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27 May 2016

By E-Mail

San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
Attn: Marnie Ajello
marnie.ajello@waterboards.ca.gov

Subject: Point Buckler Club, LLC and John D. Sweeney
Proposed Cleanup and Abatement Order

Dear Ms. Ajello:

On behalf of Point Buckler Club, LLC and John D. Sweeney (jointly the “Club”), I am submitting the following objections and comments in response to the document entitled “Hearing Procedure For Administrative Civil Liability Complaint No. R2-2016-1008 and Tentative Cleanup and Abatement Order” (the “Hearing Procedure”).

1. Appointment of Presiding Officer.

To date, the Club has not received notice of who is presiding officer in this matter. The Administrative Adjudication Bill of Rights calls for a presiding officer. (Gov. Code § 11425.10(a)(5), § 11430, § 11440.) Please identify the presiding officer.

2. Decisions Made By Persons Other Than Presiding Officer.

The Club objects to any decision made by anyone other than the presiding officer, including the decision on our request to postpone the 10 August hearing on the proposed cleanup and abatement order. The role of the advisory team is to advise the presiding officer, not to make decisions. (*See e.g.* 23 CCR § 648(d) (“[t]he *presiding officer* may waive any requirements...”, emphasis added.)

3. Special Hearing.

The Club requests that the matter be taken off the Regional Board's monthly calendar and be given a special hearing similar to the hearing used in the consolidated Byron-Bethany Irrigation District and West Side Irrigation District cases (jointly "Byron-Bethany"). This case is at least as complex and substantial as those cases. Here the prosecution team has proposed a civil liability of \$4.8 million, the largest ever proposed in this region. In comparison, the proposed civil liability in Byron-Bethany was for about \$1.5 million. In Byron-Bethany, the prosecution team had proposed a cleanup and abatement order, as the prosecution team has here.

Any element of due process afforded in Byron-Bethany should be afforded here. There the State Board action threatened to deprive the districts of their property rights in water. Here the Regional Board's actions threaten to deprive the Club of its property rights in land.

4. Briefing Schedule.

The briefing schedule is so unfair it calls into question the legitimacy of the entire process. The Hearing Procedure gives the Club only ten days to respond to the prosecution team's opening brief (page 7). The opening brief is due 1 July, and our opposition brief is due 11 July.

The process at issue here is most closely analogized to a motion for summary judgment. It requires the development and submission of *evidence* by the opposing party, not just legal argument. Motions for summary judgment are governed by Code of Civil Procedure ("CCP") 437c, which establishes the following briefing schedule: opening brief due 75 days before hearing; opposition brief due 14 days before hearing; reply brief due 5 days before hearing. (CCP §437c(a)(2), (b)(2), b(4).) You will note that this schedule gives the opposing party *61 days* to respond to the opening brief. When applied to the 10 August hearing, this schedule produces the following deadlines:

Hearing	10 August
Reply brief	5 August
Opposition brief	27 July
Opening brief	27 May

"Due process always requires, at a minimum, notice and an opportunity to respond."
(*United States v. Raya -Vaca*, 771 F.3d 1195, 1204 (9th Cir. 2014); accord Gov. Code

§ 11425.10(a)(1) (“[t]he agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence”.) Until we receive the prosecution team’s opening brief, we will not have all their evidence and arguments in front of us, and we will not know which legal issues and which factual arguments the prosecution team is putting most emphasis on. In other words, we will not know what we really need to respond to, and what we can safely ignore.

It does not help to say that the prosecution team has already given us a 452-page technical report and a 21-page proposed cleanup and abatement order (compared with the 6-page cleanup and abatement order issued last September) that includes 71 proposed findings. Even 61 days are not enough to rebut every substantial factual assertion in the 452-page report and all of the 71 proposed findings. To provide fair notice, the prosecution team must give us, in the words of the Hearing Procedure, “[a]ll legal and technical arguments or analysis” (page 4).

The Hearing Procedure does not require the prosecution team to provide that information until 1 July. For us to have a fair opportunity to respond to those arguments and analysis, we must have sufficient time to think about them, to *collect whatever additional data we may decide we need*, and to draft responses. In this case, we expect to need to obtain field data, which takes time.

The summary-judgment schedule provides time to collect additional data. The existing Hearing Procedure does not. We therefore request that the summary-judgment schedule be applied to this matter, and that the dates set out above be used, with one change. The schedule set out above would make the prosecution team’s opening brief due today. We have no objection to giving the prosecution team two weeks from today, until 10 June, to file its opening brief, as long as we receive a minimum of 45 days to respond.

As things now stand, the prosecution team has had about 20 months (from September 2014 to 17 May 2016, when it issued the Hearing Procedure) plus an additional 45 days from the issuance of the Hearing Procedure, to prepare its opening brief. The Club gets ten days to respond. That is grossly unfair.

5. Time For Hearing.

The Hearing Procedure gives us only 30 minutes before the Regional Board. During that time, we must make our opening statement, provide the testimony of our witnesses, cross-examine the other side’s witnesses, and make our closing argument. Those 30 minutes, divided

among these four tasks, provides only 7.5 minutes per task. This time is too short to give us a fair opportunity to present our case. It implies that there is no point in talking because the Regional Board will rubber stamp whatever is put before it.

The Club requests that it be given the time given to the prosecution team and to West Side Irrigation District in Byron-Bethany—20 minutes for oral opening statements (that time was shortened because written opening statements were submitted), plus 1.5 hours for presentation of direct testimony, plus 1 hour for cross-examination, plus 30 minutes for rebuttal testimony, plus 1 hour for direct testimony related to the cleanup and abatement order, plus 1 hour for cross-examination of those witnesses, which add up to 5 hours and 20 minutes—plus additional time for a full opening statement and for closing argument, for a total request of 7 hours.

A copy of the order setting these times is attached as Exhibit 2. You will note that the order is signed by the two hearing officers, rather than by anyone on the advisory team.

6. Bias.

A presiding officer is subject to disqualification for bias. (Gov. Code § 11425.10(a) (5).) Although presiding officers are presumed to be impartial, that presumption can be overcome by a “particular combination of circumstances creating an unacceptable risk of bias”. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 741.) Here that particular combination exists.

First, the Hearing Procedure gives the Club only 30 minutes to explain its case, present its witnesses, cross-examine the prosecution team’s witnesses, identify the applicable law, and make all its arguments. This time is wholly inadequate for a fair trial. It implies only one purpose: to get the presentations over as quickly as possible so that the Regional Board members can rubber stamp staff’s proposal. See discussion above.

Second, the briefing schedule is strongly biased in favor of the prosecution team. The prosecution team gets 20 months plus 45 days to prepare its opening brief, whereas the Club gets only 10 days to respond. See discussion above.

