CALIFORNIA
Water Boards

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San Francisco Bay Regional Water Quality Control Board

June 8, 2016

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Subject: Response to Objections to the Hearing Procedure for the ACL and CAO Issued To John D. Sweeney and Point Buckler Club, LLC

Dear Mr. Bazel:

Please find the Advisory Team's response to your objections dated May 27, 2016 and your letter dated May 25, 2016. The Advisory Team has consulted with the Chair of the Regional Water Board, Dr. Terry Young, and this letter memorializes her rulings on your objections. Most significantly, the Board Chair has agreed to remove Bruce Wolfe from the Advisory Team. In addition, the Advisory Team has issued a Revised Hearing Procedure[1] to reflect the grant of your request to postpone the hearing on the Administrative Civil Liability (ACL) complaint. For clarity's sake, the Advisory Team will address the objections in the order in which they were raised in the May 27, 2016 document, with matching headings and numeration.

1. Appointment of Presiding Officer

You asked the Advisory Team to identify the presiding officer of the adjudicative hearing. The presiding officer is Board Chair Young.

[1] Attachment A.

2. Decisions Made by Persons Other Than Presiding Officer

You object to anyone other than the presiding officer making procedural or administrative decisions, including the decision to postpone the hearing on the ACL. The Board Chair rejects your contention that the Advisory Team improperly postponed the ACL hearing and disagrees that the Prosecution or Advisory Team are unable to make procedural or administrative decisions. The Regional Water Board and its presiding officer may properly delegate their functions to the executive officer or to other individuals, except in the situations enumerated in Water Code section 13223, which do not apply here. (See also San Francisco Bay Regional Water Board Resos. No. 70-11, R2-2008-0055; Executive Officer Memorandum, "Delegation of Authority; Signature Requirements" (Nov. 23, 2009) ["2009 Memorandum"].[2]) Such delegation is both appropriate and anticipated when prosecutorial and advisory functions have been separated, as the 2009 Memorandum recognizes. (See 2009 Memorandum, p. 2 ["delegation to the Assistant Executive Officers to act in [Executive Officer's] stead is necessary where there has been a separation of functions and [the Executive Officer is] acting as the advisor to the Board."].) Accordingly, the assertion that all communications and decisionmaking relating to the ACL and tentative CAO must be made by the presiding officer is inaccurate.

Moreover, the Advisory Team's accession to your request to postpone the ACL hearing is not an adjudicative decision that would ordinarily involve the Board or its chair. Scheduling of board items is a collaborative task, undertaken by the Executive Officer, Assistant Executive Officers, and managerial staff, and dependent on a number of considerations, including workload and statutory notice and comment requirements. The statutes governing adjudicative proceedings do not limit the ability of staff, as opposed to the board members themselves, to set the schedule. (See Govt. Code § 11425.10, subd. (a) [requiring the *agency* to provide an

[2] Attachment B.

opportunity for notice and comment and to make the hearing procedure available to the person to which the agency action is directed].)

3. Special Hearing

The Board Chair rejects your request to schedule a separate, "special" hearing on the tentative CAO. She disagrees that a special hearing, held separately from a scheduled board meeting, is warranted because such a hearing was scheduled in the Byron-Bethany matter. The Byron-Bethany enforcement action is not comparable to the CAO hearing scheduled for August. Byron-Bethany involved water rights and a cease and desist order to prevent unauthorized diversions, not a cleanup and abatement order. (See Attachment C, State Water Resources Control Board [*Byron-Bethany Draft Order*] [May 26, 2016].)

Moreover, the ACL and CAO hearings have been bifurcated in response to your request for additional time to prepare for the ACL hearing. Only the hearing on the CAO, which does not impose liability, remains on the calendar for August. (See Attachment A.) The Regional Water Board and its presiding officer need not weigh the evidence underlying the alleged violations giving rise to the $4.8 million in civil liability in order to issue the CAO, so the August hearing should be fairly straightforward. Accordingly, a lengthy special hearing is not necessary.

4. Briefing Schedule

On May 25, 2016, the Advisory Team agreed to postpone the hearing on the Administrative Liability Complaint (ACL Hearing) in response to your request, and directed you to work with the Prosecution team to set a mutually agreeable hearing date and briefing schedule. Accordingly, your arguments regarding the unfairness and/or illegality of the ACL briefing schedule are not ripe, and the Board Chair need not now address your claims that a summary judgment-type briefing schedule is appropriate. The Advisory Team also reminds you that you are statutorily entitled to a hearing within ninety days of issuance of an ACL complaint. (Wat. Code § 13323, subd. (c).) This requirement is designed to protect dischargers' constitutional right to a prompt hearing, not to impair their ability to mount an adequate defense.

