

Central Marin Sanitation Agency  
INFORMATIONAL ITEMS

June 9, 2009

- I-1 Letter dated 5/18/09 from the Department of the Army Re: File Number 2008-00448 N: Central Marin Sanitation Agency—Marine Outfall Maintenance, Tier I Request; DMMO Serial Number: 08-052
- I-2 Letter dated 5/20/09 from Jack Govi, Assistant County Counsel Re: CASA Conference: April 30—May 2<sup>nd</sup>, 2009.
- I-3 Letter dated 5/22/09 from California Association of Sanitation Agencies Re: Appeal of Trial Court Decision in City of Vacaville NPDES Permit Case—Request for Financial Support
- I-4 Letter dated 5/27/09 to the California Regional Water Quality Control Board Re: Monthly Self-Monitoring Report (SMR)—Month of April 2009
- I-5 Letter dated 6/1/09 from Thomas Capriola, Attorney, McDonough Holland & Allen Re: February 4, 2009 Public Records Act Request



DEPARTMENT OF THE ARMY  
 SAN FRANCISCO DISTRICT, CORPS OF ENGINEERS  
 1455 MARKET STREET  
 SAN FRANCISCO, CALIFORNIA 94103-1398

MAY 18 2009

Operations and Readiness Division (1145b)

SUBJECT: File Number 2008-00448 N: Central Marin Sanitation Agency – Marine Outfall Maintenance; Tier I Request; DMMO Serial Number: 08-052

Mr. Jason Dow  
 Central Marin Sanitation Agency  
 1301 Andersen Drive  
 San Rafael, CA 94103-1398

RECEIVED  
 MAY 26 2009

CENTRAL MARIN  
 SANITATION AGENCY

Dear Mr. Dow:

The U.S. Environmental Protection Agency, San Francisco Bay Conservation and Development Commission, San Francisco Bay Regional Water Quality Control Board, and the Corps of Engineers, have completed their review of your request for a Tier I decision for the approximately 22 cubic yards of sediment proposed to be dredged from the exterior of the Central Marin Sanitation Agency (CMSA) Marine Outfall located in the City of San Rafael, Marin County, California. This request was initially made in a letter addressed to the U.S. Army Corps of Engineers dated November 10, 2009 and revised by you subsequent permit application to the U.S. Army Corps of Engineers dated March 18, 2009.

The members of the above inter-agency group are recommending to their respective agency's management that a Tier I decision is appropriate for the material proposed to be dredged from the exterior of the CMSA Marine Outfall, as characterized in the above letters. The material is suitable for unconfined aquatic disposal immediately adjacent to the Marine Outfall, within a 20-foot radius from the dredging location.

**Please note that this letter does not constitute an authorization to proceed with your dredge project. You must first obtain Federal, State and local permits as appropriate.**

If you have any questions please call me at (415)503-6808 or write to me at the above address and refer to the file number at the head of this letter.

Sincerely,

Robert J. Lawrence  
 Chief, Dredged Material Management Office  
 Operations and Readiness Division

Copies Furnished:

Central Marin Sanitation Agency, San Rafael CA, Attn: Ken Katen

US EPA, San Francisco, CA, Attn: Brian Ross

CA BCDC, San Francisco, CA, Attn: Brenda Goeden

CA RWQCB, Oakland, CA, Attn: Beth Christian

CA SLC, Sacramento, CA, Attn: Donn Oetzel

CA F&G, Monterey, CA, Attn: George Isaac

CA F&G, Eureka, CA, Attn: Vicki Frey

NOAA Fisheries, Santa Rosa, CA, Attn: Korie Schaeffer, David Woodbury

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COUNTY COUNSEL

JACK F. GOVI  
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01/09  
I-2  
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STEVEN M. PERL  
SHEILA SHAH LICHTBLAU  
EDWARD J. KIERNAN  
JESSICA F. MILLS  
DEPUTIES  
JEANINE MICHAELS  
ADMINISTRATIVE ASSISTANT

May 20, 2009

Jason Dow  
General Manager  
Central Marin Sanitation Agency (CMSA)  
1301 Andersen Drive  
San Rafael, CA 94901

RECEIVED  
MAY 22 2009

CENTRAL MARIN  
SANITATION AGENCY

**Re: CASA Conference: April 30 – May 2<sup>nd</sup>, 2009**

Dear Jason,

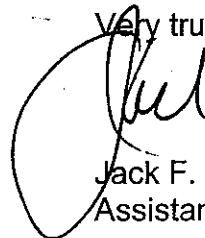
I want to take this opportunity to thank you and the Board for sending me to the annual spring CASA Conference.

