
North Coast Regional Water Quality Control Board

March 29, 2024

North Coast Regional Water Quality Control Board Hearing Officer Ruling on Parties Pre-Hearing Motions, Objections, and Hearing Procedure Comments in the Matter of Administrative Civil Liability Complaint R1-2021-0047-A/Mark West Quarry

The Prosecution Team for the North Coast Regional Water Quality Control Board (Prosecution Team) and Respondent, Bo Dean Company Inc. (Bo Dean) (collectively “Parties”) have submitted a series of comments, objections and motions related to the hearing procedure and pre-hearing discovery for the North Coast Regional Water Quality Control Board’s (North Coast Water Board or Board) October 2-4, 2024 scheduled hearing on Administrative Civil Liability Complaint R1-2021-0047-A (ACL Complaint or Complaint).¹

This ruling, along with the hearing procedure issued in conjunction with this ruling address the Parties’ motions, objections, and comments.

I. Parties’ Comments on Hearing Procedure

The North Coast Water Board’s Advisory Team (Advisory Team) issued a notice of public hearing and tentative hearing procedure on January 29, 2024. The tentative hearing procedure allowed parties and interested persons to submit comments on the

¹ On February 12 and 13, 2024, the Parties submitted comments on the Public Notice and Tentative Hearing Procedures that the Board Advisory Team issued on January 29, 2024. On February 20, 2024, Bo Dean submitted a proposed discovery plan to the Advisory Team. On February 21, 2024, the Prosecution Team filed a Motion for a Protective Order in response to two sets of interrogatories issued by Bo Dean on January 12, 2023, and February 8, 2024. On February 25, 2024, the Advisory Team held a meeting with the Parties to discuss the motion, discovery plan and hearing procedure. The Parties were unable to reach an agreement on a discovery plan, and the Prosecution Team was given the opportunity to submit comments on the Bo Dean discovery plan and submitted two sets of comments on February 28, 2024. Bo Dean filed an opposition to the Prosecution Team’s Motion on March 1, 2024. On March 6, 2024, Bo Dean filed a Motion to Reset Deadlines in the Hearing Procedure and requested a new hearing date. On March 19, 2024, Bo Dean provided the Advisory Team notice that it was seeking to meet and confer with the Prosecution Team on its current document production. On March 21, 2024, the Prosecution Team responded to Bo Dean’s March 19 communication.

hearing procedure by February 12, 2024. The Advisory Team received comments from both Parties by the deadline, and accepted additional comments submitted after the deadline.

As noted in the tentative hearing procedure, this hearing is subject to the regulations that apply to State Water Resources Control Board (State Water Board) and Regional Water Quality Control Board (Regional Water Board) (collectively “Water Boards”) adjudicative hearings, (Cal. Code Regs. tit. 23, §§ 648-648.8) Chapter 4.5 of the Administrative Procedure Act, (Gov. Code § 11400 et seq.) Evidence Code sections 801-805, Government Code section 11513, and the State Water Board’s 2017 Enforcement Policy.

A. Bo Dean’s Request to Reference Additional Regulatory and Statutory sections in Hearing Procedure

Bo Dean has requested that the Board modify the hearing procedures to specifically include additional references to:

- 1) California Code of Regulations, title 23, section 649.6;
- 2) Evidence Code section 500;
- 3) Water Code section 1075 et seq.;
- 4) And all federal and state court and State Water Resources Control Board and Regional Water Quality Control Board decisions, to the extent such decisions have not been overturned or invalidated by statute or more current decisions by such bodies.

1. Incorporation of title 23, section 649.6

The Prosecution Team does not object to including a reference to title 23, section 649.6 and the subpoena procedures outlined within that section. Section 649.6 is part of the Water Boards’ title 23 regulations that apply to adjudicative hearings and the North Coast Water Board may incorporate section 649.6 into a hearing procedure for an adjudicative matter. The Board modifies the hearing procedure to include this reference.

2. Incorporation of Water Code sections 1075-1106

The Prosecution Team does not generally object to Bo Dean’s request to include references to Water Code sections 1075 – 1106. Those sections include statutory provisions that apply to subpoenas of witnesses for deposition (Water Code section 1100) and witness subpoenas for testimony at hearing (Water Code section 1080). The Prosecution Team requests clarification, however, on whether all sections from 1075 through 1106 apply to the hearing. Water Code section 13221 specifies that Chapter 3, Division 2 of the Water Code, which includes sections 1075-1106, applies to regional

water boards. Neither party² has submitted argument that supports excluding any section or provision, therefore the Board modifies the hearing procedure to include a reference to Water Code sections 1075-1106.

