

Los Angeles Regional Water Quality Control Board

**ORDER ON REQUESTS CONCERNING HEARING PROCEDURES AND PROCESS,
UNTIMELY WRITTEN COMMENTS, AND ORDER OF PROCEEDINGS**

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT
FOR MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) DISCHARGES
FROM THE CITY OF LONG BEACH (LONG BEACH MS4 PERMIT)
(NPDES PERMIT NO. CAS004003)**

The Los Angeles Regional Water Quality Control Board (Los Angeles Water Board or Board) set forth the procedures and process the Board will use at the hearing on the tentative NPDES Permit for MS4 Discharges from the City of Long Beach (Tentative Order) in a Notice of Opportunity for Public Comment, Notice of Workshop, and Notice of Public Hearing dated November 22, 2013 (hereafter, "Notice"). Pursuant to the Notice, the Board received timely requests concerning the hearing procedures and process to be used at the public hearing on February 6, 2014. The Chair, having reviewed the requests, provides rulings on the requests as set forth below. The Chair also hereby rules on untimely written comments and also establishes the order of proceedings.

REQUESTS FOR PARTY STATUS

Request:

The Board previously designated the City of Long Beach as a party to this proceeding. Pursuant to the Notice, the Board received one timely additional request for party status in this matter. That request was made by Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay (collectively, "Environmental Groups").

Ruling:

The Environmental Groups' request for party status is GRANTED. The Environmental Groups are each hereby designated as additional parties to this proceeding, pursuant to section 648.1(a) of Title 23 of the California Code of Regulations. In their request, the Environmental Groups state that they represent numerous members¹ who recreate in the waters affected by the discharges regulated by the Tentative Order and whom are impacted by pollution in stormwater runoff and its resulting health impacts. Like the other designated party, the Environmental Groups have an interest in, and will be affected by, the Board's decision in this proceeding. The Environmental Groups have also demonstrated that the existing designated party does not adequately represent the Environmental Groups' interests. As noted in their request for party status, the Environmental Groups have presented arguments that are different from or in opposition to positions taken by the existing designated party. The Environmental Groups have also presented arguments that are different from or in opposition to positions taken by the Board; thus, the Board does not adequately represent the Environmental Groups' interests either. Accordingly, the Board finds that the Environmental Groups' perspective and participation as a party will be beneficial to further develop the issues before the Board. In

¹ Please note that the Environmental Groups' individual members are not designated as parties to this proceeding.

addition, because all parties and interested persons will be subject to reasonable time limits to make presentations, there is no impact on the efficient conduct of the hearing itself.

PARTICIPATION OF LOS ANGELES WATER BOARD STAFF AND ATTORNEYS

Request:

The Environmental Groups request that the Los Angeles Water Board designate a separate legal staff member for solely procedural and evidentiary matters that may arise during the hearing, in order to prevent any actual or perceived conflict between the various potential roles required of Board counsel at the hearing.

Ruling:

This request is DENIED. Government Code section 11425.10 provides that “[t]he adjudicative function shall be separated from the *investigative, prosecutorial, and advocacy functions* within the agency....” (emphasis added.) This permit proceeding involves none of these functions. This is a proceeding to issue a new permit for MS4 discharges. The proceeding is not an investigation. No investigative order is under consideration, and no investigation functions are involved in this proceeding. Likewise, a permit proceeding does not involve a prosecution. Neither sanctions, liability, nor criminal, civil, or administrative penalties of any sort are being sought during this proceeding. There is nothing to prosecute, and, therefore, no prosecutorial function is involved. Board staff and attorneys also have no advocacy function in this permit proceeding. Typically, the Board does not designate its staff as a party for permit proceedings. Here, as in virtually all permit proceedings, staff’s proposals, recommendations, and their participation exists for the purpose of advising and assisting the Los Angeles Water Board. Likewise, attorneys for the Board advise and assist the Board, which includes the Board members and its entire staff. *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1585, held that, “[b]y definition, an advocate is a partisan for a particular client or point of view.” Given the nature of this proceeding and the limited facts in dispute, assigning a separate staff to “advocate” on behalf of a particular position would not further the development of the issues before the Board. In a non-prosecutorial, non-investigative proceeding, staff’s role is well-settled. Staff merely advises the Board members about policy choices, technical recommendations, and legal issues. Unlike an advocate, Board staff and attorneys provide neutral evaluations and explanations of the pros and cons of all options. This is distinct from an advocate, who picks a particular view and advocates for that view.