You have not specifically challenged the deadlines in the Hearing Procedure as they apply to the hearing on the CAO, which is still set for August. While you make conclusory claims that the eighty-five or so days between May 17 and August 10 provides insufficient time to prepare for a combined hearing on the ACL and CAO, you have not explained why this time period is also insufficient to prepare for the CAO alone.

In contrast to an ACL complaint, neither due process nor the Water Code requires a hearing at all on a CAO. (See *Machado v. State Water Resources Control Bd.* (2001) 90 Cal. App. 4th 720, 725; compare Wat. Code §13323 with §13304.) Nonetheless, the Regional Water Board has agreed that a hearing in this case is appropriate, and has provided for a thirty-day public comment period, which remains open until June 16, 2016. (See Attachment A, pp. 5, 6.) Therefore, in addition to the formal briefing schedule, you have an opportunity to submit written comments. In response to such comments, the Advisory Team may revise the tentative CAO, and you will have an additional opportunity to comment orally on the tentative order at the August hearing itself.

Accordingly, the Board Chair overrules your objection to the briefing schedule to the extent you assert there is inadequate time to prepare for the CAO hearing.

5. Time for Hearing

The Advisory Team and Board Chair deny without prejudice your request for additional time because they disagree that the time provided for testimony at the hearing is insufficient or that the time limits applicable at the Byron-Bethany hearing should be adopted here. As described above, the Byron-Bethany matter is not comparable to this matter. The consolidated Byron-Bethany hearing, which took place in March, involved an ACL and cease and desist orders against two irrigation districts. Numerous interested parties offered written and oral testimony, and the hearing continued for three days. (See Attachment C, pp. 4-5.)

Here, by contrast, only the Prosecution Team and the Dischargers are expected to participate in the CAO hearing, which does not impose liability, but prohibits the discharge of

pollution and sets forth a timeline for implementation of corrective actions, restoration of the property, and mitigation and monitoring. Accordingly, an elaborate or lengthy hearing procedure, such as the one in Byron-Bethany, is not required. (See *Machado*, *supra*, 90 Cal. App. 4th, p. 726.)

As set forth in the Revised Hearing Procedure, you have until July 21, 2016 to request additional time. Such a request may be granted at the discretion of the Advisory Team or Board Chair upon a showing that the additional time is necessary. (See Attachment A, p. 4.)

6. Bias

The Board Chair denies your request to take the August 10 hearing off calendar on the ground that the Hearing Procedure issued May 17, 2016 (May 17 Hearing Procedure) demonstrates bias or improper separation of functions. You have not supported your claim that the May 17 Hearing Procedure was improperly issued by the Prosecution Team, unfairly favors the Prosecution Team, or was based on a standard hearing procedure form that was approved improperly.

As explained in more detail in section 9, *infra*, issuance of a Hearing Procedure is not an adjudicatory action that may only be undertaken by the presiding officer. (See Govt. Code § 11425.10, subd. (a)(2).) Moreover, the task of issuing the Hearing Procedure may be properly delegated to individuals other than the regional board members. (See Wat. Code. § 13223; San Francisco Bay Regional Water Board Resos. 70-11; R2-2008-0055.) Therefore, the Prosecution Team's issuance of the Hearing Procedure neither improperly delegates a board function nor violates the separation of advisory and prosecutorial functions.

Similarly, the May 17 Hearing Procedure does not favor the Prosecution Team. Your claim that the May 17 Hearing Procedure gives the Prosecution Team an opportunity to submit a reply brief where the standard hearing procedure does not, is mistaken. Both the standard hearing procedure and the May 17 Hearing Procedure afford the Prosecution Team an opportunity to submit a reply brief. (Compare the Standard Hearing Procedure, p. 6 [providing that the

Prosecution's deadline to submit rebuttal information is 30 days prior to hearing and "any designated part[y's]" deadline to submit rebuttal information is 15 days prior to hearing] with the May 17 Hearing Procedure, p. 7 [providing that Prosecution Team's deadline to submit all information is July 1, 2016 and "all designated parties deadline for rebuttal information" is July 21, 2016].[3]) You have failed to explain how other, unspecified, and concededly "minor" differences between the May 17 Hearing Procedure and its template demonstrate "pervasive bias."

In addition, you have not explained the basis for claiming that the thirty-minute time limit, which applies equally to the Prosecution Team, is either "wholly inadequate" or serves to facilitate the "rubber stamp[ing]" of the draft CAO.[4] As described above, due process does not require a hearing on a CAO at all. (See *Machado*, *supra,* 90 Cal. App. 4th, p. 725.) You similarly do not elaborate on your assertion that the Prosecution Team has more time to brief the issues than the Club does, or explain how you determined that the Prosecution Team had "twenty months plus 45 days to prepare its opening brief."

