Ed Moore which put into motion a whole
16 series of events where we were accused of breach;
17 and where now we are not in material breach. And
18 we're going to make that case with the state. We
19 filed a claim yesterday.

20 We held that claim, we were authorized
21 to make that claim well in advance of the events
22 that transpired on October 17th, and that was the
23 negotiations through Sam Blakesley, Assemblyman
24 Blakesley. We held that as good faith. And the
25 events that happened with that were somewhat

1 distressing.

2 That's why I've now invoked our right.
3 We also believe we have federal rights, because
4 federal monies are involved.

5 On October 17th, of course we know about
6 the negotiations. That's in the record. The SRF
7 Staff, especially the Executive Officer, issued a
8 letter with nine conditions. And in asking for --
9 approving structured negotiations, if our Board
10 was willing to accept those nine conditions. And
11 we agreed to that. So we entered in those.

12 And I've got to tell you, within an hour
13 after the state team, especially Darrin Polhemus,
14 we made a lot of progress. It was good. I mean I
15 can't say enough about the guy; we had a rapport -
16 - and it wasn't easy, he's not an easy guy to get
17 along with sometimes, he's tough, he's smart and
18 he knows what he's doing.

19 CHAIRPERSON YOUNG: Mr. Bleskey, did you
20 think that Mr. Polhemus was representing the State
21 Board, itself, the Board Members?

22 MR. BLESKEY: Yes, sir. And the reason
23 why I believed that is because staff -- I know my
24 staff or myself am allowed to enter into
25 negotiations subject to approval by the Board.

1 And that was represented to us at that meeting.

2 It's in the letter.

3 BOARD MEMBER SHALLCROSS: And were his
4 negotiations, or the things he agreed to, subject
5 to approval by his Board?

6 MR. BLESKEY: Yes, sir, they were.

7 CHAIRPERSON YOUNG: Well, this is
8 probably why we need to be able to get him on the
9 phone tomorrow, Sheryl, and Ms. Okun, so that we
10 can maybe get any of that cleared up.

11 Go ahead.

12 MR. BLESKEY: Do you we want to take
13 five or -- it's that good old technology failure.

14 CHAIRPERSON YOUNG: Switch failed? Do
15 you want to take five minutes to get that
16 straightened out? Okay. Why don't we do that.

17 MR. THOMPSON: How much time --

18 CHAIRPERSON YOUNG: Seventeen minutes,
19 23 seconds.

20 (Brief recess.)

21 CHAIRPERSON YOUNG: All right. Michael
22 Thomas, where is he? Mr. Packard, do we know
23 where Michael Thomas is? Okay. We'll continue
24 without him, okay.

25 All right, Mr. Bleskey.

1 (Pause.)

2 MS. SCHICKER: Mr Chair, --

3 CHAIRPERSON YOUNG: Yes.

4 MS. SCHICKER: -- while we're waiting
5 for Mr. Bleskey to return, we could skip forward
6 to Rob Miller, is that okay?

7 CHAIRPERSON YOUNG: Pardon me?

8 MS. SCHICKER: We could skip forward to
9 Mr. Miller, would that be all right, or --

10 CHAIRPERSON YOUNG: Sure.

11 MS. SCHICKER: -- should we wait?

12 CHAIRPERSON YOUNG: Okay.

13 MS. SCHICKER: We don't want to waste
14 time.

15 CHAIRPERSON YOUNG: Okay.

16 MS. SCHICKER: Okay.

17 MR. MILLER: Thank you, Mr. Chairman,
18 I'm ready to begin. My name is Robert Miller and
19 I'm the District Engineer, along with the Wallace
20 Group, a local consulting firm. We've been the
21 District Engineer since 1999, and also were the
22 Assessment Engineer for the County of San Luis
23 Obispo. So we do have some history with the
24 project.

25 I'm primarily just going to provide some

1 technical data and a few map overlays here this
2 evening, and make a few key technical points.

3 First of all, there's a couple documents
4 I want to make reference to that are in the listed
5 documents. One is document 40, and that is the
6 latest groundwater monitoring results that were
7 performed by Cleath and Associates. And then also
8 document 133, which is a study that was done back
9 in '95 by Metcalf and Eddy, looking primarily at
10 groundwater separation and denitrification in the
11 soil column below the septic systems.

12 And we're going to go ahead, in the
13 interest of time, and forward through a couple of
14 slides here, and talk about nitrate --

15 (End Tape 3A.)

16 MR. MILLER: -- sources here. Again,
17 this is out of the study that was performed by
18 Metcalf and Eddy. And I think the critical point
19 in my discussion here is that one of the systems
20 that the CSD operates and maintains is the Bay
21 Ridge Estates system.

22 And that was one of the subjects of
23 study within this task that Metcalf and Eddy
24 completed. And it basically involved installation
25 of lysimeters, sample points to take groundwater

1 samples above the actual groundwater elevation.
2 But that's never been done in the Vista del Oro
3 site. And so as I show the maps you can keep that
4 in mind.

5 We did see some denitrification,
6 significant denitrification, about 67 percent
7 below some of the sites with adequate groundwater
8 separation.

9 BOARD MEMBER SHALLCROSS: Can I just ask
10 a quick question?

11 MR. MILLER: Absolutely.

12 BOARD MEMBER SHALLCROSS: These are
13 issues that go to the part of the complaint that's
14 alleging a basin plan violation, right?

15 MR. MILLER: I believe that would be
16 correct.

17 BOARD MEMBER SHALLCROSS: Not against
18 the time schedule --

19 MR. MILLER: I believe that would be
20 most correct.

21 BOARD MEMBER SHALLCROSS: -- of alleged
22 violation. Okay, thank you.

23 MR. MILLER: Right. So, again, looking
24 at some of the nitrate reductions and the
25 denitrification we'll flip through those. And

1 then we do have information that was generated
2 about the Bay Ridge system back in '95, and those
3 are on file with your staff, also.

4 Really the key conclusions were that a
5 in a number of these occasions where you did have
6 good groundwater separation, there were times when
7 the leachate that was reaching the groundwater was
8 actually a lower nitrogen concentration than what
9 the groundwater was at selected sites.

10 That being said, of course, it's very
11 much acknowledged that there is a nitrate problem
12 in the Los Osos groundwater basin.

13 We did produce a map that might be
14 helpful both to your staff and it certainly is to
15 us. This is a map that shows an overlay, which I
16 don't know that these two have ever been overlaid
17 this clearly, the areas of high groundwater in the
18 community in the blue; and then the areas where we
19 took nitrogen samples in the last sample event.
20 And then in the green you see the Vista del Oro
21 system there where the mouse is, and the Bay Ridge
22 Estate system there with the bigger block over to
23 the right. And then the fire station.

24 So you have everything on one map so you
25 can really get a good understanding of where the

1 worst areas are for separation, and then where we
2 took monitoring samples, and the resulting
3 nitrogen concentrations.

4 The big point in the Cleath study that
5 was done back in April, again document number 40,
6 was that the trend for nitrogen concentrations in
7 the groundwater really does reflect the
8 effectiveness of the prohibition zone and the
9 prohibition against future construction. Because
10 since the mid '80s when samples have been taken,
11 the trends are, for the most part, fairly static.
12 Within 15 wells we don't see any long-term trends
13 in that 20-year period.

14 Two of the wells didn't have adequate
15 data to make a conclusion. Three of the wells
16 actually showed a decrease in overall nitrogen
17 levels; three of the wells showed an increase in
18 nitrogen levels; one well showed an increase in
19 total dissolved solids; and then three of the
20 wells have trends that seem to have reversed. So
21 you can't pull firm conclusions. And that's out
22 of 27 monitoring wells in that Cleath assessment.

23 And I think the point of all that is the
24 prohibition against future development was
25 effective of at least stabilizing the nitrogen

1 levels through that time period. But just the
2 technical data that we're looking at we haven't
3 seen a discernible trend since that time with the
4 samples that we've taken by the CSD.

5 And this give you, again, a tool to be
6 able to look at how those nitrogen results factor
7 into the separation to groundwater.

8 So that's essentially the technical
9 information that we wanted to provide here today.
10 And I'd be happy to answer any questions. That
11 completes my portion.

12 CHAIRPERSON YOUNG: Just so I'm clear,
13 Mr. Miller, are you saying that the septic tanks
14 are not contributing to the nitrate levels in
15 groundwater?

16 MR. MILLER: No. I think I would
17 definitely make the statement that over time,
18 since the '50s, nitrates certainly have been one
19 source of nitrogen contamination in the
20 groundwater.

