



State Water Resources Control Board

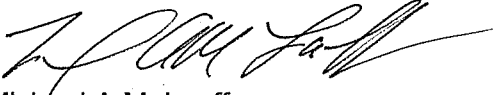


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TO: [via e-mail and U.S. Mail]
Board Members
**STATE WATER RESOURCES CONTROL BOARD AND
CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARDS**


FROM: Michael A.M. Lauffer
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DATE: August 2, 2006

SUBJECT: SUMMARY OF REGULATIONS GOVERNING ADJUDICATIVE PROCEEDINGS
BEFORE THE CALIFORNIA WATER BOARDS

This memorandum outlines and reinforces some of the primary requirements that apply when the State Water Resources Control Board (State Water Board) and the nine California Regional Water Quality Control Boards conduct adjudicative proceedings. Adjudicative proceedings are the evidentiary hearings used to determine the facts by which a water board reaches a decision that determines the rights and duties of a particular person or persons. Adjudicative proceedings include, but are not limited to, enforcement actions and permit issuance.

Background

The California Water Boards perform a variety of functions. The boards set broad policy consistent with the laws passed by Congress and the Legislature. The boards also routinely determine the rights and duties of individual dischargers or even a class of dischargers. In this regard, the boards perform a judicial function. The judicial function manifests itself when the boards adopt permits and conditional waivers or take enforcement actions.

Different rules apply depending on the type of action pending before a water board. One of the distinctions between the two types of proceedings is the prohibition against ex parte communications. A prohibition on ex parte communications only applies to adjudicative proceedings.¹ Besides the ex parte communications prohibition, additional rules, procedures, and participant rights adhere in adjudicative proceedings. This memorandum outlines some of the more important procedural mechanisms associated with adjudicative proceedings.

¹ The Office of Chief Counsel addressed ex parte communications in a July 25, 2006 memorandum and questions and answers document.

Adjudicative Proceedings

What is an adjudicative proceeding?

Adjudicative proceedings are the evidentiary hearings used to determine the facts by which a water board reaches a decision that determines the rights and duties of a particular person or persons. Generally, this includes permitting and enforcement actions, but does not include planning and general regulatory functions such as Basin Plan amendments and Total Maximum Daily Loads.

Below is a partial list of common water board actions that are of an adjudicative nature:

- National Pollutant Discharge Elimination System (NPDES) permits;
- Waste discharge requirements (WDRs);
- Water right permits and requests for reconsideration;
- Orders conditionally waiving waste discharge requirements;
- Administrative civil liability (ACL) orders;
- Cease and desist orders;
- Cleanup and abatement orders;
- Water quality certification orders (401 certification);
- Permit revocations.

What laws govern adjudicative proceedings?

Adjudicative proceedings are governed by Chapter 4.5 of the Administrative Procedure Act² and by regulations adopted by the State Water Board³. By regulation, the State Water Board has chosen not to apply several sections of the Administrative Procedure Act to the California Water Boards' proceedings. These sections are Language Assistance, Emergency Decisions, Declaratory Decision, and Code of Ethics. All other sections and provisions of Administrative Procedure Act Chapter 4.5 apply.

Who are the parties to an adjudicative proceeding?

Parties to an adjudicative proceeding are any person or persons to whom a water board's action is directed as well as any other person or persons that the board chooses to designate as a party. In some cases, certain members of a water board's staff will be a party to an adjudicative proceeding. If some water board staff are designated as a party, other staff will be assigned to advise the board members. Anyone who is not a party, but who participates in the proceedings (other than staff advisers to the water board), is considered an interested person. The process for deciding who is a party is left to the discretion of a water board. A hearing may be held on the issue or the chair may be delegated to make such determinations. When a party is designated, the chair should provide notice in advance of the hearing to the water board staff and the discharger.

What is a formal hearing?

Most of the time an adjudicative proceeding will be a formal hearing in which a water board requires parties to follow a pre-determined process that may include such procedural issues as

² Gov. Code, § 11400 et seq.

³ Cal. Code Regs., tit. 23, §§ 648-648.8.

submittal of the names of witnesses, qualifications of experts, exhibits, proposed testimony, and legal argument. A hearing notice will be drafted spelling out the requirements and the timeframes. The terms and conditions of the notice are left to the discretion of the water board conducting the proceeding, though it is suggested that some level of formality is useful in preserving decorum and fostering efficiency. A hearing under Chapter 4.5 of the Administrative Procedure Act and the State Water Board's regulations is considered a "formal hearing," even if it does not have some attributes of hearing formality, unless it is officially designated as an "informal hearing" under Government Code section 11445.20 and California Code of Regulations, title 23, section 648.7.

The order of proceedings is within the discretion of a water board as well. However, the regulations suggest a specific order and should generally be followed unless the facts and circumstances of a particular case indicate otherwise. Normally, the proceedings begin with an opening statement by the chair followed by the administration of the oath to those indicating that they intend to participate. Then the parties make their presentations through testimony and the introduction of exhibits. Typically, witnesses may be cross-examined by other parties but the timing of such cross-examination is within the discretion of the regional board. If the re-direct examination has been specified in the notice, re-direct examination follows cross-examination. A water board should decide in advance how it would like to handle questions from board members. Interruptions and questions by board members should not count against time allotted to a party. At some point during the proceeding, comments from interested persons must be admitted. Thereafter, the regulations anticipate a closing statement from each party.

What are the rules of evidence in an adjudicative proceeding?

The rules of evidence are not those that apply in the courtroom. Any relevant evidence will be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, no matter what the statutory or customary rule may be. Hearsay evidence is admissible, but only for the purpose of supplementing or explaining other evidence. If an objection is raised that certain testimony constitutes hearsay evidence, the chair should note for the record that the evidence will be admitted but that it cannot, by itself, support a finding. If no other evidence is introduced in support of that finding, a water board must ignore the hearsay evidence and decline to make such a finding.

A water board may accept evidence by taking official notice of certain things such as laws, court decisions, regulations, and facts and propositions that are common knowledge or not in reasonable dispute.

What are informal hearings?

Informal hearings may be used in place of formal hearings in some instances, if a water board thinks it advisable. Generally, this process can be used where significant facts are not in issue and the proceeding held is to determine only what consequences flow from those facts. In deciding whether to use the informal process, a water board should consider how many parties are involved, whether any of the parties have requested a more formal process, how many interested persons there are, how complex the issues facing the water board may be, and how important a formal record may be if petitions and appeals result. If any party objects to the informality of the process, a water board or its chair must address and resolve the objections before proceeding.

Because of the flexibility the regulations provide for formal hearings, a water board may find it advisable to conduct its hearings as formal hearings with streamlined procedures, as opposed to conducting an informal hearing. The regulations provide that a water board may waive any of the regulatory requirements that are not required by a statute. While this is certainly within the prerogative of a water board, caution should be exercised before any such waiver. These regulations generally seek to preserve the fairness of the process and omission of any of these provisions may result in unnecessary disputes over procedural issues.

How can the chair control the conduct of the adjudicative proceeding?

A water board need not tolerate disruption of an adjudicative proceeding. The Administrative Procedure Act and State Water Board regulations provide that a water board may cite for contempt any person who defies a lawful order, refuses to take an oath, obstructs or interrupts a meeting by disorderly conduct or breach of the peace, violates the ex parte communication rules, or refuses to comply with a subpoena or similar order of a water board. No immediate action can be taken, but the matter may be referred to the local Superior Court for action, including sanctions and attorneys fees.

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