3. Incorporation of Evidence Code section 500

Bo Dean requests that the hearing procedure include a reference to Evidence Code section 500 because it will clarify which party has the burden of proof in the hearing. Evidence Code section 500 states: “Except as otherwise required by law, a party has the burden of proof as to each fact the existence or non-existence of which is essential to the claim for relief or defense that he is asserting.”

The Water Boards’ regulations specify that only Evidence Code sections 801-805 are applicable to adjudicative hearings. (Cal. Code Regs., tit.23, §648 subd. (a).) The Board finds that inclusion of Evidence Code section 500 is of no real consequence. The Prosecution Team acknowledges that it “bears the burden of proof in this matter” regarding the charged allegations. (February 13, 2024, Prosecution Team Response to Comments on Hearing Procedure). Generally, absent an applicable statute or regulation, a party asserting a claim or making a charge has the burden of proof in administrative proceedings. (*Bode v. Los Angeles Metro. Med. Ctr.* (2009) 174 Cal. App. 4th 1224; *Owen v. Sands* (2009) 176 Cal. App. 4th 985, 989.) Further, any decision or order adopted by the Board must be supported by a preponderance of the evidence. (*Owen v. Sands* (2009) 176 Cal. App. 4th 985, 989; *Gardner v. Commission on Prof. Competence* (1985) 164 Cal. App. 3d 1035, 1039.)

A reference to Evidence Code section 500 would not alter the standard burden of proof that applies to this proceeding; accordingly, it is unnecessary for the Board to modify the hearing procedure to include this reference.

4. Incorporation of state, federal and Water Boards’ administrative decisions

Bo Dean’s requests that the hearing procedure include reference to all applicable federal and state judicial decisions and Water Boards’ administrative decisions as they have value in the Board’s interpretation of applicable law and regulation. The Prosecution Team agrees that certain State Water Board or Regional Water Board decisions may serve to inform or guide the North Coast Water Board in this matter, but they are not laws or regulations and should not be referenced in the hearing procedure.

The North Coast Water Board will conduct the hearing in compliance with all applicable laws and regulations, which includes case law that interprets the laws and regulations that apply to the proceeding. To the extent a State Water Board decision includes precedential requirements and/or guidance that is relevant to this proceeding, the Board

² There are only two designated parties to this action, the Prosecution Team and Bo Dean. No other person requested designated party status.

will apply those requirements and consider the guidance.³ A change to the hearing procedure to include the acknowledgment that the North Coast Water Board will consider relevant guidance, or proceed in accordance with applicable law and regulation is unnecessary.

B. Bo Dean's Request to submit Demonstrative Evidence

Bo Dean requests clarification on when demonstrative evidence is due. There is no meaningful difference between the submission of demonstrative evidence and all other evidence that must be submitted by the listed deadlines in the hearing procedure. All such evidence is due at the time the Parties' cases are due: June 24, 2024, for the Prosecution Team and August 26, 2024, for Bo Dean. The Parties may summarize and present demonstrative or any other evidence that was timely submitted in their hearing presentations that are due by 12 p.m. the day before the hearing.

C. Bo Dean's Request to Incorporate Provisions of the Code of Civil Procedure

Bo Dean requests that the North Coast Water Board apply California Code of Civil Procedure (CCP) provisions to this hearing, particularly those sections that apply to discovery responses. The Prosecution Team objects to including references to CCP deadlines or its provisions for discovery responses and asserts that CCP provisions do not apply to this hearing unless referenced in the applicable statutes or regulations that apply to this hearing.⁴

The hearing procedure issued concurrent with this ruling sets dates and deadlines considering the nature and complexity of the case, party requests, and with the aim of promoting a fair and efficient hearing. While deadlines contained within the CCP can be informative and may provide general guidance to the Board, the Board is not required by applicable law to incorporate CCP provisions in the hearing procedure or set dates that align with those contained in the CCP. As further discussed below, deadlines in the hearing procedure have been modified to allow for adequate discovery.

D. Bo Dean's Request for Additional Hearing Time

Bo Dean requests that each party be allowed eight hours to present their cases at the October hearing. This request is generally based on the complexity of the hearing, penalty amount, and number of alleged violations. The Prosecution Team did not submit comments or objections to the proposed hearing time.

The draft hearing procedure initially allowed 90 minutes to each party. Based on Bo Dean's comments, and discussion with the Advisory Team at the February 25, 2024,

³ Regional Water Boards have distinct boundaries and jurisdictional areas. (Wat.Code §13200.) The North Coast Water Board is not aware of any authority that suggest adjudicative decisions reached by other regional boards outside a regional board's jurisdiction are precedential or binding.