Third, the Hearing Procedure itself shows that there is insufficient separation of functions. The adjudicative function of an agency must be kept completely separate from the prosecution functions:

While the state's administrative agencies have considerable leeway in how they structure their adjudicatory functions, they may not disregard certain basic precepts. One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisers in private. Another directs that the functions of prosecution and adjudication be kept separate, carried out by distinct individuals.

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2006) 40 Cal.4th 1, 5.)

Here the prosecution team acted as the adjudicator when it issued the Hearing Procedure. The Hearing Procedure sets specific deadlines by which actions must be taken. That is the job of the presiding officer, not the prosecution team. Because the prosecution team has acted as the adjudicator in this case, the Regional Board has not maintained the required separation.

The Club has been told that the Hearing Procedure is a standard form that has been approved by the advisory team, and has received a copy of the standard form, which is attached as Exhibit 3. The Club has also receiving documentation showing that Bruce Wolfe informed the Regional Board of the standard form in 2009, but did not ask the Board to approve the form. That is not good enough to meet due-process requirements.

If anyone on the prosecution team took any part in the preparation of the form, then there has been a violation of the separation requirement.

Regardless of who prepared the standard form, the Hearing Procedure is not identical to the standard form. The Hearing Procedure, for example, gives the prosecution team a reply brief, whereas the standard form does not allow for a reply brief. According to the standard form, the prosecution team can only submit objections to evidence following the opposition brief. This difference implies that the prosecution team has made adjudicatory decisions—it has modified the standard procedure in its favor—and thereby violated the separation of functions rule.

There are also differences in the deadlines set by the Hearing Procedure and set out in the standard form. It does not matter that these differences are minor. What is important here is that the prosecution team is making adjudicatory decisions with the apparent blessing of the advisory team. That is evidence of a pervasive bias against true separation of functions.

The nonpublic nature of the Hearing Procedure is also evidence of bias within the Regional Board. If the Regional Board has established procedural rules for hearings, those rules should be made available to the general public through regulations or, at the very least, by having the rules prominently posted on the website. By maintaining secret rules that are known to the prosecution team but not to the affected parties, the Regional Board has biased the hearing in favor of the prosecution team.

Fourth, there have been ex parte communications between the prosecution and advisory teams, and misrepresentations about those ex parte communications. Bruce Wolfe was a part of the prosecution team on the previous cease and desist order (or he was a decision maker who participated in ex parte communications with the prosecution team), and is now part of the advisory team. For this reason, the Club has requested that Mr. Wolfe be disqualified from participating in this matter. (Copy attached as Exhibit 4.)

The Hearing Procedure asserts that there have been no ex parte communications, but that statement is not accurate. (See discussion below.)

Because of this evidence of bias, the 10 August hearing should be taken off calendar. A presiding officer should be appointed, and that presiding officer should determine who is properly on the advisory team. The presiding officer should invite proposals on a hearing procedure from the parties, and rule on them as an independent adjudicator.

7. Ex Parte Communications.

The Hearing Procedure incorrectly asserts that “[m]embers of the Prosecution Team have not had any ex parte communications with the members of the Regional Water Board or the Advisory Team regarding this proceeding.” (Page 4.) But, as explained in Exhibit 4, Mr. Wolfe has engaged in ex parte communications.

8. Bruce Wolfe.

The Club has objected to Mr. Wolfe’s participation on in this matter. The Club requests that the decision on this objection be made by the presiding officer. The Club also requests that it be informed about the timing and procedure that will be used to make this decision.

9. The Hearing Procedure.

The Club objects to the Hearing Procedure on the ground that it was issued by the prosecution team, which has no authority to make adjudicatory decisions. To the extent that it was blessed by the advisory team, the Club objects because the advisory team has no authority to be making adjudicatory decisions in the place of the presiding officer. (See discussion above.)

10. Waiver.

The Hearing Procedure incorrectly characterizes the waiver regulation. The Hearing Procedure asserts that “[i]n accordance with Section 648, subdivision (d), any procedure not provided by this Hearing Procedure is deemed waived.” (Page 2.) But that section says only that “[t]he presiding officer may waive any requirements in these regulations...so long as those requirements are not mandated by state or federal statute or by the state or federal constitution.” (23 CCR §648(d).) The Club objects to the assertion of waiver in the Hearing Procedure both because it was not made by the presiding officer, and because the Club cannot reasonably be held to waive objections it may have to procedures not yet been identified. The Club also objects to assertions of waiver on the ground that they were made by the prosecution team, which has no authority to made adjudicatory decisions. The prosecution team may, of course, waive any of its own rights.

11. Non-Parties.

The Hearing Procedure invites nonparties to provide written “policy statements” and to make statements at the hearing. (Pages 4 and 5.) Policy statements may be appropriate for quasi-legislative proceedings, but not for adjudicatory proceedings. Just as no non-party is allowed to participate in a court proceeding, no non-party should participate in this proceeding.

12. The 16 June Deadline.

The Hearing Procedure includes a 16 June deadline, which is explained as “Dischargers’ and interested persons deadline for submission of written recommendations/non-evidentiary policy statements.” (Page 7.) The standard form make no mention of dischargers in this context. (Ex. 3, page 6.) The Club objects to this deadline both for the reason given above, and because it is vague and ambiguous. If the Club has an obligation to make a submission by that date, the obligation should be clarified. If not, the deadline should be deleted.

13. Rebuttal Evidence.

The Hearing Order does not specifically prohibit the prosecution team from submitting evidence with its reply brief. It should. Due process requires that the Club have an opportunity to respond to the evidence. When evidence is submitted with the final brief, there is no opportunity to respond.

14. Documents.

The Club has submitted a request under the Public Records Act, but does not appear to have received all responsive documents. The Club expects to be following up with the prosecution team. To the extent that the prosecution team does not produce all the documents that it should produce, the Club objects to the Hearing Procedure, hearing date, and briefing schedule on the ground that documents have been withheld.

Thank you for considering these objections and comments, and please let me know if you need any additional information or legal argument.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Bazel", with a large, stylized flourish at the end.

Lawrence S. Bazel

cc: D. Coupe (by e-mail)
D. Whyte (be e-mail)
L. Drabandt (by e-mail)
T. Austin (by e-mail)
B. Martin (by e-mail)



Fact Sheet

Draft Order Dismissing Pending Water Right Enforcement Actions Against Two Irrigation Districts To be Considered by State Water Board June 7, 2016

On May 26, 2016, the State Water Resources Control Board (State Water Board or Board) released a draft order proposing to dismiss pending enforcement actions against Byron-Bethany Irrigation District (BBID) and The West Side Irrigation District (WSID). The Division of Water Rights (Division) initiated the enforcement actions last summer. Two members of the Board sat as impartial hearing officers to consider the evidence during a public hearing held in March. The Board will consider the [draft order](#) for possible adoption on June 7, 2016.