21 I'm merely pointing out what may not be
22 widely understood, and that is the actual sampling
23 data since the mid '80s in that document 40 shows
24 the trend for each and every monitoring well. And
25 I think it's important just to look at those

1 trends and understand that since the prohibition
2 against future further development was enacted, we
3 just haven't seen a sweeping trend throughout
4 those 27 monitoring wells of increases in that
5 time period.

6 CHAIRPERSON YOUNG: The staff, the Water
7 Board Staff has put up graphs, you know, at
8 several hearings with the orange circles and red
9 circles and showing, you know, an increasing trend
10 of nitrate in groundwater.

11 Is it your position that those are
12 inaccurate depictions?

13 MR. MILLER: You know, those, if I'm --
14 they did show a graphic earlier which shows a bar
15 chart that has an increase. Looking at a longer
16 time period, clearly in the '50s, '60s, '70s, when
17 development was rapidly occurring in the
18 community, we did see a significant increase in
19 nitrogen concentrations in that shallow water, if
20 that's the graphic you're referring to. I don't
21 dispute the validity of that graphic.

22 CHAIRPERSON YOUNG: Right. No, I've
23 seen graphs where the trend is increasing through
24 time --

25 MR. MILLER: I think what you're --

1 CHAIRPERSON YOUNG: -- to this date.

2 MR. MILLER: I think what you're
3 referring to then is maybe it's in a plan view and
4 you see a series of red overlays on the community
5 that grow in size --

6 CHAIRPERSON YOUNG: Yes.

7 MR. MILLER: I think those would be a
8 good thing to compare with the actual data that's
9 been collected, again, and summarized in that
10 document 40. And we can look at each individual
11 monitoring well. I think that would be a good
12 exercise for the Board to go through.

13 But if you look at the actual sampled
14 data, again you see 15 wells without long-term
15 trends. You do see three wells with an increasing
16 trend. But just pointing out that physical data,
17 I don't know if that's ever been presented clearly
18 to the Board.

19 CHAIRPERSON YOUNG: Do these wells
20 correspond with the well data that the staff is
21 relying upon?

22 MR. MILLER: I believe they do.

23 CHAIRPERSON YOUNG: Okay.

24 MR. MILLER: I think this would be the
25 tool that staff can look at to analyze. And they

1 may have comments on that document 40, which
2 trended every single well. And so you can page
3 through well-by-well to look at the actual trends
4 in the wells.

5 And so that's the information I wanted
6 to present.

7 CHAIRPERSON YOUNG: Okay.

8 MR. MILLER: I'd be happy to answer more
9 questions.

10 CHAIRPERSON YOUNG: All right. Any
11 questions for Mr. Miller? Okay. You guys have 12
12 minutes remaining.

13 MS. SCHICKER: Okay, thank you. I'm
14 going to go really quickly and I would
15 respectfully request more time, if we could,
16 because of technology problems and other things.

17 Let's show the clip. What I'm -- as the
18 clip is about to start, I'm trying to make the
19 point that the TSO -- I'll wait.

20 (The following video was played:)

21 MR. SPEAKER: -- directed their efforts
22 to Broderson, did not include those
23 other sites, and you did that on purpose
24 because that was the linchpin, that was
25 the first thing that you needed to get

1 done and you needed to get the
2 groundwater, the specific model, the
3 finite model, to a point where it was
4 usable. So, you did that on purpose.
5 And we've been waiting for them to get
6 the wrinkles out of that model and to be
7 able to adapt the same technique to
8 these other sites. So right now, if you
9 want to do linear leach fields in the
10 other areas of the community, you have
11 no way of knowing what the downslope
12 impacts are going to be for those areas.
13 MS. PANDORA: I guess my confusion is
14 that we don't even know if the soils --
15 what the percolation rate through these
16 soils is in these different locations.
17 I mean we did this extensive testing
18 that was used at the -- up at the hill
19 to tell us we couldn't use injection
20 wells. We have an idea of soil
21 characteristics, water permeability,
22 that sort of thing, which is real data.
23 And I'm having a little trouble
24 understanding why we don't want real
25 data, we're just going to use a model

1 where we haven't even looked at soil
2 bores or anything from any of these
3 areas. We're also using a model where
4 we're using wells that are in the
5 vicinity to populate the cells of the
6 model with data. But it's a model. And
7 I guess I'm not comfortable with using
8 just the model without any field data.
9 MS. STAN: I have a question. It's my
10 understanding that the Vista del Oro
11 leach field is failing, and that the
12 Monarch Grove Elementary School leach
13 field, that there's a problem downslope
14 of that.
15 MR. SPEAKER: Yes.
16 MS. STAN: I agree that, you know, we've
17 been asking for quite some time that we
18 look at road rights-of-way, and I have
19 also, I'm not totally convinced that the
20 Kai (inaudible) needs the ability to use
21 that to get us on the other side of the
22 fault line. It isn't something that we
23 should be looking at. So it seems like
24 some of these are appropriate and some
25 aren't.

1 MR. SPEAKER: Yeah, and your board can
2 tell Cleath which of these you want them
3 to study. I think -- I'm going to be
4 brutally blunt here. Unless we can get
5 some opinion as to what the downslope
6 impacts are of the sites you want us to
7 analyze, Mr. Clark can't complete his
8 environmental impact report. I don't
9 care which sites you pick next Wednesday
10 or the 21st, but somehow you have to
11 give the information to your
12 environmental consultant from a credible
13 source as to what the downslope impacts
14 are. And whether it's Kai (inaudible)
15 or Santa Maria, almost doesn't make any
16 difference. You have these various
17 sites that could be analyzed.

18 MS. PANDORA: But we're not doing any
19 field work.

20 MR. SPEAKER: That is true. You're
21 relying on the knowledge we have in the
22 basin. You don't have time, frankly.
23 We need these analyses done by early
24 October at the very latest for them to
25 be usable."

1 MS. SCHICKER: Mr. Chair, I have to
2 express my frustration at this time. We have so
3 much information to present to you.

4 CHAIRPERSON YOUNG: Okay, how much
5 more --

6 MS. SCHICKER: I feel like I'm rushing
7 and shoving.

8 CHAIRPERSON YOUNG: -- how much more
9 time do you need?

10 MS. SCHICKER: I need ten minutes and he
11 needs ten minutes. I mean, I --

12 CHAIRPERSON YOUNG: Okay, all right.
13 Hang on, --

14 MS. SCHICKER: Okay. It's very
15 frustrating.

16 CHAIRPERSON YOUNG: -- hang on. Okay.
17 And I want to allow you adequate time, you know,
18 for your closing. So, why don't we do this --

19 MS. OKUN: Well, we still have cross-
20 examination before their closing.

21 CHAIRPERSON YOUNG: Oh, yeah, oh, I
22 understand. I'm just thinking of allotting more
23 time to both sides. So why don't I do this. I'll
24 just give both of you, both sides, 30 more minutes
25 to use.

1 MS. SCHICKER: I very much appreciate
2 that.

3 CHAIRPERSON YOUNG: Yeah, that's fine.

4 MS. SCHICKER: It's just that we're
5 rushing to hard.

6 CHAIRPERSON YOUNG: I understand.

7 MS. SCHICKER: We're not doing a good
8 job, and we'd like to do a good job for you.

9 CHAIRPERSON YOUNG: Okay. All right.
10 Is that enough time?

11 MS. SCHICKER: I hope so, I think it
12 should be.

13 CHAIRPERSON YOUNG: Okay, good.

14 MS. SCHICKER: At the rate we're going,
15 it should be okay.

16 CHAIRPERSON YOUNG: Good.

17 MS. SCHICKER: So, thank you.

18 CHAIRPERSON YOUNG: All right.

19 MS. SCHICKER: Why we showed the
20 historic clip, why it's so important to us, and
21 why we're so concerned about this hearing and this
22 ACL complaint is this.

23 We believe that the short TSO, the short
24 amount of time that was given to the initial TSO
25 in 2000 is problematic. Because what it did --

1 and I know we've had some discussion, Mr. Jeffries
2 did mention your TSO -- whose is it -- we
3 understand that many times the TSO was -- requests
4 were made by Mr. Buel to the Board and/or your
5 staff to please revise the time schedule order.
6 Because it wasn't realistic, it wasn't happening,
7 we weren't getting good data before design.

8 That's why we showed the historic clip.
9 All the data, all the research for a good project
10 came out after the design.

11 So therefore, the design of the project
12 does not reflect the goals that will meet the
13 objectives of cleaning up the water basin in the
14 best way for the best amount of money. You know,
15 the best use, you know, all of the things that you
16 folks agree with us on. We're on the same page
17 there.