⁴ For example, Water Code section 1100 applies to this proceeding and references Title 4 of Part 4 of the Code of Civil Procedure as applying to depositions taken.

pre-hearing conference, the Board modifies the hearing procedure to allow five hours to each party to present their cases, examine and cross-examine witnesses,⁵ and make opening and closing statements. Five hours is sufficient time for the Parties to adequately present and summarize their cases, particularly since evidence and argument will be submitted in advance of the hearing, time spent answering questions from the Board or Advisory Team does not count against time limits, and the site visit is excluded from the time limits.⁶ While each hearing has its own unique considerations, it is worth noting that the proposed five hours provided to each party is three times the limit that the North Coast Water Board has allowed in similar hearings that involved similar proposed penalties for alleged stormwater violations.

E. Bo Dean's Request for Surrebuttal

Bo Dean requests limited surrebuttal if the Prosecution Team offers rebuttal evidence in response to written comments from Interested Persons. The Prosecution Team opposes the request stating that surrebuttal is allowed only in exceptional circumstances. In its February 20, 2024, letter, Bo Dean agrees that surrebuttal is not necessary unless the Prosecution Team submits new evidence in response to comments from Interested Persons that will not be included in the Prosecution Team's case submission due June 24, 2024. There is no compelling reason to not allow surrebuttal in this circumstance as Interested Persons will not submit their comments until August 26, 2024. The Board modifies the hearing procedure to allow surrebuttal consistent with Bo Dean's request.

F. Bo Dean's Request regarding Evidentiary Objections

Bo Dean requests clarification on the Parties' rights to submit evidentiary objections and in-hearing motions. The Board modifies the hearing procedure to note that the Parties may raise objections and motions before and during the hearing, and that such motions and objections do not count against the parties' respective time limits. Of note however, the hearing procedure includes a date by which written objection to evidentiary submissions is due. The Parties are strongly encouraged to submit evidentiary objections prior to the hearing, and it remains within the Board's discretion on the timing and scope of any rulings on any objections or motions.

G. Bo Dean's Request Regarding Submitting Evidence by Reference

Bo Dean requests that the Board limit the evidence that may be submitted by reference. The Prosecution Team states in its February 13, 2024, comment letter that it intends to submit evidence by reference only where size of the document precludes its inclusion. As Bo Dean acknowledges in its comments, the Board has the discretion to accept

⁵ This includes direct and redirect examination and re-cross examination of witnesses.

⁶ In accordance with the hearing procedure, the Parties may request additional time prior to, or at the hearing. The Board has the discretion to approve or disapprove the request.

evidence by reference (Cal. Code Regs., tit. 23 § 648.3.) The Board will not modify the hearing procedure to limit the Board's discretion to accept evidence by reference. To ensure a clear record is before the Board, where evidence by reference will be included the Parties must clearly identify the location of the document and the portion of the document the party is relying on as provided by the regulation.⁷

H. Prosecution Team's Request for Deadline for Bo Dean to Raise Ability to Pay Defense

In its February 28, 2024, comment letter the Prosecution Team proposes that Bo Dean provides written notice to the Prosecution Team indicating whether it will raise an inability to pay claim or submit a waiver of ability to pay defense by March 6, 2024. The Prosecution Team states that it has issued subpoenas for financial records with the original complaint, the Parties have discussed these subpoenas as part of the meet and confer process, and that Bo Dean will notify the Prosecution Team of its intention regarding these subpoenas in early March 2024. The Advisory Team requested a status update from Bo Dean and the Prosecution Team and on March 6, 2024, counsel for Bo Dean responded that they were conferring with their client and would provide an update on whether the client will raise the ability to pay defense in the coming weeks. The Advisory Team has not received an update. The Board modifies the hearing procedure to include a date by which Bo Dean must indicate whether it intends to raise an ability to pay defense.

