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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 statement 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,

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)