18 So, that's the premise of these clips,
19 and the premise of my presentation is that the
20 short TSO, the push and the shove, because of your
21 absolute frustration over time of not getting a
22 project has, in fact, made things possibly worse
23 because of that.

24 Now we have a design that doesn't
25 reflect the technical data that was produced after

1 the design. And this list right here, this is a
2 quote from you about how "We strongly believe it
3 is in the best interest of the community you
4 represent to open-mindedly evaluate alternatives
5 based on technically correct information."

6 Yet all these reports that you see here
7 on the right happened after design. Therefore, we
8 maintain the design of the plant is so
9 problematic, and it was pushed by the TSO. And
10 our Board's absolute commitment to trying to meet
11 it, even though they asked you over and over
12 again, would you please talk to us about
13 renegotiating it. Would you please --

14 We put a petition in, you know. There
15 were reasons we didn't think the time order was
16 realistic. So now we've got a project that's the
17 highest per capita in the country. We have huge
18 division in the community. We have you coming
19 after us for fines. We have the state pulling our
20 money. And we're trying to solve the water issue,
21 and we're very committed to that.

22 But now we're in this situation that's
23 actually even possibly, for your consideration,
24 maybe even made worse by this time schedule order
25 crunch, squish, push.

1 And so that's what I wanted to say. And
2 I'm going to keep going in the presentation. But
3 I just wanted to explain this. This was in 2000,
4 February.

5 CHAIRPERSON YOUNG: Ms. Schicker, I'll
6 stop the clock and I just wanted to ask you a
7 little bit about that. What is it about the
8 design of the plant, based on this data that is
9 incorrect --

10 MS. SCHICKER: It's coming up in my
11 presentation.

12 CHAIRPERSON YOUNG: Okay.

13 MS. SCHICKER: I have a few slides about
14 it, but --

15 CHAIRPERSON YOUNG: Okay, because --

16 MS. SCHICKER: Yeah, I know, I'll go
17 over it --

18 CHAIRPERSON YOUNG: -- doesn't the Tri-W
19 plant clean up, it's going to collect the septic
20 tank effluent; it's going to process it; it's
21 going to put it through a membrane filter system;
22 it's going to produce tertiary treated water which
23 is going to be recycled and put into the Broderson
24 site at 800,000 gallons a day.

25 Are you saying that design would be

1 different based on the data that you say came to
2 light afterward?

3 MS. SCHICKER: Yes, I believe so. And I
4 will demonstrate a few of those high points for
5 you. We have great concerns about the design of
6 this project. The task force was formed mainly to
7 protest the design. We have great concerns that I
8 will not meet the water quality goals that were
9 established for this project.

10 CHAIRPERSON YOUNG: Well, if it produces
11 tertiary treated water, how does that not meet a
12 water quality goal?

13 MS. SCHICKER: I will demonstrate that
14 in a moment, --

15 CHAIRPERSON YOUNG: Okay.

16 MS. SCHICKER: -- but just keep in mind
17 if we're putting 7 mg/L of nitrates back into the
18 mix, and it's going to take 30 years to fix it,
19 and we're stabilized right now, is that a good
20 solution. And if we don't have anywhere to put
21 the water because the Broderson leach fields
22 possibly are completely under-sized and will fail,
23 and the water pops out in Morro Bay and Questa-by-
24 the-Sea, and we don't have anywhere to put it, or
25 we're pumping it to the Bay which we promised we

1 wouldn't, which is also part of the design, we've
2 got some serious problems with this design.

3 That's all we've ever been about is
4 exposing these problems.

5 CHAIRPERSON YOUNG: Well, wasn't the
6 800,000-gallon-per-day estimate for the Broderson
7 field based on engineers' estimates?

8 MS. SCHICKER: That's the --

9 CHAIRPERSON YOUNG: I mean you're going
10 to be producing about a million gallons a day,
11 right?

12 MS. SCHICKER: That's correct.

13 CHAIRPERSON YOUNG: So there's like,
14 someone has already made a determination that the
15 field could accept about 800,000 gallons.

16 MS. SCHICKER: Yeah, and we have --

17 CHAIRPERSON YOUNG: And the 200,000 has
18 to be dealt with in some other way.

19 MS. SCHICKER: I'm talking about the
20 800,000 gallons. We have serious concerns of
21 clogging in the field due to the salts. And then
22 the liquefaction risk. And also the way the clay
23 is designed, I could go on and on. It's going to
24 end up in Questa-by-the-Sea; it's going to flood
25 homes. We're going to have to pump it or dump it

1 into the Bay. We're going to recycle, recycle,
2 recycle. Energy costs go up. It's a bad design.
3 And it's conceptual. It has never been shown,
4 it's never been proven yet.

5 We're very concerned about that. That's
6 what we've been trying to reach you for a couple
7 years now.

8 CHAIRPERSON YOUNG: Do you mean
9 conceptual in that it has never been demonstrated
10 at this site, or anywhere in the state?

11 MS. SCHICKER: That these big leach
12 fields are going to work and not clog. And the
13 liquefaction risk based on the neighborhood, on
14 the Fugro reports. Some of those reports that I
15 showed you afterwards, you know, and the nitrate
16 modeling.

17 CHAIRPERSON YOUNG: All right, I'm going
18 to -- go ahead.

19 MS. SCHICKER: Okay, to continue on,
20 this is a letter sent from the SRF program in
21 2000. They were concerned about our project even
22 at that time, that we hadn't analyzed the cost
23 effectiveness completely and an evaluation of
24 project alternatives. They didn't like our
25 project report.

1 They have to be consistent with water
2 management plans. We didn't have one yet. See,
3 this is what I'm saying. All the reports were
4 done later. And adequate cost effectiveness
5 evaluation may lead to a different project all
6 together. These are State Water Board engineers.
7 We agree with these statements. It just didn't
8 happen because of the push.

9 Another one. Yeah, quickly.

10 (The following video was played:)

11 MS. SPEAKER: We have two
12 representatives from the Regional Water
13 Quality Control Board here tonight,
14 Gerhard Hubner and Sorrel Marks. Would
15 either one of you care to speak to the
16 probability of our getting an extension
17 on our timeline?

18 MR. HUBNER: Madam Chair, Members of the
19 Board and the community, my name is
20 Gerhard Hubner. I'm a Senior
21 Engineering Geologist and Chief of the
22 southern watershed unit. And I'd be
23 happy to answer questions that you might
24 have. But I believe the question was --

25 MS. SPEAKER: The specific question is

1 we went to ask your Board for support to
2 go to the State Water Resources Board
3 and ask for an extension of our
4 timeline. And can you tell the
5 community the message that we were
6 given?

7 MR. HUBNER: The Board, at this time, is
8 not inclined to give an extension. At
9 least that was the direction that they
10 gave. They have asked us at the October
11 27th meeting to come back to them with
12 various enforcement options. We, as
13 staff, are working with your District
14 Staff and the consultants, looking to
15 see that we had a good faith effort, so
16 that we can come to the Board in October
17 and recommend a lesser type action.

18 Presently there's a cease and desist
19 order. We're looking potentially to
20 revise that with some dates. However,
21 we do need to see that the Board is
22 moving forward so that we can make that
23 recommendation."

24 MS. SCHICKER: Again, just another
25 example of what we are possibly suggesting to your

1 Board might have been part of the problem with
2 coming to a solution that was agreeable to all.

3 This push -- we asked for assistance, we
4 asked for help and we were told no. No, you don't
5 get any more time, you can't do this. Yet, we
6 find ourselves in this situation today. And maybe
7 we're all involved with that result. I'm asking
8 you to consider that.

9 Again, high costs of MBR at Tri-W,
10 really high costs. MBR is a good technology;
11 there's no disagreement there. They replace the
12 tertiary filters. We're unclear on the sizing.
13 The capital costs are outrageous. The costs for
14 electricity is out of this world, it's 50 to 80
15 percent more. And then if you add on that pump-
16 and-dump thing I was talking about with the water
17 recycling, you've got electrical costs.

18 No sustainability. That was a big goal
19 for our community. You just held a workshop on it
20 last month. We believe in that goal. We agree
21 with you. We aren't getting it with this project.

22 The MBR technology and these filters
23 need to be replaced, possibly every seven years.
24 Forty percent of the capital costs every seven
25 years. The O&M goes way up on a plant like this

1 for a community of our size and the amount of
2 people that are using it. We question that cost
3 factor, again.

4 Here's a summary of some of the flaws.
5 Mr. Young, you were asking me why we think this is
6 such a poor project for our town. Again, the
7 technical reports came after the design, so the
8 plant was not designed appropriately to meet
9 things.