II. Bo Dean's Motion to Reset Deadlines and October Hearing Date

Bo Dean's March 8, 2024, motion asserts that an October hearing date will not accommodate a revised discovery schedule due to the need for extensive discovery and hearing preparation and Prosecution Team delays in discovery responses. As is more fully discussed below in response to the Prosecution Team's Motion for a Protective Order, the Board modifies the hearing procedure and schedule to address concerns related to discovery. For example, the deadline to serve notices of discovery and to issue witness deposition subpoenas have been extended. Regarding current disputes over a document subpoena issued by Bo Dean on January 12, 2024, the Board notes that the Prosecution Team has initiated production and states that it anticipates the bulk of documents will be available by March 29, 2024, with the remaining documents produced by May 26, 2024. This ruling does not directly address the adequacy of those productions, nor does it directly address Bo Dean's contentions that the May 26, 2024, date is unreasonable. The Board notes, however, that the May 26, 2024, production date is five months after Bo Dean's initial subpoena was issued and it is not entirely clear why an additional two months is necessary to produce the remainder of the documents, or if they may be produced earlier. The hearing procedure

⁷ The Board may also take official notice of certain records. (Cal. Code Regs., tit.23, § 648.2.)

and modified deadlines are based, in part, on the Prosecution Team's representation that documents will not be produced until that date.

The modified deadlines will allow Bo Dean adequate opportunity to initiate additional discovery. With these deadline modifications, there is adequate time for the Parties to complete discovery and prepare their cases for an October hearing if the Parties diligently propound and respond to all discovery requests and continue to meet the deadlines in the hearing procedure.⁸

The Board is mindful that delays in document production, inadequate compliance with written discovery requests for document production, or delays in scheduling witness depositions could impact the Parties' preparation for the hearing. The Parties are expected to promptly respond to all subpoenas for document requests and the scheduling of witnesses for deposition. Further, the Parties are expected to meaningfully meet and confer without undue delay when disputes arise regarding discovery or other pre-hearing matters.

In light of ongoing concerns regarding the discovery process and compliance with subpoenas, the hearing procedure now provides for an additional pre-hearing conference in early May so the Advisory Team can discuss the discovery status with the Parties and address any concerns with the hearing proceeding at the scheduled date.

III. Prosecution Team's February 21, 2024, Motion for Protective Order

The Prosecution Team's February 21, 2024, Motion for Protective Order concerns two sets of interrogatories Bo Dean issued. Set one contains 320 interrogatories and set two contains seven interrogatories. The interrogatories were issued along with a subpoena for documents in discovery requests Bo Dean submitted January 12 and February 8, 2024. The interrogatories fall into one of three broad categories: 1) identification of all facts supporting allegations contained in the complaint; 2) identification of individuals with knowledge of the site conditions; and 3) identification of laws, regulations and policies that were relied upon in preparing the administrative civil liability complaint.

The Prosecution Team asserts that responding to the interrogatories will be unduly burdensome and that responses to the interrogatories will be duplicative of: 1) much of their responses to the document subpoena Bo Dean has issued; 2) the Prosecution Team's case that must be submitted in advance of the hearing; and 3) the depositions of witnesses that Bo Dean may take.

The Prosecution Team asserts that the Board cannot expand the scope of discovery allowed by the regulations and applicable statutory sections and allow for discovery not

⁸ Initially, at the first prehearing conference held on January 10, 2024, the Prosecution Team advocated for an April 2024 hearing date, and Bo Dean a hearing date in December 2024. The Prosecution Team's readiness for an April hearing date suggests that it can complete any pre-hearing discovery well before the October hearing date.

specifically referenced in those provisions. Bo Dean asserts that the Board has the discretion to allow interrogatories and that interrogatories are useful as Bo Dean will need to gather information on a large number of alleged violations in a short period of time and they will shorten and expedite the discovery process by leading to fewer and shorter depositions.

There are no provisions within the Water Boards' hearing regulations, Water Code, or Administrative Procedures Act Chapter 4.5, that specifically addresses interrogatories. Discovery tools for this type of hearing are addressed by Government Code section 11450.10, which discusses subpoenas for production of witnesses and documents, and Water Code sections 1080 and 1100, which apply to subpoenas for witness attendance at hearings and depositions, respectively.

Neither party points to applicable authority that expressly discusses interrogatories in this type of hearing. The Prosecution Team cites an unpublished case⁹, that considered discovery in a proceeding dissimilar to the matter here, and a hearing officer decision in a State Water Board water rights hearing where interrogatories were not allowed. In that case, the court found this was not a denial of due process rights or an abuse of discretion. (*Millview County Water Dist. v. State Water Res. Control Board* (2014) 229 Cal.App.4th 879, 906.) Bo Dean cites to regional water board proceedings where board discretion was exercised and interrogatories were allowed, and authorities and cases where interrogatories are discussed in the civil, not administrative hearing context.