The Environmental Groups assert that the potential exists for Board attorneys to be required to fulfill dual roles—acting, on the one hand, to cross examine witnesses or to present evidence before the Board, and, on the other hand, to rule on the admissibility of evidence, on proper procedure for witness conduct, or to otherwise serve in an advisory capacity to the Board on procedural and evidentiary issues. Board attorneys do not have dual roles in this proceeding; rather, the Board attorneys have one role. That role is to advise and assist the Los Angeles Water Board, which includes the board members and its entire staff. While allowed,² the Board attorneys will not be cross examining witnesses or presenting evidence during this proceeding. The Board attorneys may, however, ask clarifying questions.

² The State Water Resources Control Board’s hearing regulations specifically contemplate that Board staff who are assisting the Board or the hearing officer with the hearing may cross examine parties’ witnesses. (Cal. Code Regs., tit. 23, § 648.5, subd. (a)(6).) In addition, “[t]he mere fact that the decision-maker or its staff is a more active participant in the factfinding process...will not render an administrative procedure unconstitutional.” (*Howitt*, 3 Cal.App.4th at p. 1581.)

Government Code section 11430.30 expressly allows Board staff to advise the presiding officer on issues in non-prosecutorial adjudicative proceedings. The provisions of Government Code sections 11430.10-11430.80 apply and obviate the need for a separation of functions in non-prosecutorial proceedings. Subject to limited exceptions, Government Code section 11430.10 generally prohibits communications concerning issues in a pending administrative proceeding between the presiding officer and an employee of the agency. One such limited exception is found at Government Code section 11430.30, which provides in relevant part:

A communication otherwise prohibited by Section 11430.10 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:

...(c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative hearing that is non-prosecutorial in character:

...(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water resources Control Board, or a regional water quality control board.

The Law Review Commission noted that this special exemption was necessary and appropriate. It stated:

Subdivision (c) applies to nonprosecutorial types of administrative adjudications, such as...proceedings...setting water quality protection...requirements. The provision recognizes that the length and complexity of many cases of this type may as a practical matter make it impossible for any agency to adhere to the restrictions of this article, given limited staffing and personnel.

(Recommendation: Administrative Adjudication by State Agencies (Jan. 1995) 25 Cal. Law. Revision Com. Rep. (1995) p. 166.) Thus, express statutory authority specifically authorizes involved Board staff to communicate with the presiding officer concerning any issues in a pending adjudicative proceeding that is non-prosecutorial in character. As the California Supreme Court has recognized, separations of functions is inextricably linked with the prohibition on ex parte communications. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeal Bd.* (2006) 40 Cal.4th 1, 10.) But the Legislature has recognized that communications that would customarily be prohibited are appropriate for Board staff during a non-prosecutorial adjudicative proceeding. (Gov. Code, § 11430.30, subd. (c)(2).) By the same token, a separation of functions in such circumstance is not necessary.

In addition, the Environmental Groups' reliance on *Nightlife Partners, LTD. V. City of Beverly Hills* (2003) 108 Cal.App.4th 81, is misplaced and easily distinguishable. *Nightlife Partners* involved a city attorney who served in conflicting functions in different phases of a proceeding about the plaintiff's application for a cabaret license. The attorney advocated to the decision maker (executive staff) that it should determine that the application was incomplete, and the decision maker rejected the application on that basis. Thereafter, the same attorney also served as the advisor to the hearing officer during the plaintiffs' subsequent administrative appeal of that ruling. Unlike the city attorney in *Nightlife Partners*, the Board's attorneys are not tasked with an advocacy function in the instant proceeding. *Nightlife Partners* did not involve the exercise of dual functions in the same proceeding and it certainly did not rule that a public body was required to task its staff with an advocacy function when it issues a permit. Perhaps most

significantly, however, unlike the Board staff, the city attorney in *Nightlife Partners* did not have the benefit of an express grant of statutory authority to advise the presiding officer off the record on any issues in a non-prosecutorial adjudicative proceeding. As Board staff is not performing an advocacy function in the instant proceeding, and because Government Code section 11430.30, subdivision(c)(2), allows for such communications and is expressly limited to the Board (and a very small number of other agencies), *Nightlife Partners* has no application to this proceeding.