The State Water Board is the state agency responsible for issuing water right permits and licenses and enforcing many of California's water right laws. The largest portion of California water rights are "appropriative" water rights, which are subject to a rule of priority. Under the rule of priority, the earliest, senior water rights are satisfied before more recent, junior water rights. The priority of an appropriative water right determines whether water is available to that right. The rule of priority is especially important in times when natural flows in rivers and streams are limited, such as during a drought.

In 2015, California was in the midst of its worst drought in modern times and snow pack levels were at historic lows. On June 12, 2015, staff of the Board informed holders of appropriative water rights with a priority of 1903 or later within the Sacramento and San Joaquin River watersheds of the apparent lack of available water because of extremely dry conditions resulting in reduced surface water flows. Board staff based the notice on water demand information provided by senior water right holders and water supply information provided by state and federal agencies.

In July 2015, the Division issued an administrative civil liability complaint against BBID and a draft cease and desist order against WSID based on evidence that the irrigation districts had diverted water when water was unavailable under their priorities of right. Both districts requested hearings to respond to these allegations.

Hearings for enforcement proceedings before the Board are subject to special procedural protections to ensure a fair hearing. The Board members serve as impartial hearing officers, weighing the evidence and arguments of the parties. Staff of the Division recommending the enforcement orders - the Prosecution Team – are separated from the hearing officers and staff advising the hearing officers. Members of the Prosecution Team and other parties to the proceeding are prohibited from having *ex parte* communications about the proceeding with State Water Board members or any member of the hearing team. The Board considers only



the evidence submitted into the record when making its determination. The BBID and WSID enforcement actions were subject to these special procedures.

On March 21, 22, and 23, 2016, the State Water Board commenced the public hearing to consider evidence about the availability of water for diversion by WSID and BBID. The Prosecution Team primarily relied upon an analysis created by the Division to determine availability of water during the drought following the rule of priority for water rights. The analysis is a forecasting tool that predicts water availability by comparing forecasted natural supply to estimated demand. The draft order finds that the water availability analysis and supporting evidence in the record was insufficient to continue the enforcement proceedings against the irrigation districts.

The draft order describes the water availability analysis as “an indispensable planning tool to forecast water availability for categories of rights when shortages are anticipated,” but points to specific inconsistencies in the analysis when applied to calculate the supply of water available to the irrigation districts in 2015. Information about water availability is necessary for water right holders to voluntarily comply with the priority system. The proposed order recognizes the analysis’s value to the state, in particular to farmers, irrigation districts, and communities who must plan around water shortages and make advanced decisions about planting, conservation measures, and alternate supplies. Moreover, the draft order does not preclude a similar but revised analysis from being used to support future enforcement actions before the Board. Further work will need to be done by the State Water Board and stakeholders to refine the analysis based on improved water accounting, inconsistencies identified during the hearing, and additional tools provided by the Legislature as part of its drought response.

The draft order clarifies that the Board has the authority to impose penalties for diversion or use of water by claimants of senior appropriative rights when water is unavailable under the priority of their rights. This authority allows the Board to administer water rights and enforce the priority system during drought or in other circumstances when the water supply is insufficient to satisfy all claimants.

The period to consider written public comments on this [draft order](#) ends at noon on June 3, 2016.

The draft order is an example of the Board’s independent review of actions initiated by the Board’s staff, in a fair and impartial administrative hearing setting. The Board intends to hold a future workshop about best practices for conducting water availability analyses for purposes of administering the water rights priority system and other regulatory approaches to the administration of water rights during shortage.

For more information on the role of the State Water Board administering the water rights system, please visit a resource page found [here](#):

This fact sheet was last updated on May 26, 2016.

State Water Resources Control Board

February 18, 2016

VIA ELECTRONIC MAIL

TO: ENCLOSED REVISED SERVICE LIST OF PARTICIPANTS

SECOND PRE-HEARING CONFERENCE RELATED TO BYRON BETHANY IRRIGATION DISTRICT ADMINISTRATIVE CIVIL LIABILITY COMPLAINT AND THE WEST SIDE IRRIGATION DISTRICT DRAFT CEASE AND DESIST ORDER HEARINGS

This letter addresses the procedural issues that were raised during the State Water Resources Control Board's (State Water Board) February 8, 2016 second pre-hearing conference and several additional procedural issues.

ORDER AND TIMING OF PROCEEDING

We will conduct the hearings in the following order:

Policy Statements: Before the commencement of Phase 1 of the consolidated hearings, we will hear from any speakers who did not submit a Notice of Intent to Appear but wish to make a non-evidentiary policy statement. (See Hearing Notice Attachment, Sec. 9a, Policy Statements.) We will limit policy statements to 5 minutes, or less as is appropriate based on the number of persons wishing to make a policy statement.

Opening Statements: We will allow one written opening statement to be submitted by each party in each proceeding. Each written opening statement shall not exceed 10 pages in length, double-spaced, in 12 point font (preferably Arial). Alternately, parties may file a joint opening statement of up to 20 pages in length. Written rebuttal of written opening statements will not be accepted. The opportunity to respond in writing to opening statements is in a party's closing brief.

After presentation of any policy statements and before we proceed to summaries of direct testimony in Phase 1, we will allow all of the parties to either proceeding to make a single oral opening statement. We will not allow time for additional opening statements prior to Phase 2 of either hearing.

Oral opening statements made by parties presenting a case-in-chief should briefly summarize the parties' objectives in the case, the major points they intend to establish, and the relationship between the major points and the Key Issues. Oral opening statements may include policy-oriented statements and should briefly summarize the party's interest and extent of participation.

We will hear oral opening statements in the following order according to the stated time limits. Parties may choose to combine their allowed time with that of other parties. However, parties will need to inform us of these changes, by **Noon, March 14, 2016**:

1. Division of Water Rights Prosecution Team (Prosecution Team) (20 minutes)
2. Byron Bethany Irrigation District (BBID) (20 minutes)
3. The West Side Irrigation District (WSID) (20 minutes)
4. Mr. Morat (5 minutes)
5. South Delta Water Agency (SDWA) (5 minutes)
6. Central Delta Water Agency (CDWA) (5 minutes)
7. City and County of San Francisco (CCSF) (5 minutes)
8. San Joaquin Tributaries Authority (SJTA) (5 minutes)
9. California Department of Water Resources (DWR) (5 minutes)
10. State Water Contractors (5 minutes)
11. Patterson Irrigation District (5 minutes)
12. Banta-Carbona Irrigation District (5 minutes)
13. Westlands Water District (5 minutes)

Cases-in-Chief – Phase 1 (Water Availability): We will allow the parties to present their oral summaries of direct testimony in the following order, according to the stated time limits. We may, upon an offer of proof as to the substance, purpose, and relevancy of the expected testimony, approve a party's request for additional time to present direct testimony during the party's case-in-chief:

Order of Presentation for Direct Testimony:

1. Prosecution Team (1.5 hours)
2. BBID (1.5 hours)
3. WSID (1.5 hours)
4. SDWA (30 minutes)

Order of Cross-Examination:

Cross-examination is not limited to the scope of direct testimony. Cross-examination must, however, be limited to the factual issues in dispute. The parties may choose to combine their allowed time for cross-examination with that of other parties. However, parties will need to inform us of these changes, by **Noon, March 14, 2016**.