In summary, the Parties acknowledge there is no statutory or regulatory authority that expressly authorizes the use of interrogatories in this proceeding, and neither party cites any decision that suggests the Board has a mandatory duty to allow or disallow additional pre-hearing discovery. Instead, Bo Dean asserts the Board should exercise its discretion and allow this additional discovery as it will lead to more efficient process, and the Prosecution Team argues the Board should disallow interrogatories as overly burdensome and unnecessary.¹⁰

The Board agrees that given the nature of the hearing and existing tools available to the Parties to prepare for hearing, Bo Dean has not shown that extensive interrogatories are necessary to ensure a fair hearing. Responding to the interrogatories would require considerable time and expense, and likely would be duplicative of information that Bo Dean can obtain using discovery tools that the Parties do not dispute are available. Due process can be satisfied without the use of interrogatories in this proceeding. (See *Cimarusti v. Superior Court* (2000) 79 Cal.App 4th 799, 808-809 [Generally there is no due process right to prehearing discovery in administrative hearing cases and the scope

⁹ *Lilia Garcia-Brower v. Nor-Cal Venture Group, Inc.* (2023) 305 Cal.Rptr.3d 694, 699 (ordered not to be published).

¹⁰ The Prosecution Team has argued that no authority supports expanding the scope of discovery beyond the existing statutory provisions to include interrogatories and they should be either disallowed, or in the alternative, that the Board has the discretion regarding the scope of discovery and if they are allowed the Board should exercise its discretion and limit them to no more than 35.

of discovery in administrative hearings is governed by statute and the agency's discretion].)

Bo Dean has not shown that interrogatories will provide greater efficiency or process and will be less burdensome than the processes afforded by the hearing procedure. The hearing is structured such that evidence and argument must be submitted well in advance of the hearing. Pursuant to the hearing procedure and deadlines, Bo Dean will have the Prosecution Team's entire case, including all the evidence that it will rely on to support its allegations roughly two months before Bo Dean must submit its case.¹¹ In addition, Bo Dean will have a complete witness list from the Prosecution Team and may depose or cross-examine any Prosecution Team witness. Many of Bo Dean's interrogatories request facts and evidence that support allegations in the complaint. To obtain this information Bo Dean can depose witnesses, including those "persons most knowledgeable" to question the allegations in the complaint. Bo Dean confirms that "most of the interrogatories are simply questions that BoDean would ask in deposition..." (Bo Dean Opposition, p. 3) In addition, Bo Dean can issue subpoenas for document production to obtain records relevant to the facts and allegations in the complaint. Bo Dean has issued a document subpoena for categories of records related to the Prosecution Team's case on January 12, 2023, and the Prosecution Team is compiling and producing those records.

Bo Dean's argument that interrogatories are necessary for reasons of efficiency and the limited time available to prepare for a complex hearing are not compelling given the extent of the pre-hearing submissions, the existing discovery tools allowed and the hearing procedure deadlines that allow adequate time for case preparation and to conduct pre-hearing discovery. While the case involves many alleged violations of a stormwater permit and investigative order that occurred over a period of time, these facts by themselves do not support the argument that the case is unusually complex such that the existing hearing procedure and discovery tools are insufficient to allow for a fair hearing and to satisfy due process concerns.

The Board has the discretion to manage the hearing in a manner that will allow all relevant evidence to be considered without unnecessary expense and delay to the parties and the Board. (Cal. Code Regs., tit. 23 § 648.5.) Bo Dean has not shown that good cause exists to expand the existing hearing procedures and discovery tools by incorporating interrogatories into this proceeding.

Last, although Bo Dean has not submitted any Requests for Admission (RFA), in its February 20, 2024, letter that outlines a proposed discovery plan, Bo Dean lists RFA's as a potential discovery tool. The Prosecution Team objects to the Board allowing RFA's in its February 28, 2024, comments for the same reasons it objects to interrogatories. Based on the same considerations outlined above with respect to the request for interrogatories, the Board will not allow RFA's. Bo Dean may avail itself of

¹¹ Based on the document subpoena Bo Dean has issued, the Prosecution Team asserts Bo Dean will essentially have all records related to its case by May 26, 2024.

the existing discovery provisions and may subpoena witnesses for deposition or question any witness at the hearing.

In denying the use of interrogatories and RFAs, the Board is not dismissive of Bo Dean's arguments regarding potential delays in document production, or that the Prosecution Team will need to diligently comply with subpoena requests for the hearing to proceed in October 2024. As discussed above, the Board will continue to evaluate the Parties' compliance with the hearing procedures and whether they are responding to discovery requests in a timely manner. Non-compliance with subpoenas, undue delays in responding to subpoenas, and failing to meaningfully engage in a meet and confer process to resolve disputes could affect the Board's determination to proceed with the hearing on the proposed hearing date.

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