The CASA Conferences are always very informative and afford the opportunities to obtain a regular update on "sanitation" issues and to exchange ideas with other CASA attorneys.

At the regular Attorney Committee's Meeting, numerous issues were presented and discussed including proposed 2009 Legislation, Chaptered Legislation and General Committee Items including the CASA Sewer Lateral Task Force, CASA Litigation Policy Revisions, Legal Notices, Clean Water Act Citizen Suit Update, New Case Law and Litigation.

Again, I appreciate the opportunity to attend the spring conference and look forward to working with you on important issues relating to CMSA.

Very truly yours,



Jack F. Govi  
Assistant County Counsel



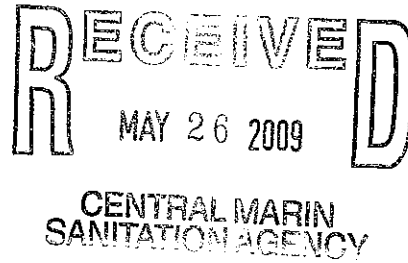
JD 5/2/09

# I-3

# CALIFORNIA ASSOCIATION of SANITATION AGENCIES

1215 K Street, Suite 2290 • Sacramento, CA 95814 • TEL: (916) 446-0388 – FAX: (916) 231-2141 • www.casaweb.org

May 22, 2009



Jason Dow, GM  
Central Marin Sanitation Agency  
1301 Andersen Drive  
San Rafael, CA 94901

**RE: Appeal of Trial Court Decision in City of Vacaville NPDES Permit Case—  
Request for Financial Support**

Dear Jason:

On behalf of the California Association of Sanitation Agencies (CASA), I am writing to request your support for an important ongoing legal effort. On April 7, 2009, the Contra Costa County Superior Court issued a final order with far-reaching impacts for California's wastewater treatment agencies. The Court upheld the precedential State Water Resources Control Board Order regarding the permit issued to the City of Vacaville. (WQO 2002-0015.) CASA and Vacaville challenged a number of provisions in the State Board Order, including the State Water Board's affirmation of the Regional Water Board's beneficial use designations and effluent limitations based on the Sources of Drinking Water Policy (Resolution 88-63) and the Basin Plan's so-called "Tributary Statement." CASA and Vacaville also challenged the use of water quality objectives that incorporate standards adopted by other agencies.

After lengthy proceedings involving numerous motions and other procedural issues, the Court's final decision rejects the challenges filed by CASA and Vacaville. Notably, the brief decision cites little supporting legal authority or facts contained in the voluminous administrative record. The Court did not simply accept the State Water Board's arguments and conceded that the regulatory process Vacaville underwent is less than ideal. However, the Court held:

While ... the process is less than efficient. . . [it] does not appear to lead to arbitrary or capricious results ... and thus is not illegal. It is not the role of the judiciary to determine which regulatory scheme is 'best' or 'most functional.' If it were, the Court would certainly recommend a different approach here. (*City of Vacaville vs. State Water Resources Control Board, Decision and Order Upon Cross-Motions for Summary Judgment or Adjudication*, Contra Costa County Superior Court, No. N03-0956 at pp. 2, 10.)

The CASA Executive Board has approved the filing of an appeal, which will occur this summer. As we discussed at the Spring Conference, CASA is requesting your agency's financial assistance to appeal the Court's decision. Traditionally, CASA has relied on voluntary contributions for litigation from members and other public

**Executive Board**

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Fairfield-Suisun Sewer District

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Dublin San Ramon  
Services District

**JOHN E. HOAGLAND**  
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City of Fresno

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East Bay Municipal Utility District

**CATHERINE SMITH**  
Executive Director

**MICHAEL F. DILLON**  
Lobbyist

**GREG KESTER**  
Biosolids Program Manager

**ROBERTA LARSON**  
Director of Legal and  
Regulatory Affairs

**ERIC SAPIRSTEIN**  
Federal Legislative Advocate

agencies with an interest in the issues. Without additional funding, CASA will be unable to represent your agency's and other members' interests in the lawsuit.