In Phase 1, cross-examination will be conducted in the following order, according to the stated time limits per witness, or in the case of multiple witnesses, per panel of witnesses:

1. Prosecution Team (1 hour)
2. BBID (1 hour)
3. WSID (1 hour)
4. SDWA (10 minutes)
5. CDWA (10 minutes)
6. CCSF (10 minutes)
7. SJTA (10 minutes)
8. DWR (10 minutes)
9. State Water Contractors (10 minutes)
10. Patterson Irrigation District (10 minutes)
11. Banta-Carbona Irrigation District (10 minutes)
12. Westlands Water District (10 minutes)

During the second pre-hearing conference, some of the parties expressed concern that the time allowed for cross-examination is too limited, and that cross-examination of witnesses by panel will lead to confusion. At this time, we intend to proceed within the time limits provided here and allow cross-examination by panel of witnesses if a party has presented its direct testimony in that manner rather than by individual witness. However, the cross-examiners may direct their questions to particular witnesses on the panel.

We note that the parties have already had the opportunity to depose the Prosecution Team's witnesses, so cross-examination during the hearing will not be the parties' first and only opportunity to elicit testimony from these individuals. The parties also have the option of coordinating and combining their allotted time. We conclude that the time limits are appropriate to avoid repetitive testimony and promote efficiency of the hearing procedure. We will consider requests for additional time during the hearing, and will allow additional time if further cross-examination appears likely to produce relevant and material evidence.

Redirect Testimony and Recross-Examination: At our discretion during the hearing, we may allow redirect examination upon an offer of proof as to the substance, purpose, and relevancy of the expected testimony. Recross-examination, if any, shall be limited to the scope of the redirect testimony. We are likely to establish time limits for any redirect and recross-examination.

If allowed, redirect testimony and recross-examination will be conducted in the same order established for direct testimony and cross-examination.

Exhibits offered into Evidence: After completion of direct testimony, cross-examination, and if allowed, redirect testimony and recross-examination, the party presenting its case-in-chief may offer its exhibits into evidence.

Presentation of Rebuttal: After completion of direct testimony and cross-examination, and any allowed redirect testimony and recross-examination, the parties may present rebuttal evidence.

Rebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party's case-in-chief, and does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence. Rebuttal evidence may not be repetitive of evidence already submitted. Cross-examination of rebuttal evidence shall be limited to the scope of the rebuttal evidence.

We will allow parties to present a summary of submitted written rebuttal testimony. Parties may also offer rebuttal testimony that is in response to new evidence and could not have been previously submitted in writing. The parties may choose to combine their allowed time for rebuttal with that of other parties. However, parties will need to inform us of these changes, by **Noon, March 14, 2016.**

Rebuttal testimony will be presented in the following order, according to the stated time limits. The Prosecution Team, BBID, and WSID will each be allowed 30 minutes. All other parties will be limited to 10 minutes per party for rebuttal.

1. Prosecution Team (30 minutes)
2. BBID (30 minutes)
3. WSID (30 minutes)
4. SDWA (10 minutes)

5. CDWA (10 minutes)
6. CCSF (10 minutes)
7. SJTA (10 minutes)
8. DWR (10 minutes)
9. State Water Contractors (10 minutes)
10. Patterson Irrigation District (10 minutes)
11. Banta-Carbona Irrigation District (10 minutes)
12. Westlands Water District (10 minutes)

We may allow additional time for rebuttal upon an offer of proof as to the substance, purpose, and relevancy of the expected testimony.

Cross-examination of rebuttal evidence will follow the same order as presentation of rebuttal, and will be limited to the scope of the rebuttal evidence. Time limits for cross-examination of rebuttal testimony will be specified at a later time.

After completion of presentation of rebuttal evidence and rebuttal cross-examination by all the parties, each party may offer any rebuttal exhibits into evidence.

Cases-in-Chief – Phase 2 (BBID ACL Complaint):

We will allow the parties to present their cases-in-chief and conduct cross-examination in the following order, according to the stated time limits. We may, upon an offer of proof as to the substance, purpose, and relevancy of the expected testimony, approve a party's request for additional time to present direct testimony during the party's case-in-chief:

Order of Presentation for Direct Testimony:

1. Prosecution Team (1 hour)
2. BBID (1 hour)
3. SDWA (20 minutes)
4. Richard Morat (10 minutes)

Order of Cross-Examination:

1. Prosecution Team (1 hour)
2. BBID (1 hour)
3. WSID (10 minutes)
4. SDWA (10 minutes)
5. CDWA (10 minutes)
6. CCSF (10 minutes)
7. SJTA (10 minutes)
8. DWR (10 minutes)
9. State Water Contractors (10 minutes)
10. Patterson Irrigation District (10 minutes)
11. Banta-Carbona Irrigation District (10 minutes)

The parties may choose to combine their allowed time for cross-examination with that of other parties. However, parties will need to inform us of these changes, by **Noon, March 14, 2016**.

We may allow additional time for cross-examination, if we determine that the examination is likely to produce relevant and material testimony.

Redirect Testimony and Recross-Examination: At our discretion during the hearing, we may allow redirect examination upon an offer of proof as to the substance, purpose, and relevancy of the expected testimony. Recross-examination, if any, shall be limited to the scope of the redirect testimony. We are likely to establish time limits for any redirect and recross-examination.

If allowed, redirect testimony and recross-examination will be conducted in the same order established for direct testimony and cross-examination.

Exhibits offered into Evidence: After completion of direct testimony, cross-examination, and if allowed, redirect testimony and recross-examination, the party presenting its case-in-chief may offer its exhibits into evidence.

Presentation of Rebuttal: After completion of direct testimony and cross-examination, and any allowed redirect testimony and recross-examination, the parties may present rebuttal evidence.

Rebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party's case-in-chief, and does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence. Rebuttal evidence may not be repetitive of evidence already submitted. Cross-examination of rebuttal evidence shall be limited to the scope of the rebuttal evidence.

We will allow parties to present a summary of submitted written rebuttal testimony. Parties may also offer rebuttal testimony that is in response to new evidence and could not have been previously submitted in writing. The parties may choose to combine their allowed time for rebuttal with that of other parties. However, parties will need to inform us of these changes, by **Noon, March 14, 2016.**

The order of presentation of rebuttal evidence will be the same as the order for cross-examination. The Prosecution Team and BBID will each be allowed 30 minutes. All other parties will be limited to 10 minutes per party for rebuttal.

We may allow additional time for rebuttal upon an offer of proof as to the substance, purpose, and relevancy of the expected testimony.