10 The biggest ones, which you folks should
11 be very concerned about, are salt water intrusion
12 and groundwater recharge. We don't accomplish
13 either of those goals with this project. For the
14 cost that's not a good thing.

15 Salt water intrusion isn't addressed at
16 all. Groundwater recharge, again technical
17 studies came out later, maybe 10 percent of the
18 water will get back in because of the clay layers.
19 It's not a -- you know, the way we have it
20 designed does not work. We're ending up pumping
21 and dumping the water.

22 So that was the next line about either
23 dumps water to the Bay or we've got to pump it in,
24 figure out what to do with it, you know. We're
25 not recharging and recycling like we wanted to.

1 It doesn't treat the nitrate problem for
2 at least 30 years. And, again, we're putting
3 plenty back in to mix with the existing. So is
4 that really a good thing? We question that.

5 We've got a grass-lined sewer overflow
6 pit right uphill from the National Estuary.
7 Everybody's saying don't pollute the Bay. We
8 don't want to pollute the Bay. How many sewer
9 plants spilled last year? We've got this plant
10 located -- I'm a site planner; I have a landscape
11 architecture, that's my advanced degree,
12 environmental planning and landscape architecture.
13 We're putting a sewer in a ditch, in a drainage
14 ditch right upstream from the back side of the
15 Morro Bay Estuary. And we're saying that's a good
16 siting. I'm sorry, I disagree.

17 Where is it going to spill to? Which
18 way is the spill going to go? This time it's raw
19 sewage, it's not effluent going through a sand
20 filter, it's raw sewage going down the hill to the
21 back Bay that doesn't flush. We think it's a bad
22 idea.

23 The project doesn't meet sustainability
24 goals. I've already mentioned that. Highest per
25 capita sewer in the country. Disposal at

1 Broderson is conceptual; dangerous to homes;
2 liquefaction risk has not been assessed. I can
3 show you that in the EIR. I've been saying it for
4 a couple years now.

5 And the Broderson leach field is
6 dangerously under-sized. There's engineering
7 disagreement about that, I realize. But we've
8 done enough studies to believe that the field will
9 clog based on the soil type and the effluent
10 quality. And we will have problems with Broderson
11 that we will be sorry about.

12 CHAIRPERSON YOUNG: Then when --

13 MS. SCHICKER: And you will be coming
14 back and fining us.

15 CHAIRPERSON YOUNG: -- when were those
16 studies done, Ms. Schicker?

17 MS. SCHICKER: The Fugro report on the
18 soil type and the groundwater management plan were
19 done in 2004 and '5.

20 This is an example that came out of the
21 2001 project report; another one of our big
22 contentions, cost, you know, for the money,
23 project for the money.

24 This is table 4.4. It shows the Tri-W
25 site has overall life cycle costs that are higher.

1 The community was completely misled. If you
2 wonder why the community is in such division about
3 this project, the environmentally superior project
4 was out of town, identified in the EIR, and it was
5 cheaper. And that was never disclosed to this
6 community. We ask you why. We've asked why for
7 about three years now. It should be of concern to
8 you, as well.

9 That's the difference in cost --

10 CHAIRPERSON YOUNG: Are you suggesting
11 it wasn't discussed in the EIR?

12 MS. SCHICKER: No, it wasn't, actually.
13 The lifecycle costs and the --

14 CHAIRPERSON YOUNG: No, I mean are
15 saying the Andre site --

16 MS. SCHICKER: Oh, no, the Andre --

17 CHAIRPERSON YOUNG: -- was not discussed
18 in the report, in the EIR?

19 MS. SCHICKER: No. The Andre site was
20 discussed --

21 CHAIRPERSON YOUNG: Okay.

22 MS. SCHICKER: -- and it was disclosed
23 as the environmentally preferred site in the EIR.

24 CHAIRPERSON YOUNG: Well, let me tell
25 you how I view environmentally superior, things of

1 that nature. I think that's somewhat subjective.
2 I think if you ask the people that live out there
3 in that part of the community, they would have a
4 different take on that.

5 I think that --

6 MS. SCHICKER: I know, sir, but with due
7 respect, the EIR, which is the environmental
8 document that you're supposed to follow,
9 identified it as the one, as the place to go. So,
10 why did the community not pick it? That's the
11 real question, isn't it? Why did the community
12 not pick this site?

13 CHAIRPERSON YOUNG: Well, there's
14 another issue, Ms. Schicker, that involves
15 feasibility, not just what might be
16 environmentally superior based on certain factors.
17 Feasibility.

18 So, --

19 MS. SCHICKER: And your --

20 CHAIRPERSON YOUNG: -- there are pluses
21 and minuses --

22 MS. SCHICKER: Absolutely.

23 CHAIRPERSON YOUNG: -- to the site at
24 Tri-W. It's closer to the collection system; it's
25 more centrally located. And getting out to Andre

1 would have other, you know, pumping costs and
2 things of that --

3 MS. SCHICKER: That's correct, but --

4 CHAIRPERSON YOUNG: -- associated with
5 it, so it --

6 MS. SCHICKER: -- but Andre --

7 CHAIRPERSON YOUNG: -- it's a series of
8 balancing of values that take place.

9 MS. SCHICKER: Another one of the goals
10 I forgot to mention was ag exchange. That was
11 another reason we thought it would be better out
12 of town.

13 But back to the ditch and the esha and
14 the Bay and the homes and the cost, all of those
15 factors -- you say it's a balancing act. I would
16 just ask you to please consider those, as well.
17 All of those things weren't in the EIR. That's
18 why you noticed a great upsurge of people coming
19 out at the Coastal Commission stage because the
20 project had changed. It had morphed.

21 Now it's 40 feet tall; now it's the most
22 expensive ever. Now we got a drainage, overflow
23 pit coming out there. We didn't have any of that
24 in the EIR. Those were new facts, never disclosed
25 to the community. That's why you have this

1 dissension. That's why you have this division.
2 It didn't come out of nowhere. It didn't come out
3 of people not wanting to clean the water. I think
4 there's a misconception about that.

5 CHAIRPERSON YOUNG: Well, I'll tell you,
6 I recall at some of the Coastal Commission
7 hearings I was at in '98 when there were people
8 that said, stop the sewer, there isn't a problem,
9 we don't need a sewer.

10 So, you know, maybe there's been a
11 progression and a maturation in appreciation for
12 what's going on with the groundwater, but, you
13 know, the community, itself, has had many
14 different roles in this.

15 I mean we are here today because of what
16 this community has done, not because of what the
17 regulatory agencies have done to the community.
18 These ar discharges from the community. You
19 elected a board before, the community did. That
20 board went through a process; it made choices. It
21 developed the EIR, did certain things. The
22 community then voted new members of the board in.
23 And so these are all -- you know, we're here today
24 because of what the community has done.

25 And so we're not really here to start

1 looking back in time at what was or wasn't in the
2 EIR. It's not really part of a defense, I don't
3 think, to what's in the ACL complaint.

4 MS. SCHICKER: With respect, Chairman
5 Young, what I'm asking you is possibly, and other
6 Directors, possibly a philosophical question,
7 that's what I brought up about the TSO. Please
8 accept a partial role in this scenario that's
9 played out.

10 When you have an agency that's
11 regulatory butting heads with the community, and
12 putting the thumb on the neck of the people and
13 saying, no, we will not revise this time schedule
14 order. And you've got people who are trying to
15 solve their problems. Would you at least be
16 willing to accept that maybe there is a dual role
17 here. And that maybe we could both benefit from
18 some negotiations or mediation or workshops. Why
19 don't you want to work with us and why do you want
20 to punish us?

21 BOARD MEMBER SHALLCROSS: I'd like to
22 say something.

23 CHAIRPERSON YOUNG: Sure, go ahead.

24 BOARD MEMBER SHALLCROSS: You know, if
25 this had just happened, if we had just found out

1 the Los Osos was polluting the waters of the
2 state, and, you know, you guys went through this
3 process, and oops, this isn't where we want it,
4 you know, I'm sure we would have been more than
5 happy to work with you.

6 This didn't just happen. This has been
7 over 20 years this community, for different
8 reasons, has not come up to the plate and stopped
9 polluting the waters of the State of California.

10 And every time there's a project that's
11 almost ready to get built you guys change your
12 mind. Oh, we want to do it ourselves. Or, we
13 don't like where it is. And you continue
14 polluting the waters of the State of California.