Your challenge to the process by which the standard hearing procedure template was adopted is untimely, coming as it does almost seven years after the standard procedure was approved by the Executive Officer and presented to the Regional Water Board. (See Attachments D, E, and F [June 10, 2009 Regional Water Board Meeting Agenda; Staff Summary Report for the Standard Hearing Procedure; and Standard Hearing Procedure template].) Even if this challenge were not untimely, however, you have pointed to no authority indicating the Regional Water Board was required to approve the use of the standard hearing procedure. Instead, endorsement and adoption of the form was within the delegated authority of the Executive Officer. (See Wat. Code § 13223; see also Attachment E (Staff Summary

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[3] The Revised Hearing Procedure preserves these deadlines. (See Attachment A, p. 6.)

[4] The attached Revised Hearing Procedure maintains the same time limits as the May 17 Hearing Procedure. (See Attachment A, p. 4.)

Report for standard hearing procedure [June 10, 2009].) In contrast to your assertions, the Executive Officer's approval was not "nonpublic" or "secret;" rather, the standard hearing procedure was presented as an information item during a public meeting of the Regional Water Board, and remains available on the Regional Board's website.[5]

Similarly, the participation of staff members now on the prosecution team in developing the standard hearing procedure template seven years ago does not amount to a violation of the separation of functions now. (*See Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2001) 45 Cal. 4th 731, 738 [the Administrative Procedure Act does not prohibit an agency employee from acting in a prosecutorial role in one case and an advisory role in another unrelated matter].) Here, the development of the standard template was a matter wholly unrelated to the instant ACL and CAO. Accordingly, your suggestion that staff overlap on these two matters violates the separation of functions lacks merit.

In light of the foregoing, the Board Chair denies your request to vacate the August 10 hearing and reissue a hearing procedure only after considering proposals from both parties. However, because the ACL Hearing has been postponed, the Advisory Team has revised the May 17 Hearing Procedure to clarify that its deadlines now only apply to the CAO hearing in August.

7. Ex Parte Communications

The Board Chair has agreed to remove Mr. Wolfe from the Advisory Team, as explained in more detail in section 8 below. However, the Board Chair does not concede that his removal was legally required or that his participation on the Advisory Team was improper. Therefore, she does not consider his review and issuance of the original CAO to constitute ex parte communication or view his communications with the Advisory Team to be, *ipso facto*, ex parte. You have pointed to no additional specific communications that you suggest were ex parte.

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[5] See http://www.waterboards.ca.gov/sanfranciscobay/board_info/agendas/2009/june/06-10-09_Board_Meeting_Agenda.pdf (Accessed June 3, 2016).

Accordingly, the Board Chair rejects your contention that the prohibition against ex parte communications was violated.

Advisory and prosecutorial functions had yet to be formally separated at the time Mr. Wolfe issued the CAO, so the mere transmittal of the CAO for Mr. Wolfe's review and signature was not an ex parte communication. Furthermore, the contested nature of the matter was beginning to emerge, and staff, including Mr. Wolfe, acted to preserve the ability to separate later if it became necessary. Thus, Mr. Wolfe did not participate in meetings with the individuals now on the Prosecution Team to discuss the terms of the CAO, and did not engage in meetings with your client or his counsel at the time. Accordingly, the Board Chair rejects the claim that any ex parte communications took place between Mr. Wolfe and the Prosecution Team while Mr. Wolfe was participating on the Advisory Team.

In any event, challenges to the propriety of the issuance of the original CAO are now moot because that order was rescinded in January. As stated above, Mr. Wolfe will not advise the Regional Water Board in its decision to adopt, modify, or reject the tentative CAO in August.

8. Bruce Wolfe

You have objected to Mr. Wolfe's participation in this matter in both a May 25 letter and in your May 27 objections to the May 17 Hearing Procedure. Although the Board Chair has agreed to remove Mr. Wolfe from the Advisory Team, she rejects the claim that Mr. Wolfe has inappropriately served in a prosecutorial role.

As Executive Officer to the Board, Mr. Wolfe has the delegated authority to issue cleanup and abatement orders. (Wat. Code §§ 13223, 13304.) A public comment period and hearing are not required when cleanup and abatement orders are thus administratively issued. (See *Machado, supra*, 90 Cal. App. 4th, p. 726; see also Wat. Code § 13304.) Nor are advisory and prosecutorial functions necessarily separated at this point because CAOs are not always contested. (See *Morongo, supra*, 45 Cal. 4th, p. 738 [separation of functions required on a case-by-case basis]; State Water Board Order WQ 2015-0075 [*Los Angeles Municipal Separate*

Storm Sewer System], p. 73 n. 208 ["separation of functions should not be expanded beyond its appropriate scope"].)

