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March 22, 2013

**VIA E-MAIL**

David W. Gibson  
San Diego Regional Water Quality Control Board  
9174 Sky Park Ct., Suite 100  
San Diego, CA 92123-4340  
DGibson@waterboards.ca.gov

*RE: Objection to Hearing Procedures and Order of Proceedings*

Dear Mr. Gibson:

The City of San Diego has serious concerns about the Hearing Procedures and Order of Proceedings for the Municipal Separate Storm Sewer System (MS4) permit hearing, which we received on March 18, 2013. We were hoping to be able to review the forthcoming revisions to the Tentative Order before deciding whether to file this formal objection, but unfortunately the revised Tentative Order is not yet available. Given the warning in the notice that objections made after today will be “deemed waived,” the City files this objection to preserve its due process rights. Specifically, the City objects to the following:

**1. Limitations on Testimony and Evidence.** The City objects to the attempt to limit the parties’ ability to present testimony and evidence. This permit hearing is an adjudicative proceeding.<sup>1</sup> Under the State Board’s own regulations, a party to an adjudicative hearing has a right to submit any “relevant” oral or written evidence.<sup>2</sup> Further, under the Clean Water Act regulations, the comment period must remain open until the close of the public hearing.<sup>3</sup> This provision is applicable to state permit proceedings.

Contrary to these regulations, the notice states: “the scope of oral testimony will be strictly limited to summarizing the previously submitted comments, commenting on revisions to the Tentative Order made since the written comment period closed, and making policy statements. No new issues may be raised at the hearing.” The notice further states that

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<sup>1</sup> Memorandum from Office of Chief Counsel to State Water Resources Control Board and California Regional Water Quality Control Boards, regarding Summary of Regulations Governing Adjudicative Proceedings Before the California Water Boards (Aug. 2, 2006).

<sup>2</sup> *Id.*; 23 Cal. Code Regs. § 648.5.1; Gov’t Code § 11513(c).

<sup>3</sup> 40 C.F.R. § 124.12(c).

PowerPoint presentations “will not be accepted if they contain any new testimony or evidence.” The parties have a right to submit any relevant evidence and testimony prior to the close of the public hearing. The Regional Board must honor this vital due process right.

**2. Limitations on Submission of Written Comments on Permit Revisions.** The City objects to the proposal to limit the parties to the written comments already submitted on the prior version of the Tentative Order, which we understand has undergone substantial revision. The City requests a limited 30-day written comment period to allow the parties to address revisions to the Tentative Order. This will allow for a more complete administrative record, a more orderly permit adoption hearing, and more informed decision-making by the Regional Board.

**3. Order of Proceedings.** The City objects to the informal hearing procedures proposed, and requests that hearing be conducted according to the formal hearing procedures in Section 648.5 of Title 23 of the California Code of Regulations. Specifically, the City reserves its right to present any relevant evidence, cross-examine witnesses, and present a closing statement. The Regional Board must grant this request because the State Board regulations provide that “[a] matter shall not be heard pursuant to an informal hearing procedure over timely objection . . . unless an informal hearing is authorized under subdivision (a), (b), or (d) of section 11445.20 of the Government Code.”<sup>4</sup> None of those exceptions apply here.

Further, the three hours allotted for thirty-nine Copermittees to share is unacceptable. This works out to less than five minutes per Copermittee. The City would have liked to coordinate its presentation with the other Copermittees as we have done in the past, but the late release of the revised Tentative Order and responses to comments has limited our ability to do so. We understand that the revised Tentative Order may not be available until the meeting agenda packet is mailed, which could give us less than two weeks to prepare for the hearing. Should the hearing go forth on April 10 and 11 as proposed, the City requests its own block of time of one hour, with 30 minutes for a staff presentation and presentation of evidence and 30 minutes for cross examination and a closing statement, if necessary.

**4. Timing of Hearing.** The City objects to holding the permit adoption hearing on April 10 and 11. The City believes that delaying the hearing to provide the parties time to digest the forthcoming revised Tentative Order may remedy many of the City’s concerns and result in a more orderly and productive hearing. The City also understands that two new Regional Board members may be appointed soon, and delaying the hearing would give them time to settle into their duties before being asked to rule on an extremely complicated and controversial permit with serious fiscal and legal implications on the Copermittees. It would also be appropriate to delay the hearing to allow the State Board to provide guidance on the Receiving Waters Limitations language, as urged in the letter from Mayor Filner dated March 15, 2013.

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<sup>4</sup> 23 Cal. Code Regs. § 648.7.

David W. Gibson

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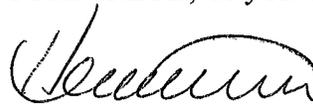
March 22, 2013

For all of these reasons, the City respectfully requests that the Regional Board issue a revised Hearing Procedures and Order of Proceedings that complies with the Clean Water Act and State Board regulations.