### Background

In March 2001, the Central Valley Regional Water Quality Control Board (Regional Water Board) adopted a revised NPDES permit for the City of Vacaville's Easterly Wastewater Treatment Plant. (Order No. R5-01-044.) The Permit was one of the first issued to a discharger to an effluent-dependent waterbody (EDW) after the adoption of the California Toxics Rule (CTR) and State Implementation Policy.

The State Water Board accepted Vacaville's petition for review of the Permit. CASA was a party to the administrative proceedings. CASA argued against the beneficial uses applied to the agricultural channel into which the Easterly WWTP discharges, overly stringent effluent limits and cost of compliance. Experts testified that reverse osmosis, microfiltration and ultra violet disinfection would be necessary to comply with the Permit. CASA emphasized the statewide impacts of using a similar approach to permit other EDW dischargers in the state. CASA estimated the capital costs to be in excess of \$300 billion along with millions of dollars annually in operations and maintenance costs and a significant increase in energy demand.

In the 2002 Order, the State Water Board generally affirmed the Permit as issued. The 2002 Order failed to resolve the problem of applying CTR criteria end-of-pipe to EDW dischargers. Moreover, the 2002 Order concluded that the Basin Plan's Tributary Statement and Sources of Drinking Water Policy designated beneficial uses for the receiving waters and a use attainability analysis (UAA) is necessary to de-designate the uses. The 2002 Order sets precedent for other, similar permitting decisions by Regional Water Boards throughout California.

In 2002, CASA and Vacaville each filed suit in Superior Court challenging the Permit, associated Basin Plan provisions and State Water Board Order.

### Issues

The key issues in the case involve the Tributary Statement in the Basin Plan, Sources of Drinking Water Policy and improper water quality objectives.

#### 1. *Tributary Statement*

The case involves the application (or misapplication) of the Basin Plan's Tributary Statement. CASA and Vacaville argued that the Tributary Statement does not "designate" beneficial uses. Rather, it requires the Regional Water Board to analyze the beneficial uses of tributary streams on a case-by-case basis when proposing to apply water quality objectives to those streams. The Court concluded that since the Regional Water Board has a process to amend the Basin Plan to remove unsupported beneficial uses, the process passes judicial scrutiny. Under the Court's decision, the Tributary Statement is a "presumption" that can

be overcome if the discharger can establish that the beneficial use does not apply. (The State Water Board did not advance this argument.) What the Court did not address, however, is that the only means of rebutting this “presumption” is to amend the regulation itself—something that is not only a resource-intensive administrative proceeding outside the permitting process, but is also beyond the discharger’s ability to control.

CASA disagrees that the Tributary Statement is a burden-shifting presumption. The rulemaking record for the Basin Plan does not establish that the Regional Water Board intended for the Tributary Statement to designate beneficial uses. Even if the record can be interpreted to support such an intention, the Regional Water Board failed to analyze the factors it must consider when setting water quality objectives.

## 2. *Sources of Drinking Water Policy*

Similarly, CASA and Vacaville argued that establishing effluent limits based on a “drinking water” beneficial use derived from Resolution 88-63, the Sources of Drinking Water Policy, is unlawful. The Office of Administrative Law (OAL) found Resolution 88-63 to be an unlawful regulation. As such, Resolution 88-63 cannot be a proper basis for the Regional Water Boards to designate beneficial uses. By its own terms, Resolution 88-63 does not apply to waters such as agricultural drains—i.e., the type of drain to which Vacaville discharges. As with the Tributary Statement, the Court concluded the Regional Water Board could cure improperly designated beneficial uses by amending the Basin Plan. However, the discharger must first establish that the receiving water is not a “source of drinking water.” The process envisioned by the Court suggests that an adopted regulation such as the Basin Plan can be varied based upon evidence at the time of permitting—which is contrary to the State Water Board Order the Court upheld.