Cross-examination of rebuttal evidence will follow the same order as presentation of rebuttal, and will be limited to the scope of the rebuttal evidence. Time limits for cross-examination of rebuttal testimony will be specified at a later time.

After completion of presentation of rebuttal evidence and rebuttal cross-examination by all the parties, each party may offer any rebuttal exhibits into evidence.

Cases-in-Chief – Phase 2 (WSID Draft CDO):

We will allow the parties to present their cases-in-chief and conduct cross-examination in the following order, according to the stated time limits. We may, upon an offer of proof as to the substance, purpose, and relevancy of the expected testimony, approve a party's request for additional time to present direct testimony during the party's case-in-chief:

Order of Presentation for Direct Testimony:

1. Prosecution Team (1 hour)
2. WSID (1 hour)
3. SDWA (20 minutes)

Order of Cross-Examination:

1. Prosecution Team (1 hour)
2. WSID (1 hour)
3. BBID (10 minutes)
4. SDWA (10 minutes)
5. CDWA (10 minutes)
6. CCSF (10 minutes)
7. SJTA (10 minutes)
8. DWR (10 minutes)
9. State Water Contractors (10 minutes)
10. Westlands Water District (10 minutes)

The parties may choose to combine their allowed time for cross-examination with that of other parties. However, parties will need to inform us of these changes, by **Noon, March 14, 2016**.

We may allow additional time for cross-examination if we determine that the examination is likely to produce relevant and material testimony.

Redirect Testimony and Recross-Examination: At our discretion during the hearing, we may allow redirect examination upon an offer of proof as to the substance, purpose, and relevancy of the expected testimony. Recross-examination, if any, shall be limited to the scope of the redirect testimony. We are likely to establish time limits for any redirect and recross-examination.

If allowed, redirect testimony and recross-examination will be conducted in the same order established for direct testimony and cross-examination.

Exhibits offered into Evidence: After completion of direct testimony, cross-examination, and if allowed, redirect testimony and recross-examination, the party presenting its case-in-chief may offer its exhibits into evidence.

Presentation of Rebuttal: After completion of direct testimony and cross-examination, and any allowed redirect testimony and recross-examination, the parties may present rebuttal evidence.

Rebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party's case-in-chief, and does not include evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence. Rebuttal evidence may not be repetitive of evidence already submitted. Cross-examination of rebuttal evidence shall be limited to the scope of the rebuttal evidence.

We will allow parties to present a summary of submitted written rebuttal testimony. Parties may also offer rebuttal testimony that is in response to new evidence and could not have been previously submitted in writing. The parties may choose to combine their allowed time for rebuttal with that of other parties. However, parties will need to inform us of these changes, by **Noon, March 14, 2016**.

The order of presentation of rebuttal evidence will be the same as the order for cross-examination. The Prosecution Team and WSID will each be allowed 30 minutes. All other parties will be limited to 10 minutes per party for rebuttal.

Cross-examination of rebuttal evidence will follow the same order as presentation of rebuttal, and will be limited to the scope of the rebuttal evidence. Time limits for cross-examination of rebuttal testimony will be specified at a later time.

After completion of presentation of rebuttal evidence and rebuttal cross-examination by all the parties, each party may offer any rebuttal exhibits into evidence.

CLOSING BRIEF

Oral closing arguments will not be permitted. We will allow the parties to submit one closing brief in each proceeding, after completion of both phases of the hearings.

Additional procedural details about the closing briefs, including page limits and deadlines for submittal, will be determined at a later time during the proceedings. Closing briefs should only address those facts and legal arguments previously raised. At this time, we will not allow responses to closing briefs.

OTHER PROCEDURAL MATTERS:

Briefs in response to the motions submitted by BBID and WSID on January 25, 2016, and as revised and resubmitted on February 3, 2016, are due on February 22, 2016. The Prosecution Team may submit one brief in each proceeding in response to the respective motions, each up to 20 pages in length. The remaining parties may submit one responsive brief in each proceeding in support or in opposition to the motion(s). Each of these responsive briefs may not exceed 10 pages in length. Alternately, parties may file a joint brief of up to 20 pages in length.

During the pre-hearing conference, some parties expressed concern that the ten-page limit on responsive briefs in support or opposition is insufficient to address the legal arguments that have been raised. We conclude that the page limits are sufficient in light of the similar limits imposed on the moving parties, and because parties may file a joint brief up to 20 pages in length.

We are considering the parties' request that the hearing officers respond to any motions in limine at least one week in advance of the hearing, and allow for oral argument if appropriate. Although we are unlikely to hold an additional pre-hearing conference, we appreciate that rulings on these motions in advance of the hearing will assist the parties in planning their presentation of evidence. The parties should, however, be prepared to present their evidence even if we do not have the opportunity to address all of those motions in advance of the hearing.

We will not allow the parties to submit a motion for judgment as a matter of law during the hearing. Any such motion may be made in writing either in the party's written opening statement or after the close of the hearing in the party's closing brief.

WSID Revised Notice of Intent to Appear

On January 19, 2016, WSID submitted an amended Notice of Intent to Appear that added Ms. Karna Harrigfeld and Mr. Greg Young as witnesses. The Prosecution Team objected to these revisions to WSID's witness list. In our ruling of [February 1, 2016](#), we allowed the revision to include Mr. Young, who had previously been identified by BBID as a witness in the BBID ACL Complaint hearing. We sustained the Prosecution Team's objection with respect to Ms. Harrigfeld, and excluded her testimony from the record.

On February 3, 2016, WSID again revised their witness list to include Mr. Jack Alvarez. We find that the same reasoning applicable to our exclusion of the testimony of Ms. Harrigfeld is applicable to Mr. Alvarez. In our prior ruling, we permitted WSID to submit the testimony of an alternate witness solely for the purpose of authenticating the referenced exhibits. Because the Prosecution Team is willing to stipulate to exhibits WSID 0001 through 0026, and absent the objection of any other party, testimony for this purpose is now unnecessary. Therefore, we will not include any of Mr. Alvarez's testimony in the record at this time.

Ex Parte Communications

We would like to take this opportunity to remind the parties that ex parte communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Please be sure to copy the service list on any correspondence to us, the other Board Members, or the hearing team.

Thank you for your continued cooperation. Questions regarding non-controversial procedural matters should be directed to Staff Counsel Nicole Kuenzi at (916) 322-4142 or by email to Nicole.Kuenzi@waterboards.ca.gov; or Ernie Mona at (916) 341-5359 or by email to Ernie.Mona@waterboards.ca.gov or to Jane Farwell-Jensen at (916) 341-5349 or by email to Jane.Farwell-Jensen@waterboards.ca.gov (Gov. Code, § 11430.20, subd. (b).)