UNTIMELY WRITTEN COMMENTS

Ruling on the Chair’s own motion:

Pursuant to the Notice, written comments must be received at the Los Angeles Water Board office by 5:00 pm on January 3, 2014. On December 16, 2013, the written comment deadline was extended to 5:00 pm on January 10, 2014. On January 10, 2014, the written comment deadline was again extended to January 15, 2014. The Board received one untimely written comment from Contech Engineering Solutions (Contech). While Contech’s written comment letter is dated January 9, 2014, the letter was only emailed to the Board on January 17, 2014 at 8:26 PM.

Pursuant to section 648.4, Title 23 of the California Code of Regulations, the Board will not consider or respond to this untimely written comment letter, nor include the written comment letter into the administrative record. The commenter has not shown good cause for its delay in submitting the written comments. While the written comment letter will not be considered, Contech may make oral comments at the hearing on the permit.

REQUESTS FOR TIME TO SPEAK AT HEARING

Requests:

Pursuant to Section VIII of the Notice, the Los Angeles Water Board received timely requests from the parties to this proceeding requesting extra time to present their oral comments at the hearing. The City of Long Beach requested 30 minutes and the Environmental Groups requested 45 minutes.

Ruling:

After consideration of all requests, taking into account the complexity and number of issues under consideration, the extent to which the parties have coordinated, the number of parties and members of the public, the opportunity to submit written comments that are part of the administrative record, the extent to which the parties have identified unique interests, and the time available for the hearing, the following times are allocated to each party, unless the Board makes a modification for cause. The times granted to each party below are adequate to summarize written comments and present oral comments and evidence.

Party	Time Requested	Time Granted
City of Long Beach	30 minutes	30 minutes
Environmental Groups	45 minutes	30 minutes

The time allocated to the parties includes any opening statement, main presentation, rebuttal and/or cross-examination, and closing statement. Questions from the Board and the time to answer them will not be charged against the parties’ allocated time.

Oral comments from the public (also called "Interested Persons") are limited to 3 minutes each. The Board may reduce the time for each interested person to comment depending on the number of persons wishing to be heard and the available time for the hearing.

Parties and interested persons with similar concerns or opinions are encouraged to choose one representative to speak, and are encouraged to coordinate their presentations with each other, and to summarize their written comments. Repetitive comments will not be allowed.

ORDER OF PROCEEDINGS

During the hearing, Board staff will provide an overview of the Tentative Order. Parties and Interested Persons will then have the opportunity to orally address the Board on the Tentative Order. Parties and Interested Persons should present all oral comments and evidence during the hearing that they would like the Board to consider. No new written materials may be submitted on the Tentative Order. If any person uses a PowerPoint presentation, they must leave a copy with the Board for inclusion in the record.

The following Order of Proceedings, including time allocated to each party and Interested Person, will be employed at the hearing on February 6, 2014, unless the Board makes a modification for cause.

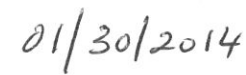
1)	Opening statement by Chair and administration of oath to persons who intend to testify	Approx. 10 minutes
2)	Los Angeles Water Board Staff Presentation	Approx. 30 minutes
3)	U.S. Environmental Protection Agency	Approx. 15 minutes
4)	Designated Parties' Presentations A. City of Long Beach B. Environmental Groups	30 minutes maximum 30 minutes maximum
5)	Public/Interested Persons' Comments	3 minutes maximum each
6)	Los Angeles Water Board Staff Responses to Comments	Approx. 15 minutes
7)	Board Questions and Deliberations	Unlimited

Board staff is directed to provide notice of this Order to all parties and interested persons.

IT IS SO ORDERED.



Maria Mehranian, Chair



Date