## 3. *Improper Water Quality Objectives*

The relevant Basin Plan contains water quality objectives that are based on drinking water standards or maximum contaminant levels (MCLs) adopted by the California Department of Public Health (CDPH). The Basin Plan also contains “non-detect” water quality objectives for certain pesticides, and the Basin Plan delegates the authority to the Regional Water Board’s Executive Officer and the United States Environmental Protection Agency (EPA) to approve laboratory techniques.

CASA and Vacaville argued that because the Basin Plan incorporates standards adopted by other agencies, it improperly delegates the water boards’ exclusive authority to adopt water quality objectives. When the Regional Water Board adopts objectives, it must comply with the Water Code’s mandates to attain a reasonable water quality and consider the factors in Water Code section 13241. CDPH and EPA do not have to comply with these provisions of the Water Code. Since the Basin Plan essentially allows these agencies to adopt water quality

objectives for the Regional Water Board, it bypasses the legal requirements for adopting objectives. For example, CDPH adopts MCLs to apply at the tap, after treatment. EPA adopts lab analysis standards without considering their impact on the attainability of effluent limits. The Court upheld the deference to CDPH, prospective incorporation by reference and application of a moving detection level as a water quality objective. The Court suggested that this practice was appropriate reliance on scientific expertise rather than a bypassing of the due process that is to be afforded through notice and comment rulemaking. The judge did not address the case law cited by CASA and Vacaville in support of our position that the incorporation is unlawful.

### Significance of the Lawsuit

If CASA is successful, the Regional Water Boards could adopt effluent limits for discharges to EDWs based on appropriate beneficial use designations without the need for an expensive and cumbersome UAA process. If the decision stands, each permittee must complete a lengthy UAA and Basin Plan amendment process with no certainty of a favorable outcome. Meanwhile, permits will include stringent end-of-pipe limits that require the agency to design and construct costly treatment processes even where there is no certainty the improvements will enable the agency to meet the effluent limits. While Vacaville's permit was originally issued by the Central Valley Regional Water Board, the State Water Board's Order is precedential, and applies throughout California. Almost all Basin Plans have incorporated the Sources of Drinking Water Policy and include a version of the Tributary Statement.

Equally importantly, the Vacaville appeal is important to ensure that the State and Regional Water Boards must follow the law in adopting and applying Basin Plan provisions that may result in significant expenditures of public resources. It is simply untenable to allow a system where beneficial uses designated without science, without analysis—essentially, with the stroke of a pen—become set in stone and can only be made right on a permit-by-permit basis through years of work and millions of dollars.

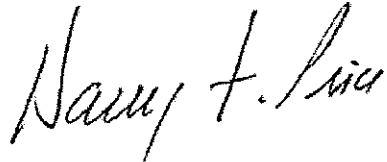
### Next Important Steps

CASA plans to appeal the Court's final decision and seek a ruling that the Regional Water Boards must follow the law when they establish beneficial uses and water quality objectives. We need your help to do this. We understand that your agency receives competing requests for its limited resources. We also recognize and appreciate that many of you contributed funds earlier in this process. CASA is grateful for the contributions and progress they helped to achieve. However, your continued financial support is vital for CASA to sustain this critical effort. The Court's decision will result in unnecessary and overly burdensome permit requirements for CASA members throughout the state, so we urge you to support the appeal.

There is no specific deadline for responding; however, in order to facilitate our budgeting and planning processes, we request that you return your pledge form by June 30, 2009.

Thank you in advance for your support of the Vacaville litigation. Your support of this important legal action will truly make a difference. If you would like additional information, please contact Roberta L. Larson, CASA's Director of Legal and Regulatory Affairs at (916) 446-7979 or [blarson@somachlaw.com](mailto:blarson@somachlaw.com).

Sincerely,

A handwritten signature in cursive script that reads "Harry T. Price".