Sincerely,



Frances Spivy-Weber, Vice-Chair
WSID Hearing Officer



Tam M. Doduc, Board Member
BBID Hearing Officer

Enclosures: Revised Service Lists

**SERVICE LIST OF PARTICIPANTS
THE WEST SIDE IRRIGATION DISTRICT
CEASE AND DESIST ORDER HEARING
(October 8, 2015, Revised 12/18/15)**

Parties	
THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)	
<p>DIVISION OF WATER RIGHTS Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 Andrew.Tauriainen@waterboards.ca.gov</p>	<p>THE WEST SIDE IRRIGATION DISTRICT Jeanne M. Zolezzi Karna Harrigfeld Janelle Krattiger Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com kharrigfeld@herumcrabtree.com jkrattiger@herumcrabtree.com</p>
<p>STATE WATER CONTRACTORS Stephanie Morris 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org</p>	<p>WESTLANDS WATER DISTRICT Daniel O'Hanlon Rebecca Akroyd Kronick Moskowitz Tiedemann & Girard 400 Capitol Mall, 27th Floor Sacramento, CA 95814 dohanlon@kmtg.com rakroyd@kmtg.com</p> <p>Philip Williams of Westlands Water District pwilliams@westlandswater.org</p>
<p>SOUTH DELTA WATER AGENCY John Herrick, Esq. Dean Ruiz 4255 Pacific Ave., Suite 2 Stockton, CA 95207 jherrlaw@aol.com dean@hprlaw.net</p>	<p>CENTRAL DELTA WATER AGENCY Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com</p> <p>Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli & McDaniel ngmplcs@pacbell.net dantejr@pacbell.net</p>
<p>CITY AND COUNTY OF SAN FRANCISCO Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 jonathan.knapp@sfgov.org</p>	<p>SAN JOAQUIN TRIBUTARIES AUTHORITY Valerie Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 vkinaid@olaughlinparis.com towater@olaughlinparis.com</p> <p align="right">(revised 12/18/15)</p>

<p>CALIFORNIA DEPARTMENT OF WATER RESOURCES Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 robin.mcginnis@water.ca.gov</p>	<p>BYRON BETHANY IRRIGATION DISTRICT Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 dkelly@somachlaw.com</p>
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**SERVICE LIST OF PARTICIPANTS
BYRON-BETHANY IRRIGATION DISTRICT
ADMINISTRATIVE CIVIL LIABILITY HEARING**

(09/02/15; Revised: 09/10/15; Revised 10/06/15; Revised 10/22/15, 12/18/15)

PARTIES	
<p>THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</p>	
<p>Division of Water Rights Prosecution Team Andrew Tauriainen, Attorney III SWRCB Office of Enforcement 1001 I Street, 16th Floor Sacramento, CA 95814 andrew.tauriainen@waterboards.ca.gov</p>	<p>Byron Bethany Irrigation District Daniel Kelly Somach Simmons & Dunn 500 Capitol Mall, Suite 1000, Sacramento, CA 95814 dkelly@somachlaw.com</p>
<p>Patterson Irrigation District Banta-Carbona Irrigation District The West Side Irrigation District Jeanne M. Zolezzi Herum\Crabtree\Suntag 5757 Pacific Ave., Suite 222 Stockton, CA 95207 jzolezzi@herumcrabtree.com</p>	<p>City and County of San Francisco Jonathan Knapp Office of the City Attorney 1390 Market Street, Suite 418 San Francisco, CA 94102 jonathan.knapp@sfgov.org</p> <p>Robert E. Donlan Ellison, Schneider & Harris L.L.P. 2600 Capitol Avenue, Suite 400 Sacramento, CA 95816 (916) 447-2166 red@eslawfirm.com</p>
<p>Central Delta Water Agency Jennifer Spaletta Spaletta Law PC PO Box 2660 Lodi, CA 95241 jennifer@spalettalaw.com</p>	<p>California Department of Water Resources Robin McGinnis, Attorney PO Box 942836 Sacramento, CA 94236-0001 robin.mcginnis@water.ca.gov</p>

<p>Dante Nomellini and Dante Nomellini, Jr. Nomellini, Grilli & McDaniel ngmplcs@pacbell.net dantejr@pacbell.net</p>	
<p>Richard Morat 2821 Berkshire Way Sacramento, CA 95864 rjmorat@gmail.com</p>	<p>San Joaquin Tributaries Authority Valerie Kincaid O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95814 vkinaid@olaughlinparis.com towater@olaughlinparis.com lwood@olaughlinparis.com</p> <p>(revised 12/18/15)</p>
<p>South Delta Water Agency John Herrick, Esq. 4255 Pacific Ave., Suite 2 Stockton, CA 95207 jherriaw@aol.com</p> <p>Dean Ruiz, Esq. Harris, Perisho & Ruiz, Attorneys at Law 3439 Brookside Road, Suite 210 Stockton, CA 95219 dean@hprlaw.net</p>	<p>State Water Contractors Stefani Morris, Attorney 1121 L Street, Suite 1050 Sacramento, CA 95814 smorris@swc.org</p>



Linda S. Adams
Secretary for
Environmental Protection

California Regional Water Quality Control Board

San Francisco Bay Region

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(510) 622-2300 • Fax (510) 622-2460
<http://www.waterboards.ca.gov/sanfranciscobay>



Arnold Schwarzenegger
Governor

HEARING PROCEDURE FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

NO. [enter complaint number]
ISSUED TO
[enter company name]
[enter facility description]
[enter location]
[enter county]

SCHEDULED FOR [enter hearing date/dates]

PLEASE READ THIS HEARING PROCEDURE CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY.

Background

The Assistant Executive Officer has issued an Administrative Civil Liability (ACL) Complaint pursuant to California Water Code Section 13323 against [name] (“Discharger”) alleging that it has violated Water Code Section(s) [enter section number(s)] by [describe conduct]. The ACL Complaint proposes that administrative civil liability [if applicable, add “(including a mandatory minimum penalty)”] in the amount of [enter amount] be imposed as authorized by Water Code Section(s) [enter penalty section(s)].

Purpose of Hearing

The purpose of the hearing is to consider relevant evidence and testimony regarding the ACL Complaint. At the hearing, the Water Board will consider whether to issue an administrative civil liability order assessing the proposed liability, or a higher or lower amount, or reject the proposed liability. An agenda for the meeting will be issued at least ten days before the meeting and posted on the Water Board’s web site (www.swrcb.ca.gov/sanfranciscobay/).

Hearing Procedure

The hearing will be conducted in accordance with this Hearing Procedure. This Hearing Procedure has been pre-approved by the Water Board’s Advisory Team in model format. A copy of the general procedures governing adjudicatory hearings before the Water Board may be found at Title 23 of the California Code of Regulations (CCR), Section 648 et seq., and is available at <http://www.waterboards.ca.gov> or upon request. In accordance with Section 648, subdivision (d), any procedure not provided by this Hearing Procedure is deemed waived. Except as provided in Section 648 and herein, subdivision (b), Chapter 5 of the Administrative Procedures Act (commencing with Section 11500 of the Government Code) does not apply to this hearing.