Sincerely yours,

JAN I. GOLDSMITH, City Attorney

By



Heather L. Stroud  
Deputy City Attorney

HLS:cw

Enclosures: Memorandum from Office of Chief Counsel to State Water Resources Control Board and California Regional Water Quality Control Boards, regarding Summary of Regulations Governing Adjudicative Proceedings Before the California Water Boards (Aug. 2, 2006).  
Letter from Mayor Bob Filner and San Diego County Board of Supervisors Chair Greg Cox to David Gibson (Mar. 15, 2013).

cc: Kris McFadden, Deputy Director, City of San Diego Transportation & Storm Water Department  
Catherine Hagan, Esq., San Diego Regional Water Quality Control Board Counsel

Doc. No.: 535085



Linda S. Adams  
Secretary for  
Environmental Protection

# State Water Resources Control Board

## Office of Chief Counsel

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Arnold Schwarzenegger  
Governor

**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  
Chief Counsel  
**OFFICE OF CHIEF COUNSEL**

**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.<sup>1</sup> 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.

<sup>1</sup> 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 Act<sup>2</sup> and by regulations adopted by the State Water Board<sup>3</sup>. 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

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<sup>2</sup> Gov. Code, § 11400 et seq.

<sup>3</sup> 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.

Board Members

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August 2, 2006

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.

cc: [All via e-mail only]

Celeste Cantú, EXEC  
Tom Howard, EXEC  
Beth Jines, EXEC  
All Division Deputy Directors  
All Executive Officers  
    Regional Water Boards  
All Assistant Executive Officers  
    Regional Water Boards, Branch Offices  
All Office of Chief Counsel attorneys



City of San Diego



County of San Diego

SAN DIEGO REGIONAL  
WATER QUALITY  
CONTROL BOARD

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March 15, 2013

Mr. David Gibson  
California Regional Water Quality Control Board  
San Diego Region 9  
9174 Sky Park Court, Suite 100  
San Diego, CA 92123

**NOTICE OF PUBLIC HEARING – NATIONAL POLLUTANT DISCHARGE  
ELIMINATION SYSTEM (NPDES) PERMIT AND WATER DISCHARGE  
REQUIREMENTS FOR DISCHARGES OF URBAN RUNOFF FROM THE  
MUNICIPAL SEPARATE STORM SEWER SYSTEMS (MS4S) DRAINING THE  
WATERSHEDS WITHIN THE SAN DIEGO REGION**

Dear Mr. Gibson:

On March 6, 2013 the San Diego Regional Water Quality Control Board (Regional Board) announced that hearings for the proposed Municipal Storm Water Permit for the San Diego Region would be held on April 10 and 11, 2013. The City of San Diego (City) and the County of San Diego (County) submitted lengthy written comments during the public comment period for the draft permit and is concerned that the hearings will be held without our respective jurisdictions being given an opportunity to review responses to their comments. Furthermore, we believe that it would be prudent to postpone any approval of the Municipal Storm Water Permit until the California State Water Resources Control Board provides guidance on the Receiving Waters Limitation language, which if not included in the initial approval of our regional permit, could necessitate that the Regional Board amend its regulations in the immediate future.

The City and the County appreciate the difficulties and challenges in implementing such complex regulatory matters as the Municipal Storm Water Permit, but as copermittees regulated by this permit, we are concerned that the Regional Board has decided to move this hearing forward without providing sufficient time to appropriately respond to and address stakeholders' concerns.

Locally and on a statewide level there continue to be numerous outstanding issues with this proposed permit. We believe it would be inappropriate and irresponsible to rush adoption

Mr. David Gibson  
March 15, 2013  
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without continued dialog between the stakeholders and Regional Board staff. The City and County are committed to the goal of improving water quality through the storm water management programs that have been developed in conjunction with the Regional Board, but the current proposed permit include provisions that are flawed and need to be addressed.

Considering the significant financial burden this permit will have on so many local governments, we believe it is more important to create a permit that incorporates sound regulation than to needlessly rush toward an arbitrary deadline. The Regional Board staff has acknowledged on the record that the impacts of some of the proposed standards and regulations are not fully understood. We do not even know that compliance can be achieved with the tools and science available today. However, we do know for certain, based on the Regional Board's own studies, that significant cost in the range of billions of dollars will be incurred as a result of copermittees trying to comply with the proposed regulations if implemented.

As stewards entrusted with managing public tax dollars, we do not believe it is prudent to implement policy without having a clear understanding of whether it will mitigate the problem it was created to address. The City and the County believe it would be more productive to postpone any hearing in order to step back and continue working with all stakeholders to clearly define goals that are achievable and do not have such detrimental financial impacts to local governmental services.

Thank you for your consideration of this request. If the Regional Board does choose to move forward with holding the hearing in April, the City and County respectfully request to speak at the designated meeting to have the record reflect our respective positions on this matter. We would also respectfully request a time certain be allocated at the beginning of such hearing so that the City and County representatives can provide testimony.

If you have any questions, please contact Richard Crompton, County of San Diego Director of Public Works at (858) 694-2233 or Kip Sturdevan, City of San Diego Director of Transportation and Storm Water at (619) 236-6594.

Respectfully,



Hon. Bob Filner  
Mayor  
City of San Diego



Hon. Greg Cox  
Chairman  
San Diego County Board of Supervisors