Harry T. Price  
President

cc: Executive Board  
Mark Cornelius, Chair, Attorneys Committee  
Catherine A. Smith, Executive Director  
Roberta L. Larson, Director of Legal & Regulatory Affairs



# CENTRAL MARIN SANITATION AGENCY

I-4

Jason R. Dow, P.E.  
General Manager  
www.cmsa.us

1301 Andersen Drive, San Rafael, CA 94901-5339

Telephone No. (415) 459-1455

Fax No. (415) 459-3971

May 27, 2009

California Regional Water Quality Control Board  
San Francisco Bay Region  
1515 Clay Street, Suite 1400  
Oakland, CA 94612

Attention: Vince Christian

**RE: Monthly Self-Monitoring Report (SMR) - Month of April 2009**

Enclosed please find the monthly report for the Central Marin Sanitation Agency (CMSA) treatment plant for April 2009. There were no NPDES Permit violations in April.

Effluent results for Antimony, Cadmium, Lead, Selenium, Silver, and Cyanide have been "J-flagged" by Caltest Analytical Laboratory. This means these constituents were detected and the concentrations that were reported are Estimated Concentrations. Note that in the electronic reporting, numerical J-flagged values will be reported and commented as DNQ (Do Not Quantitate). The Final Effluent results for Beryllium and Thallium were reported as "ND" by Caltest Analytical Laboratory. This means that these compounds were not detected at or above the listed Method Detection Limit (MDL). Note that in the electronic reporting, constituents reported as ND will be reported as less than (<) the value listed as the MDL.

EPA Forms 3320-1 that reflect CMSA's NPDES Permit, Order #R2-2007-007 that went into effect on April 1, 2007 have been completed. As of the October 2004 monitoring period, EPA Forms 3320-1 have been submitted to the State Water Resources Control Board as requested in the letter sent out by USEPA Region 9, Alexis Strauss, dated October 7, 2004. The 3320-1 forms have been sent since the June 2006 reporting period to the new address that was emailed on July 7, 2006 from the DMR Processing Center. We received notification from the DMR processing center in January 2009 that forms will now be emailed in electronic format. The 2009 forms were emailed on February 18 and will be used for reporting for calendar year 2009.

CMSA also plans to submit this report electronically.



If there are any questions please contact me at (415) 459-1455, ext. 142. Quality assurance data are available for all test results cited in this report. Values reported are measured values and are each subject to analytical variability. CMSA reserves the right to question data in an enforcement proceeding.

I certify under penalty of law that this document and all attachments are prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gathered and evaluated the information submitted. Based on my inquiry of the person or persons who managed the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for known violations (40 CFR 122.22(d)).



Robert N. Cole  
Environmental Services Manager

enclosures:

Caltest data  
Routine DMR data (map, spreadsheets, forms, graphs)

cc: EPA Forms 3320-1  
Division of Water Quality  
c/o DMR Processing Center  
1001 I Street, 15<sup>th</sup> Floor  
Sacramento, CA 95814



McDonough Holland & Allen PC  
Attorneys at Law

RECEIVED  
JUN 02 2009

Thomas Capriola  
Attorney at Law

Oakland Office  
510.273.8780 tel  
510.839.9104 fax  
tcapriola@mhalaw.com

June 1, 2009

CENTRAL MARIN  
SANITATION AGENCY

VIA FIRST CLASS MAIL AND FACSIMILE TO (415) 499-3796

Mr. Jack F. Govi  
Assistant County Counsel  
County Counsel of Marin County  
3501 Civic Center Drive, Suite 275  
San Rafael, CA 94903

Re: February 4, 2009 Public Records Act Request

Dear Mr. Govi:

I write regarding the Public Records Act ("PRA") request submitted by Sanitary District No. 1 of Marin County ("District") to Central Marin Sanitation Agency ("CMSA") on February 4, 2009. After an exchange of letters between our offices, you sent a letter on March 5, 2009 that finally acknowledged the District's request for electronic records and stated that CMSA would "comply fully with [the District's] request by March 13th."

Based on the assurances in your March 5, 2009 letter and an exchange District General Manager Brett Richards had with CMSA General Manager Jason Dow on March 10, 2009, the District worked with CMSA to first secure and review the broader budgetary records under the PRA request and upon review of these documents determine what additional materials would be necessary. In doing so, Mr. Richards made clear that the District reserved the right to review or secure copies of any of the other records requested under the scope of the February 4, 2009 PRA if CMSA's initial disclosure did not provide adequate detail.