15 So, don't give me this, you know, change
16 the TSO stuff, because we, you know, held back in
17 enforcing for over 20 years. You guys have had
18 plenty of time. And to come to us at this late
19 date and say work with us. We've been saying work
20 with us for over 20 years. And you people said,
21 oh, yeah, yeah, yeah, and you never have.

22 And I'm wondering if you ever will.
23 With Measure B, I'm not sure you're ever going to
24 get to a plant because I can see this very divided
25 community voting over and over and over again to

1 turn down site after site after site, because they
2 don't want to pay for a plant.

3 So this is very disingenuous of you.

4 (Audience participation.)

5 MS. SCHICKER: Oh, Mr. Shallcross, --

6 (Audience participation.)

7 MS. SCHICKER: -- Mr. Shallcross --

8 CHAIRPERSON YOUNG: Please keep it down
9 or I'll ask everybody to leave. Okay? Go ahead,
10 Ms. Schicker.

11 MS. SCHICKER: Mr. Shallcross, I
12 appreciate your frustration, but with all due
13 respect, we had a conversation about a year ago in
14 Watsonville. You asked me, I don't know why you
15 want a plant downtown. You told me that,
16 yourself.

17 BOARD MEMBER SHALLCROSS: I absolutely
18 agree. I probably wouldn't, either. But that's
19 not why we're here.

20 MS. SCHICKER: But, I'm not that 20-year
21 person that you're describing, as kind of a
22 generic person, you should have. It wasn't me.
23 It's a progression.

24 You are wanting to blame me for the
25 past, and I'm telling you I'm here to solve the

1 problem. I'm volunteering as an elected
2 representative. I took the ultimate sacrifice. I
3 ran. You told us to change the Board if we wanted
4 to change the project. We did. We ran for
5 office; we got elected. We're trying to work with
6 you. We don't want to work against you.

7 BOARD MEMBER SHALLCROSS: Let me say
8 this, you know, I agree. If you wanted to change
9 the site, your argument was with the Board, your
10 Board, not with us.

11 You and Ms. -- thank you -- Ms. Tacker
12 came in here time after time. First of all,
13 generally when you came in you would start
14 insulting us or bad-mouthing us and saying help us
15 move the site.

16 We got really tired of it because we
17 have absolutely no ability to move the site. We
18 have absolutely no jurisdiction to move the site.

19 So I told you if you have a problem with
20 the site, that's within the jurisdiction of the
21 CSD. You have to go and change those folks if you
22 can. You did.

23 Now, does that mean that all of a sudden
24 you get to do whatever you wanted? Does that mean
25 you get to violate the Porter-Cologne Act? Does

1 that mean you get to violate the Clean Water Act?

2 No.

3 I think you could have had a good chance
4 at moving the site and gotten some of the stuff
5 you wanted if you had gone about it right. I
6 think the thing that's really tying you folks up
7 is Measure B. I think that's the killer in this.
8 And I know it's not the Board's fault because
9 you're sort of bound by it. The Measure B is
10 what's going to keep this community from ever
11 building anything. And that's what I think.

12 (Audience participation.)

13 BOARD MEMBER SHALLCROSS: Yes, that's
14 what we're here to do.

15 (Audience participation.)

16 CHAIRPERSON YOUNG: Okay, excuse me.

17 (Audience participation.)

18 CHAIRPERSON YOUNG: Excuse me. You'll
19 have a chance to testify at public comment. All
20 right, Ms. Schicker, the clock was stopped during
21 that. So, keep on going.

22 MS. SCHICKER: Thank you very much, sir.

23 CHAIRPERSON YOUNG: Okay, go ahead.

24 MS. SCHICKER: We've heard several times
25 that the group of us who really felt we could

1 change this -- wanted to change this project that
2 you didn't have a plan. Well, yes, we do have a
3 plan; we've been studying for at least a year and
4 a half about which way to go.

5 And this is the top of our list. It's
6 not the only one, but we do have a plan. We've
7 researched it. We've had speakers come into town
8 and workshops.

9 At the multi-stage pond treatment, a
10 high rate modular pond that can treat the nitrates
11 and it can do tertiary treatment. And this
12 summarizes what the components of this project
13 would be. Aerobic ponds, anoxic ponds, et cetera,
14 I mean you can read them.

15 But the main thing is the timeline for
16 construction was do-able; the cost, the lifecycle
17 cost was lower. We thought we could get more buy-
18 in from the community.

19 And then you know about these state
20 negotiations we had with the State Water Board
21 Staff. They bought it; they thought it was great.
22 They thought it was do-able. I don't want to say
23 they thought it was great. They saw the same
24 issues we saw, complications of site planning.

25 This is how we entered the negotiations

1 with Mr. Blakesley's office. This was Mr.
2 Polhemus. Here's a summary of results of some of
3 our work. State Water Board Staff did agree with
4 our negotiating team, which was Vice President
5 Fouche and I, Mr. Miller and Mr. Bleskey, along
6 with Assemblyman Blakesley and the State Water
7 Board Staff. They agreed with us. We had
8 something that looked do-able and less expensive.
9 Less O&M.

10 So this is what we went for. And this
11 is why we wanted to get the state revolving fund
12 loan changed. So this is just a summary of that.
13 The pond east of town would have had the 21, and
14 the MBR Tri-W was 46. So we convinced Mr.
15 Polhemus that we had a do-able proposal. He took
16 it back to his Board, and they kiboshed the loan.
17 He came here in full -- with full willingness, and
18 he told us, I have full authority to negotiate
19 with you. I can, on behalf of my agency, I'm
20 coming here in good faith. We spent a week. We
21 came up with something.

22 So, anyhow, this is jus a -- this is a
23 summary from some of those negotiations I thought
24 you might be interested in that.

25 Going on to the planned O&M costs, it

1 was a question that I think, Mr. Young, you asked
2 about, could you break out the cost of O&M for the
3 plant versus the ponds. And this data comes from
4 Montgomery Watson Harza's work, 2003. It hasn't
5 been escalated completely to 2005, but it's close
6 enough that you could see and we could show the
7 state that our O&M, which is really the big cost
8 over time, is much less with the ponding system
9 It's about half.

10 So this is some of the data we presented
11 in our negotiations; just some that I thought you
12 would also find interesting.

13 CHAIRPERSON YOUNG: Ms. Schicker, how do
14 those numbers on the right differ from the numbers
15 we heard earlier --

16 MS. SCHICKER: Yes, Mr. Buel gave you
17 the overall project, disposal and collection and
18 included.

19 CHAIRPERSON YOUNG: Okay.

20 MS. SCHICKER: And this is just the
21 plant.

22 CHAIRPERSON YOUNG: Just the facility.

23 MS. SCHICKER: And that was the question
24 you had asked, --

25 CHAIRPERSON YOUNG: Okay.

1 MS. SCHICKER: -- I think. This was
2 some summary of the benefits noted in the
3 compromise that we worked out with the state staff
4 before it went to the Board. We thought we could
5 get the collection going right away. We could
6 address more of those deferred costs that I listed
7 for you, the groundwater intrusion, the salt --
8 the ag exchange, the groundwater recharge and the
9 salt water intrusion. We thought we could get
10 more bang for the buck, more water quality goals.

11 We thought about -- we offered to
12 consider sewerage outside the prohibition zone.
13 I've talked to many people, as an elected, who
14 said that more people want to hook up, not less,
15 but more. They can't do that with this downtown
16 plant.

17 So we were getting initial feedback that
18 maybe we could sewer the whole town. So, we
19 thought that was a good idea. And, again, the
20 out-of-town would provide for future modifications
21 for treatment when necessary to improve water
22 quality.

23 BOARD MEMBER SHALLCROSS: I'd like to
24 ask you a quick question about the negotiations.
25 Procedurally you guys came to some sort of an

1 agreement at some point, and you went back to your
2 Board for a vote and you agreed to it.

3 And then I'm assuming Mr. -- what's his
4 name?

5 CHAIRPERSON YOUNG: Polhemus.

6 BOARD MEMBER SHALLCROSS: -- Polhemus
7 went back to his Board, and at that point did they
8 also vote to agree to it?

9 MS. SCHICKER: It actually went back to
10 their staff first, and the staff put the kibosh on
11 it before it ever went to the Board. They never
12 went back to -- his staff above him went. And I
13 understand there were also some Board Members that
14 were negotiating with Mr. Polhemus during that
15 week and Mr. Blakesley --

16 BOARD MEMBER SHALLCROSS: Okay.

17 MS. SCHICKER: -- were a part of that
18 negotiation.

19 BOARD MEMBER SHALLCROSS: So it never
20 went back to the Board for a vote.

21 MS. SCHICKER: Not that --

22 BOARD MEMBER SHALLCROSS: Is it your
23 understanding that it needed to go back to the
24 Board for a vote for them to accept it?