9. The Hearing Procedure

The Board Chair overrules your objections to the May 17 Hearing Procedure and rejects your claim that the issuance of the May 17 Hearing Procedure was an adjudicatory decision or that it was improper for the Prosecution Team, as opposed to the presiding officer, to issue it.

The May 17 Hearing Procedure does not adjudicate any legal or factual issues disputed by the parties. Instead, the document serves to satisfy statutory notice requirements and make the parties aware of the hearing date, interim deadlines, and the procedures that govern the hearing.

Both the May 17 and Revised Hearing Procedures are based on the standard hearing procedure, a preapproved template. (See Section 6, *supra*, for a discussion of the process by which the standard hearing procedure was adopted; see also Attachment F [standard hearing procedure].) The statutes governing adjudicative proceedings before the Regional Water Board do not require the presiding officer to issue the Hearing Procedure. (See Govt. Code § 11425.10, subd. (a)(2) ["[t]he agency shall make available to the person to which the agency action directed a copy of the governing procedure"].) Accordingly, it was proper for the Prosecution Team to issue the Hearing Procedure in May, just as it is proper for the Advisory Team to issue an Amended Hearing Procedure now.

10. Waiver

The Board Chair overrules your objection that the Hearing Procedure inappropriately invokes the waiver provision in California Code of Regulations, title 23, section 648, subdivision (d), which provides that "the presiding officer may waive any requirements in these regulations pertaining to the conduct of adjudicative proceedings. . . ." Both the May 17 and the Revised Hearing Procedures repeat language from the standard hearing procedure citing section 648, subdivision (d), stating that "any provision not provided by this Hearing Procedure is deemed

waived," and reiterating that Chapter 5 of the Administrative Procedure Act (commencing with § 11500) does not apply to Regional Board proceedings. (See Attachment F, p. 1.) This language in the standard procedure was preapproved by the Executive Officer, pursuant to his properly delegated authority; accordingly, the inclusion of this language in the May 17 Hearing Procedure does not reflect an adjudicatory decision by the Prosecution Team.

Instead, this language clarifies that the Hearing Procedure and section 648 govern the deadlines and procedures to be followed at Regional Water Board adjudicative proceedings.

11. Non-Parties

The Board Chair and Advisory Team overrule your objections to provisions in the Hearing Procedure inviting nonparties to submit policy statements or to testify at either the ACL or CAO hearing. California Code of Regulations, title 23, section 648.1, subdivision (d) authorizes the Board or presiding officer to "provide an opportunity for presentation of policy statements or comments, either orally or in writing, by interested persons who are not participating as parties in the [adjudicative] proceeding." Accordingly, the contention that such nonparty testimony is only appropriate in quasi-legislative proceedings is without merit.

12. The 16 June Deadline

The Board Chair denies your request to delete the June 16, 2016 comment deadline. The June 16, 2016 is the deadline for Dischargers and interested persons to comment on the tentative CAO. It appears not only in the Hearing Procedure, but is also clearly notated in the May 17, 2016 Transmittal Letter for the tentative CAO and ACL Complaint addressed to Mr. Sweeney. (See Attachment G.) The Dischargers as well as any member of the public may submit comments on the tentative CAO.

13. Rebuttal Evidence

The Board Chair overrules your objection that the May 17 Hearing Procedure impermissibly allows the Prosecution Team to submit new evidence with its reply brief. While the Regional Water Board has a policy to "discourage the introduction of surprise testimony and exhibits"

(Cal. Code Regs., tit. 23, § 648.4, subd. (a)), the governing regulations permit the introduction of rebuttal testimony and exhibits up to and at the hearing. (See Cal. Code Regs, tit. 23, § 648.4, subd. (f).)

14. Documents

The Board Chair overrules your objection to the Hearing Procedure, hearing date, and briefing schedule on the ground that documents have been withheld from you. Dyan Whyte, on behalf of the Prosecution Team, confirmed the completed status of your PRA request in her letter dated May 25, 2016. (See Attachment H, p. 4 ["[Dischargers] have already made a Public Records Act [request] and received *all* responsive, non-privileged documents concerning the Site."] [emphasis added].) You have not supported your allegations that other responsive, non-privileged documents exist and have not been disclosed to you.

Sincerely,

Marnie Ajello

Attachments:

Attachment A: Revised Hearing Procedure
Attachment B: 2009 Memorandum
Attachment C: State Water Resources Control Board (*Byron-Bethany Draft Order*)
Attachment D: June 10, 2009 Board Meeting Agenda
Attachment E: Staff Summary Report for Standard Hearing Procedure
Attachment F: Standard Hearing Procedure
Attachment G: May 17, 2016 Transmittal of ACL Complaint and Tentative CAO
Attachment H: May 25, 2016 Letter from Prosecution Team

cc:

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