On March 17, 2009, CMSA General Manager, Jason Dow, sent a letter to Mr. Richards which produced some but not all of the requested documents. Despite the District's efforts to work with CMSA in good faith, Jason Dow's response failed to provide the electronic records in the format they were requested as required under Government Code section 6253.9 and his letter also failed to demonstrate how the withheld records qualified for exemption under the PRA as required by Government Code section 6255.

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fax 510.839.9104



Jack F. Govi  
June 1, 2009  
Page 2

Due to the insufficiency of the records released by CMSA on March 17, 2009, Mr. Richards sent Mr. Dow a letter on April 21, 2009 to clarify any misunderstandings between the two entities regarding the PRA request and reiterated its request for copies of the following public records:

- Electronic copies of emails related to the budget, financial information relating to the budgets, capital projects, or bonding that were sent and received within CMSA or to and from outside parties from July 1, 2003 to present;
- Electronic and physical copies of any supporting documents to the budgets, including but not limited to, description documents, financial workbooks, capital project work plans, cost estimates, and budget workbooks;
- All budget related work papers – both physical and electronic – associated with the budgetary years FY 2003-2004 to FY 2007-2008, capital projects, and bonding information; and,
- All electronic versions of the documents created and used as financial workbooks including budgets, capital projects, and bonding information in whatever format which they were created, whether in Excel or some other spreadsheet program.

Additionally, Mr. Richard's April 21, 2009 letter made clear that the District wished to hold off on getting copies of the estimated 36,500 pages of physical documents that CMSA has offered to make available, which – based on Mr. Dow's representations – are made up largely of receipts.

Mr. Dow responded on May 7, 2009 by stating that the 36,500 pages of physical records that are largely receipts would be copied upon receipt of a check for \$7,300. This response, however, ignored all of the specific requests for additional electronic and physical records listed in Mr. Richards' April 21, 2009 letter and simply referenced the advice of counsel without citing to an actual exemption as required under Government Code section 6255. This response is reminiscent of your February 27, 2009 letter that ignored the District's repeated requests for electronic records.

In the hopes that Mr. Dow's May 7, 2009 letter is the product of either a misunderstanding or oversight, the District hereby repeats the requests made in the District's initial February 4, 2009 PRA request and reiterated in Mr. Richard's April 21, 2009 letter for the electronic and physical documents. The District expects any



Jack F. Govi  
June 1, 2009  
Page 3

electronic records to be released as electronic copies of CMSA's records and that these records will be released in the electronic format, such as Excel, that they were created in along with any relevant metadata. (Govt. Code § 6253.9.) If CMSA believes any of these records can be withheld under an exemption of the PRA, it is CMSA's duty under Government Code section 6255 to cite to an express provision of the PRA that justifies non-disclosure. The District expects to receive any such copies or written justifications for non-disclosure by June 10, 2009.

With regard to the additional 36,500 pages referenced in Mr. Dow's May 7, 2009 letter, the District would like to review these documents at CMSA offices. District staff will be calling CMSA on the afternoon of Wednesday, June 3, 2009 to setup a time for this review. The District would like to begin its review during the first or second week of June with the understanding that at least two full afternoons from 1pm to 5pm may be necessary for the review. Since the District has not yet seen these documents, we may need more than two days for review. We are hopeful that CMSA will be able to accommodate these requests since they are in conformance with the review your office approved in your March 5, 2009 letter and are squarely within the District's rights under the PRA.

Throughout this request it has been and remains the District's desire to secure the relevant public records from CMSA while keeping down the copying and staff costs to both the District and CMSA. We are hopeful that CMSA will fully respond by June 10, 2009 with either the requested copies or written responses which cite specific provisions of the PRA which would justify non-disclosure of withheld physical and electronic copies as required under the Government Code. If CMSA fails to respond by June 10, 2009, then the District will take CMSA's failure to do so as a denial without legal justification to withhold the records. If this occurs, the District is prepared to institute legal action to enforce its rights to these records and will seek to recover its costs and attorneys' fees incurred in the action pursuant to Government Code Section 6259.

Very truly yours,

Thomas Capriola

cc: Brett Richards, General Manager  
Michelle Marchetta Kenyon, District Counsel  
✓ Jason Dow, CMSA General Manager