25 MS. SCHICKER: What they told us at the

1 staff level was that it was too risky and they
2 weren't even going to agendize it. We had thought
3 that --

4 BOARD MEMBER SHALLCROSS: No, I'm sorry,
5 what I meant was would the Board have had to have
6 voted to accept it in order for it to take effect.

7 MS. SCHICKER: Yeah. We had thought we
8 were going to be agendized. And we were quite
9 surprised, actually, that we weren't even on the
10 agenda.

11 And so we had thought for sure that we
12 were going to be going before a Board to finalize
13 it just like we had done with our Board hearings,
14 et cetera.

15 BOARD MEMBER SHALLCROSS: So the Board
16 never voted on it. Okay. Thank you.

17 MS. SCHICKER: This is just a few of the
18 benefits in the compromise. This is something
19 that I spoke with Mr. Polhemus with, and maybe you
20 guys can ask him that tomorrow.

21 We have a clip. So this comes from the
22 January meeting when we were going back to get the
23 loan. This has to do with what would happen if
24 there was a recall and we wanted to change the
25 project. This is from staff, State Water Board

1 Staff, in January 2005.

2 (The following video was played:)

3 MR. SPEAKER: -- come back. If you
4 approve this \$93 million loan for the
5 project before us, and if the community
6 decides to change their mind at some
7 point in the future, they could come
8 back and ask you to change the project.
9 But you would basically then need to
10 recommit and consider that. And that's
11 at this Board's discretion on how they
12 want to treat that."

13 MS. SCHICKER: I know one of you asked
14 me, what gave you the impression that you could do
15 this. And I have to tell you, this was part of
16 the -- this is definitely --

17 CHAIRPERSON YOUNG: Okay, but what I
18 clearly take from that image is that it's within
19 the State Board's discretion. I certainly would
20 not go to the bank on a statement like that from,
21 you know, staff that the Board has to do it. And
22 I think I'd certainly want to be very clear in my
23 mind before relying upon that that he said.

24 MS. SCHICKER: Absolutely, Mr. Young.

25 CHAIRPERSON YOUNG: Yeah.

1 MS. SCHICKER: And just so you know, we
2 did actually meet with Mr. Polhemus for about five
3 hours outside of the Board hearing to discuss
4 details about this. Because we wanted to make
5 sure that this was a possibility.

6 And, of course, he said it's a Board
7 action. We understand that, we're a Board, we
8 understand how that works.

9 But because this summer, because they
10 knew about Measure B and the recall and all that
11 before they let the money, we didn't really
12 believe that after the election that there would
13 be a change. If they knew about it before and
14 they let the money out, less than one month before
15 an election, why would it matter afterwards?

16 We were totally committed to a project.
17 He knew that. We'd been talking to him for a
18 couple years now. And he was totally, he knew
19 that we wanted a project. And he knew about
20 Measure B beforehand, the Board knew, the staff
21 knew, everybody knew.

22 So if they were so concerned about it
23 before, that's the question that we asked, why did
24 they let the money out. Because now we're in a
25 bigger mess and we didn't have to be. We were

1 ready to go. We had our -- we were ready to get
2 to work right away. We didn't want any delays.
3 We don't believe in the delays. We want to get it
4 fixed completely.

5 Chuck, do you want to do your part now?

6 MR. CESENA: Do we have time?

7 MS. SCHICKER: Yeah, really quick. We
8 have a little more time. Mr. Cesena. Really
9 quick.

10 CHAIRPERSON YOUNG: Mr. McClendon,
11 you're down to 21 minutes of that additional 30.

12 MR. CESENA: Okay, I'm going to make
13 this quick then. The community's been living
14 under the threat of fines for a long time. This
15 has always been a tactic --

16 MS. SCHAFFNER: I'm sorry to interrupt,
17 sir, but could you please introduce yourself.

18 MR. CESENA: Chuck Cesena; I'm one of
19 the Directors of the CSD Board.

20 MS. SCHAFFNER: Thank you.

21 MR. CESENA: I've been in the
22 environmental planning field for 25 years, and
23 deal with permitting and all of the factors
24 involved with developing public works projects.

25 It's always been a tactic of the

1 previous Board to come to the community and say,
2 if you don't go along with what we're telling you
3 you're going to get fined. And the most blatant
4 example would be in July of 2005 when Director
5 Legros, I believe came to your meeting, talking
6 about \$11 million in fines, pretty much asked you
7 to levy a fine.

8 Came back to the community and told us
9 that if we voted to move the sewer there would be
10 \$11 million in fines even though he did not get
11 your Board to say that that definitely would
12 happen. He came back and presented that to us as
13 a definite done deal.

14 Following Chairman Young's advice, I
15 think this was given at the Monarch Grove ACL
16 hearing. There was a reference made that staffs
17 should get together and try and work these things
18 out before they have to come to the Board, and we
19 agree with that.

20 CHAIRPERSON YOUNG: And I've said that
21 many times.

22 MR. CESENA: Oh, absolutely.

23 CHAIRPERSON YOUNG: I don't want these
24 things coming to this Board like this.

25 MR. CESENA: I don't think anyone wants

1 to be here today, that's for sure.

2 To that effect, immediately after the
3 election we formed a compliance team to meet with
4 Regional Board Staff. I believe October 6th was
5 the day that that meeting took place.

6 Unfortunately, it wasn't really very productive.

7 We wanted to start discussions regarding
8 the septic tank maintenance district, something
9 that was ordered by this Board back in what, 1983,
10 but never implemented. Why has that been
11 overlooked? We could have been pumping the upper
12 aquifer to provide a greater separation between
13 leach fields and the groundwater all this time.
14 It was never ever -- all these things we wanted to
15 come talk about getting going.

16 Maybe it was just too late because of
17 the history and acrimony between community and
18 staff. And that's exemplified by this next slide.
19 You probably remember seeing this in the past.
20 Not only was this a slam at our community, it
21 managed to rip the Coastal Commission, even took a
22 swing at law enforcement. And all of this was
23 prepared by a staff member who worked for Mr.
24 Briggs. So maybe there was just too much poison
25 for us to work together now.

1 MS. OKUN: I object to this slide and
2 move that it be stricken from the record.

3 (Audience participation.)

4 MR. CESENA: It's a fact it was prepared
5 by --

6 MS. OKUN: It's irrelevant, it's
7 inflammatory. It was done by a staff person on
8 his own time. It's already been investigated.

9 CHAIRPERSON YOUNG: Well, was this
10 something --

11 MR. CESENA: It does call into question
12 the ability of staff to carry out the duties under
13 the ACL.

14 CHAIRPERSON YOUNG: Was this something
15 that was marked as an exhibit?

16 MR. CESENA: Yes.

17 CHAIRPERSON YOUNG: Okay. You know, it
18 is a newspaper article --

19 MR. CESENA: No. No, no, no, no, this
20 was a cartoon distributed at a CSD Board meeting.

21 CHAIRPERSON YOUNG: Okay. What is the
22 relevancy of this?

23 MR. CESENA: It refers back to the
24 ability for staff to work with us, to be civil.

25 CHAIRPERSON YOUNG: How is that relevant

1 to the District's defense to the ACL, and perhaps
2 Mr. McClendon should answer that question.

3 I see it as irrelevant.

4 MR. CESENA: I could throw in one
5 comment. We were told today that people normally
6 come in and start working with us toward
7 compliance immediately if there's a new board or
8 when an ACL is issued. And we did that.

9 My point being maybe it's just too late.
10 Maybe there was no point in trying to come and
11 work things out with staff, even though we've been
12 given that direction.

13 CHAIRPERSON YOUNG: Okay. I'm not going
14 to allow it to come in for the reason that there's
15 probably been many cartoons like this, different
16 depictions. I don't see what purpose it serves to
17 what's at issue here.

18 MS. OKUN: Also, for the record, this
19 was drawn by a staff person who was a resident of
20 Los Osos, but never worked on the project, as far
21 as I know, for the Board. And no longer works for
22 the Board.

23 CHAIRPERSON YOUNG: So this was done by
24 a --

25 MS. OKUN: A staff person.

1 CHAIRPERSON YOUNG: -- resident of Los
2 Osos, okay.

3 MR. CESENA: These are some of the
4 comments that we've heard today that we take
5 objection to: that the current project is the
6 least costly means of resolving water quality
7 problems in Los Osos. We think we demonstrated,
8 along with Mr. Polhemus that that's not true.