California Environmental Protection Agency

The procedures and deadlines herein may be amended by the Advisory Team in its discretion. **Any objections to this Hearing Procedure must be received by the Advisory Team by [DAY 10 (days refer to number of days after issuance of ACL Complaint; see “Important Deadlines” at the end)], or they will be waived.**

Hearing Participants

Participants in this proceeding are designated as either “parties” or “interested persons.” Designated parties to the hearing may present evidence and cross-examine witnesses and are subject to cross-examination. Interested persons generally may not submit evidence, cross-examine witnesses, or be subject to cross-examination, but may present policy statements. Policy statements may include comments on any aspect of the proceeding, but may not include evidence (e.g., photographs, eye-witness testimony, monitoring data). Both designated parties and interested persons may be asked to respond to clarifying questions from the Water Board, staff or others, at the discretion of the Water Board.

The following participants are hereby designated as parties in this proceeding:

- (1) Water Board Prosecution Team
- (2) [Entity name], referred to as the Discharger
[enter names, email addresses, addresses, and phone numbers of Discharger (and attorney if known)]

Requesting Designated Party Status

Persons who wish to participate in the hearing as a designated party (who have not been designated as parties above) must request party status by submitting a request in writing (with copies to the existing designated parties) so that it is received by 5 p.m. on [DAY 20] to [insert Advisory Team contact information]. The request shall include an explanation of the basis for status as a designated party (e.g., how the issues to be addressed in the hearing and the potential actions by the Water Board affect the person), the information required of designated parties as provided below, and a statement explaining why the party or parties designated above do not adequately represent the person’s interest. Any opposition to the request must be received by the Advisory Team, the person requesting party status, and all parties by 5 p.m. on [DAY 30]. The parties will be notified by 5 p.m. on [DAY 40] in writing whether the request has been granted or denied.

Separation of Functions

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the Water Board (Prosecution Team) have been separated from those who will provide advice to the Water Board (Advisory Team). Members of the Advisory Team and the Prosecution Team are:

Advisory Team:

[enter names, titles, email addresses, addresses, and phone numbers of Executive Officer, attorney, and technical staff (if applicable). Identify the primary contact for the Advisory Team.]

Prosecution Team:

[enter names, titles, email addresses, addresses, and phone numbers of Assistant Executive Officer(s), attorney, and all staff who will be testifying. Identify the primary contact for Prosecution Team. Identify any who will be testifying as an expert.]

Any members of the Advisory Team who normally supervise any members of the Prosecution Team are not acting as their supervisors in this proceeding, and vice versa. Members of the Prosecution Team may have acted as advisors to the Water Board in other, unrelated matters, but they are not advising the Water Board in this proceeding. Members of the Prosecution Team have not had any ex parte communications with the members of the Water Board or the Advisory Team regarding this proceeding.

Ex Parte Communications

The designated parties and interested persons are forbidden from engaging in ex parte communications regarding this matter with members of the Advisory Team or members of the Water Board. An ex parte contact is any written or verbal communication pertaining to the investigation, preparation or prosecution of the ACL Complaint between a member of a designated party or interested person on the one hand, and a Water Board member or an Advisory Team member on the other hand, unless the communication is copied to all other designated parties (if written) or made in a manner open to all other designated parties (if verbal). Communications regarding non-controversial procedural matters are not ex parte contacts and are not restricted. Communications among one or more designated parties and interested persons themselves are not ex parte contacts.

Hearing Time Limits

To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: each designated party shall have a combined 30 minutes to present evidence, cross-examine witnesses (if warranted), and provide a closing statement; and each interested person shall have three minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. Participants who would like additional time must submit their request to the Advisory Team so that it is received no later than [insert date that is 15 days prior to scheduled Water Board hearing]. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the Water Board Chair (at the hearing) upon a showing that additional time is necessary.

Submission of Evidence and Policy Statements

The following information must be submitted in advance of the hearing:

1. All evidence (other than witness testimony to be presented orally at the hearing) that the designated party would like the Water Board to consider. Evidence and exhibits already in the public files of the Water Board may be submitted by reference as long as the exhibits and their location are clearly identified in accordance with Title 23, CCR, Section 648.3.
2. All legal and technical arguments or analysis.
3. The name of designated party members, title and/or role, and contact information (email addresses, addresses, and phone numbers).
4. The name of each witness, if any, whom the designated party intends to call at the hearing, the subject of each witness' proposed testimony, and the qualifications of each expert witness.
5. (Discharger only) If the Discharger intends to argue an inability to pay the civil liability proposed in the Complaint (or an increased or decreased amount as may be imposed by the Water Board), the Discharger should submit supporting evidence as set forth in the "ACL Fact Sheet" under "Factors that must be considered by the Board."

Designated parties shall submit one hard copy of their information and one electronic copy of the information to [insert Advisory Team contact information] so that they are received by 5 p.m. on [DAY 30]. The Prosecution Team shall include all applicable information listed above with the complaint.

The Prosecution Team may submit information that rebuts the information previously submitted by other designated parties by submitting one hard copy of their rebuttal information and one electronic copy of the information to [insert Advisory Team contact information] so that they are received by 5 p.m. on [insert date that is 30 days prior to scheduled Water Board hearing].

The Discharger may submit information that rebuts the rebuttal information submitted by the Prosecution Team by submitting one hard copy of the rebuttal information and one electronic copy of the information to [insert name of primary Advisory Team contact] so that they are received by 5 p.m. on [insert date that is 20 days prior to scheduled Water Board hearing].

Rebuttal information shall be limited to the scope of the information previously submitted by the other designated parties. Rebuttal information that is not responsive to information previously submitted by other designated parties may be excluded.

In addition to the foregoing, each designated party shall submit (1) one copy of the above information to each of the other designated parties so that it is received by 5 p.m. on the deadlines specified above.

Interested persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to the Advisory Team to [insert Advisory Team contact information] so that they are received by 5 p.m. on [DAY 30]. Interested persons do not need to submit written non-evidentiary policy statements in order to speak at the hearing.

In accordance with Title 23, CCR, Section 648.4, the Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the Water Board may exclude evidence and testimony that is not submitted in accordance with this Hearing Procedure. Excluded evidence and testimony will not be considered by the Water Board and will not be included in the administrative record for this proceeding. PowerPoint and other visual presentations may be used at the hearing, but their content may not exceed the scope of other submitted written material. A copy of such material intended to be presented at the hearing must be submitted to the Advisory Team at or before the hearing for inclusion in the administrative record. Additionally, any witness who has submitted written testimony for the hearing shall appear at the hearing and affirm that the written testimony is true and correct, and shall be available for cross-examination.