9 Pollution of Morro Bay and the
10 groundwater resources will continue until the
11 community sewer is complete. I guess what this
12 alludes to is that once we build that system the
13 pollution will stop or somehow go away.

14 It'll take 30 years if we're putting 7
15 mg/L nitrate water back into the upper aquifer to
16 drop 1 mg to get us down to the drinking water
17 standards.

18 We feel that an ag exchange program east
19 of town, where we're not putting nitrate-laden
20 water back into the ground would be a quicker way
21 to deal with the pollution.

22 CHAIRPERSON YOUNG: Are the farmers
23 willing to accept water like that in the winter?

24 MR. CESENA: I talked to one a year and
25 a half ago who said he'd take 200,000 gallons a

1 day in the dry season, that's a quarter --

2 CHAIRPERSON YOUNG: The winter is what I
3 asked about.

4 MR. CESENA: Okay, --

5 CHAIRPERSON YOUNG: When it's raining do
6 farmers need to take water?

7 MR. CESENA: We would probably need
8 Broderson and we would need some wet weather
9 storage. But there's a lot of land out there that
10 would make storage ponds and that sort of thing
11 much more feasible.

12 The Coastal Commission even required an
13 ag exchange program. It's coming. I mean they
14 fought it in the Pajaro River Basin, the Salinas
15 River Basin. It's -- change is always dealt with
16 with trepidation.

17 And obviously we share the water basin
18 with the farmers; we're all in this together. So
19 we think we have to work with them, and we hope
20 they want to work with us.

21 The delays are wasting millions of
22 dollars. We think if we can deliver a cheaper
23 project that obviously would be false.

24 Thank you.

25 MS. SCHICKER: Just a few more things

1 coming out of the negotiation I thought would be
2 of interest to you.

3 We also in negotiation, and as part of
4 our task force and elected roles, we believe in
5 all these things to help immediately, to help the
6 water quality problems in Los Osos.

7 Short-term and interim pollution control
8 methods include leachate treatment systems for
9 specific sites. We can relate those to the map
10 that you just saw.

11 Pumping for irrigation and ag exchange.
12 Begin immediate pump down of the upper aquifer to
13 allow further denitrification to occur in the soil
14 matrix. We think that's a quick solution that we
15 could start on right away.

16 And then finally, additional well
17 production in the east basin, thereby allowing
18 reduced pumping in the deep west basin.

19 We proposed all of these in the
20 negotiations with Mr. Polhemus, and he was
21 amenable to these, as well.

22 We want to immediately implement
23 emergency water conservation. We want to adopt an
24 ordinance and a program. As a matter of fact,
25 we're scheduling another Board meeting tomorrow

1 night, Friday night, and all of these things are
2 on the agenda. We're going to go forward with
3 them, nonetheless. We have all these things on
4 the agenda. I'd encourage anybody to come and
5 hear what we have to say.

6 CSD is signatory to the California Urban
7 Water Conservation Council implementing BMPs; ID
8 the high groundwater leachate failures and fix
9 them; review for possible collection and
10 treatment.

11 And then finally, we are committed to
12 establishing a septic tank management district.
13 And when I say we, I'm bringing it before the
14 Board and the public. And to begin by serving
15 onsite for implementation of AB-885.

16 Just to assure you and encourage you
17 that we are on it, as far as the water quality,
18 water conservation and things, we have great
19 goals. We're very excited to get going.

20 This last two months has been pretty
21 painful for us because we've been waylaid by the
22 loan and the fine issues that we've had to deal
23 with. They've taken a great amount of time. But
24 we're not giving up.

25 And, again, we understand the

1 supplemental environmental program and projects.
2 And we would encourage you to consider those for
3 us, as well. And we have lots of ideas about how
4 we could get those going.

5 And this comes from your staff report,
6 again, in July of '04, about how they work. And
7 we're familiar with them. We know we'd have some
8 great ideas for Los Osos if you'd be willing.

9 So, that kind of summarizes my
10 presentation. But we need to go back to Mr.
11 Bleskey to finish the timeline.

12 CHAIRPERSON YOUNG: Fourteen minutes.

13 MR. BLESKEY: The remainder of my
14 presentation is just going to be to make the point
15 that we've used and exhausted any and every
16 contract remedy to get the work going again. And
17 our commitment to doing that.

18 You've heard all about the negotiations.
19 That was a do-able deal. That was a bilateral
20 agreement, supplemental to the scope of the
21 original project. It's been my experience
22 personally, as well as professionally, that
23 there's only two contracts that can unilaterally
24 be modified. One is no-fault divorce in
25 California, can't do anything about that one. The

1 other one is DOD contracts for the federal
2 government, but remedies are provided under the
3 Claims Act.

4 And those remedies for the unilateral
5 actions of the federal government in the
6 administration of defense-related contracts,
7 especially in war time, have severe penalties.

8 I'm not aware of anything else that
9 allows an agency to dictate terms that are out of
10 scope in the form of a supplemental agreement that
11 are mandated by one party in a bilateral
12 agreement. That's for the courts to sort out.
13 Normally that's done through the form of
14 negotiations.

15 Negotiations cannot occur unless both
16 parties can agree an effective negotiation range.
17 We thought we had that. That was removed. And
18 now the SRF loan has violated the terms of its
19 contract.

20 We have issued -- there's a term that
21 you're going to hear here, and when does
22 construction start? Number one, the issuance of a
23 notice to proceed. That starts the clock.

24 What constitutes a delay? Delay is only
25 the impacts on the critical path of the agreed-to

1 and approved construction schedule. There is no
2 construction schedule for this project, period.
3 it doesn't exist. There's no baseline, and the
4 ability to negotiate what are the actual impacts
5 of a construction claim will be very very
6 difficult because of the lack and the failing of
7 the consultants to actually be consultants in
8 charge of that to implement that project.

9 I have never seen a contract of this
10 complexity that allowed start of construction
11 without an agreed-to construction schedule.

12 The schedule was crashed from the
13 beginning; front-loaded. And the only thing that
14 you can say about it, when looking at it, is that
15 it was to get the maximum amount of work in the
16 dirt in the form of the ability to issue
17 subcontracts and equipment orders that would bind
18 the CSD through a form of -- by using, you know,
19 accelerating the schedule in the beginning, which
20 is ludicrous. You don't invoke emergency contract
21 measure when you start a contract. You wait until
22 you have an emergency. That was not done on this,
23 and that's a very detailed discussion by
24 professionals that would be able to discuss in
25 detail.

1 I don't want to go over that. But those
2 are the things that we faced.

3 It's my professional opinion that when
4 counsel for this Board went and represented a
5 private entity without a amicus prior to, and
6 sitting at the table of a party that they were not
7 -- this Board was not a party to this suit,
8 representing them constitutes a form of contract
9 interference.

10 CHAIRPERSON YOUNG: Wait, you're
11 referring to Ms. Okun?

12 MR. BLESKEY: Yes, I am.

13 CHAIRPERSON YOUNG: And who are you
14 saying she was representing?

15 MR. BLESKEY: She was with -- she tried
16 to -- she was with Taxpayers Watch Group, and she
17 was sitting at a table --

18 CHAIRPERSON YOUNG: You said she was
19 representing --

20 MR. BLESKEY: She said that she -- yes,
21 that's correct.

22 (Parties speaking simultaneously.)

23 MR. BLESKEY: She said -- no, she was
24 representing this Board there to provide
25 information on a claim in a suit that she was not

1 a party to.

2 It's my contention that from a
3 contractually related matter is that if I were
4 going to pursue this claim, that the claim was
5 purchased at that time back to the point where we
6 used our contractual remedies between the parties
7 to suspend the work to assess the project status.
8 That's a remedy that is granted us. We've been
9 denied that remedy.

10 Secondly, there was a failure of
11 notification because we had a conversation with
12 Mr. Evoy and their staff that was witnessed by
13 other members on a conference call where Mr.
14 Moore's name was brought up as having talked to
15 them. He is not a party to the contract with the
16 SEF in this District.

17 The SEF Staff has failed in every way to
18 use the required notification clauses. It failed
19 to grant us a cure, which is instrumental into
20 remedying construction deficiencies, and did not
21 issue a notice to -- basically a show-cause letter
22 why we should be terminated.

23 They threatened termination at the
24 beginning. Realizing that termination was not an
25 option to them, they withheld funding. The funds

1 were withheld based upon statements made by
2 parties outside the contract, and not through the
3 proper notification clauses of the contract.

4 This is why we find ourselves in a delay
5 today. We have acted responsibly, and we are
6 having a difficult time with the SRF. And they're
7 kind of tying our hands behind our back, and
8 basically forcing us into a claim situation where
9 we can negotiate this. There are tools available
10 that they failed to realize they're required to.

11 Especially if they get in the federal
12 arena, because the money on this project is
13 colored federal. Once that happens, and if we can
14 get into that arena, then we're confident that
15 we're going to be back at the table working this
16 out.

17 We have filed a claim. We have notified
18 the District Attorney about certain actions. And
19 we have notified the Inspector General of the EPA.
20 And I've made initial contacts right now with the
21 Congressional Office of Management and Budget.
22 Because these types of things really make no sense
23 to fight when we have tools to fix.

24 So the delay, in my opinion, and you
25 know, I've been proved wrong before, but I feel

1 fairly comfortable that the team on the other side
2 should take heart because we are willing to
3 negotiate. We've proved that.

4 We've had the rug pulled out from
5 underneath us, and that doesn't matter anymore.
6 Because it's what we do from here on to mitigate
7 these damages. And we've been damaged. Our
8 contractors have shown tremendous faith. But,
9 still, they can only take so much. It's a tragedy
10 on their part.

11 And I'm going to leave it there and go
12 with questions.

13 CHAIRPERSON YOUNG: Okay, let's --

14 MR. BLESKEY: -- thank you.

15 CHAIRPERSON YOUNG: -- do this. We've
16 got -- you have seven minutes left. And we are at
17 a quarter of eight, and I said we would stop, and
18 we're going to stop.

19 And let's talk about when we're going to
20 resume this tomorrow. Mr. McClendon, would your
21 team be ready to resume at 8:30?

22 We could also do it at 1:30. We do have
23 an agenda that we're now going to have to amend --

24 MR. McCLENDON: Okay, I --

25 CHAIRPERSON YOUNG: -- to continue with

1 this. And so I'm going to ask Mr. Briggs --

2 MR. McCLENDON: Sounds like --

3 CHAIRPERSON YOUNG: -- what's also do-
4 able.

5 MR. McCLENDON: Sounds like everyone's
6 on board for 8:30.

7 CHAIRPERSON YOUNG: Well, let me ask Mr.
8 Briggs. Can we -- I know we have staff reports
9 that maybe can be deferred to another Board
10 meeting. We don't meet, you know, every week or
11 every two weeks. We meet about ten times out of
12 the year. And so to call a special meeting which
13 we do with panels, you know, that's how this
14 operates.

15 So, I think --

16 MR. BRIGGS: Mr. Chairman, we have folks
17 who are planning on attending for other Regional
18 Board Business at 8:30 in the morning. I think it
19 would be preferable to take care of as much of
20 that business as possible say by 11:00. We can
21 defer the status reports and the nonaction items.
22 But I think we could take care of the bulk of the
23 agenda and perhaps continue this item at 11:00 or
24 sometime after that.

25 CHAIRPERSON YOUNG: Okay. Mr.

1 McClendon, would that be do-able? Mr. Seitz?

2 MR. McCLENDON: Sounds like 11:00 works
3 for our side.

4 CHAIRPERSON YOUNG: Okay, good. All
5 right, so we will do that. That will give
6 everyone time anyway to review their notes, think
7 about what else they want to say and get into.
8 And I think we will then resume with cross-
9 examination by Regional Board Staff.

10 MS. OKUN: I have a --

11 CHAIRPERSON YOUNG: Yes.

12 MR. BRIGGS: Has the District concluded
13 their remarks? It sounded like they finished up.

14 CHAIRPERSON YOUNG: Yeah, are you guys
15 finished with your case? I think you probably
16 are, you've got seven minutes left that I think
17 you want to maybe wrap up with your closing
18 arguments.

19 MR. McCLENDON: Tomorrow --

20 CHAIRPERSON YOUNG: Yeah, tomorrow with
21 that. I mean, you know, and if there is really
22 something else that you want to get in, Mr.
23 McClendon, other testimony, please discuss it with
24 Ms. Okun and Ms. Schaffner and with me in the
25 morning, and we'll take a look at that.

1 MR. SEITZ: Okay. Will Ms. Okun be,
2 your staff be involved in your meetings from 8:30
3 to 11:00? I'm just trying to figure out how we
4 can really address your --

5 CHAIRPERSON YOUNG: Well, we do have the
6 Monarch Grove --

7 MR. SEITZ: Oh, do you? Okay.

8 CHAIRPERSON YOUNG: -- issue which
9 because a panel hearing did that, the full Board
10 now has to adopt or consider adopting the panel's
11 recommendation. So Ms. Schaffner is actually
12 going to be involved in that, not Ms. Okun.

13 MR. SEITZ: Okay.

14 MS. OKUN: Well, no, I'm going to be
15 here representing staff.

16 CHAIRPERSON YOUNG: Representing staff.

17 MR. SEITZ: Okay, I was just wondering
18 about the availability of us getting together with
19 Lori tomorrow.

20 MS. OKUN: No.

21 MR. SEITZ: It seems like it's pretty
22 slim.

23 CHAIRPERSON YOUNG: Right.

24 MR. SEITZ: Okay.

25 CHAIRPERSON YOUNG: Right.

1 MS. OKUN: I have a couple other
2 housekeeping items.

3 CHAIRPERSON YOUNG: Okay, go ahead.

4 MS. OKUN: We have three copies of the
5 CalCities record index, so we can give them all to
6 the District. If you and Ms. Schaffner want
7 copies, we can give those to you now.

8 CHAIRPERSON YOUNG: Okay, that's fine.

9 MS. OKUN: I issued subpoenas yesterday
10 for the settlement agreement that involved Measure
11 B. And I haven't seen anything. I don't know if
12 that's here or --

13 CHAIRPERSON YOUNG: Okay, --

14 MS. OKUN: -- if there's a copy for us.

15 CHAIRPERSON YOUNG: -- can we get ahold
16 of that, Mr. McClendon? Was there a settlement
17 agreement entered? With respect to the District
18 dismissing its complaint in Superior Court.

19 MR. McCLENDON: Well, I did it. Now
20 that you bring that up, I do have a couple of
21 issues with that. One is the timeliness of the
22 request. You know, under title 23 of your reg
23 648.4 it's the policy of the State and Regional
24 Boards to discourage the introduction of surprise
25 testimony and exhibits.

1 So I think it's at least fair to ask
2 what's the probative value of this, what's the
3 relevance?

4 CHAIRPERSON YOUNG: Okay. Do you --

5 MS. OKUN: Well, in terms of the timing,
6 if the District had done us the courtesy to tell
7 us that they've dismissed that case, we could have
8 subpoenaed the settlement agreement earlier.

9 (End Tape 3B.)

10 MS. OKUN: In terms of the relevance, a
11 large part of the District's defense rests on
12 Measure B; and it's relevant to what actions
13 they've taken to perpetuate or eliminate Measure
14 B.

15 CHAIRPERSON YOUNG: Why don't we do
16 this. If you can have it with you and then we can
17 maybe continue this discussion as to whether it
18 should be used or not tomorrow.

19 MR. McCLENDON: I would --

20 CHAIRPERSON YOUNG: Is it readily
21 available to you.

22 MR. McCLENDON: I would point out
23 that -- yes, I can make it available. But, too,
24 if it's going to become a topic of discussion that
25 discussion is not a matter of a few minutes. I

1 think there's a fair amount of elaboration that
2 needs to be explained and what went into that
3 settlement.

4 CHAIRPERSON YOUNG: Okay, well, we'll
5 take that up tomorrow on our clock, okay, not
6 yours.

7 MS. OKUN: And then --

8 CHAIRPERSON YOUNG: And anything else,
9 Ms. Okun?

10 MS. OKUN: -- does the Board want copies
11 of the letters from Monterey Mechanical to the
12 District, and from the District to Monterey
13 Mechanical? They're in the record. I don't know
14 if you have copies --

15 CHAIRPERSON YOUNG: Sounds like Mr.
16 Jeffries does, so I guess the answer is yes.

17 Anything else?

18 MS. OKUN: No, that's it, thank you.

19 CHAIRPERSON YOUNG: Okay, folks, thank
20 you for being patient. And we will resume this
21 agenda item at 11:00 tomorrow. Thank you.

22 (Whereupon, the Regional Water Quality
23 Control Board Public Hearing was adjourned, to
24 reconvene at 11:00 a.m., Friday, December 2, 2005,
25 at this same location.)

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript from the electronic sound and DVD recordings of the proceedings in the above-entitled matter, to the best of my ability.

Margo D. Hewitt

Official Transcriber

Date