Request for Pre-hearing Conference

A designated party may request that a pre-hearing conference be held before the hearing in accordance with Water Code Section 13228.15. A pre-hearing conference may address any of the matters described in subdivision (b) of Government Code Section 11511.5. Requests must contain a description of the issues proposed to be discussed during that conference, and must be submitted to the Advisory Team, with a copy to all other designated parties, as early as practicable.

Evidentiary Objections

Any designated party objecting to written evidence or exhibits submitted by another designated party must submit a written objection to the Advisory Team and all other designated parties so that it is received by 5 p.m. on [insert date that is 15 days prior to scheduled Water Board hearing]. The Advisory Team will notify the parties about further action to be taken on such objections and when that action will be taken.

Evidentiary Documents and File

The ACL Complaint and related evidentiary documents are on file and may be inspected or copied at the Water Board's office. This file shall be considered part of the official administrative record for this hearing. Other submittals received for this proceeding will be added to this file and will become a part of the administrative record absent a contrary ruling by the Water Board Chair. Many of these documents are also posted on the Water Board's web site. Although the web page is updated regularly, to assure access to the latest information, you may contact [assigned Prosecution Team member].

Questions

Questions concerning this proceeding may be addressed to [assigned Advisory Team member].

IMPORTANT DEADLINES

(Note: the Water Board is required to provide a hearing within 90 days of issuance of the ACL Complaint (Water Code Section 13323). The Advisory Team will generally adhere to this schedule unless the Discharger waives that requirement.)

- DAY 1 Prosecution Team issues ACL Complaint to Discharger.
- DAY 10 Deadline for objections, if any, to this Hearing Procedure.
- DAY 20 Deadline for requests for designated party status.
- DAY 30 Deadline for oppositions to requests for designated party status.
- DAY 30 Discharger’s deadline for waiving right to hearing within 90 days.
- DAY 30 Discharger’s deadline for all information required under “Submission of Evidence and Policy Statements.”
- DAY 30 Interested persons deadline for submission of written non-evidentiary policy statements.
- DAY 40 Advisory Team issues decision on requests for designated party status, if any.
- DAY 45 Remaining designated parties’ deadline for all information required under “Submission of Evidence and Policy Statements.”

30 DAYS PRIOR TO SCHEDULED WATER BOARD HEARING
Prosecution Team deadline for information that rebuts information previously submitted by other designated parties.

20 DAYS PRIOR TO SCHEDULED WATER BOARD HEARING
Designated parties’ deadline for information that rebuts information previously submitted by other designated parties.

15 DAYS PRIOR TO SCHEDULED WATER BOARD HEARING
Deadline for any designated party to submit an objection to written evidence or exhibits submitted by another designated party.

[signature]
[Name]
[Title]
Prosecution Team

Date

BRISCOE IVESTER & BAZEL LLP

155 SANSOME STREET
SEVENTH FLOOR
SAN FRANCISCO CALIFORNIA 94104
(415) 402-2700
FAX (415) 398-5630

Lawrence S. Bazel
(415) 402-2711
lbazel@briscoelaw.net

25 May 2016

By E-Mail

San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612
Attn: Marnie Ajello
marnie.ajello@waterboards.ca.gov

Subject: Point Buckler Club, LLC and John D. Sweeney
ACL Complaint No. R2-2016-1008 and Proposed CAO

Dear Ms. Ajello:

On behalf of Point Buckler Club, LLC (the “Club”) and John D. Sweeney, I request that Bruce Wolfe be removed from the advisory team and no longer participate in this matter.

Due process requires agencies to separate advocates from decision makers, and prohibits ex parte communications between them:

While the state’s administrative agencies have considerable leeway in how they structure their adjudicatory functions, they may not disregard certain basic precepts. One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker’s advisers in private. Another directs that the functions of prosecution and adjudication be kept separate, carried out by distinct individuals.

(Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd. (2006) 40 Cal.4th 1, 5.)

In this case, Mr. Wolfe has been part of the prosecution team. He issued cease and desist order no. R2-2015-0038 against the club. He has therefore prosecuted a claim against the club and Mr. Sweeney in this matter. If he was acting as the decision-maker or part of the advisory team in that matter, he should be disqualified on the ground that he was communicating ex parte with the prosecution team. That order was issued as a result of secret communications between

Mr. Wolfe and the prosecution team (which had not even been identified to us as the prosecution team at that time).

Alcoholic Beverage Control reaffirmed the separation and ex parte rules applied by a line of cases reaching back to at least 1950. (See *English v. City of Long Beach* (1950) 35 Cal.2d 155, 159 (holding that an administrative board deprived a person of a fair trial when its decision was based on ex parte communications “of which the parties were not apprised and which they had no opportunity to controvert”); *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1586-1587 (holding that “performance of both roles [i.e. advocate for a party and adviser to the tribunal] by the same law office is appropriate only if there are assurances that the advisor for the decision maker is screened from any inappropriate contact with the advocate”); *Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 93, 98 (confirming that “it is improper for the same attorney who prosecutes the case to also serve as an advisor to the decision maker”, and holding that when an advocate acted as legal advisor to a hearing officer he violated due process); *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 812, 815 (holding that there was a “clear appearance of bias and unfairness” that violated due process when a deputy city attorney represented a party in proceedings before the Board, and then represented the Board itself in proceedings on “a writ petition in the superior court”).) Although these cases often involved lawyers, the separate requirement is not limited to lawyers. It arises out of the concept that to ensure a fair trial, a person involved in the prosecution of a matter should not be involved in the decision-making process for that matter.

The State Board imposes a strict separation between the members of the prosecution and advisory teams:

The hearing officer and the other [State] Board members treat the enforcement team “like any other party.” Agency employees assigned to the enforcement team are screened from inappropriate contact with Board members and other agency staff through strict application of the state Administrative Procedure Act's rules governing ex parte communications. (Gov. Code, § 11430.10 et seq.) “In addition, there is a physical separation of offices, support staff, computers, printers, telephones, facsimile machines, copying machines, and rest rooms between the hearing officer and the enforcement team (as well as the hearing team),” according to the Whitney declaration.

(*Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 735-736.)

BRISCOE IVESTER & BAZEL LLP

San Francisco Bay Regional Water Quality Control Board

25 May 2016

Page 3

The same strict separation should be applied here.

Because Mr. Wolfe has either violated the separation requirement by moving from the prosecution team to the advisory team in this matter, or has violated the ex parte prohibition by engaging in ex parte discussions about this matter, he is disqualified from participating in the matter and should be removed from the advisory team.

Thank you for considering this request, and please let me know if you need any additional information or legal argument to assist your decision.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Bazel", with a large, stylized loop at the end.

Lawrence S. Bazel

cc: D. Whyte (be e-mail)
L. Drabandt (by e-mail)
T. Austin (by e-mail)
B. Martin (by e-mail)
M. Bullock (by e-mail)
M. Goldman (by e-mail)