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11 July 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
Tentative Cleanup and Abatement Order Scheduled For 10 August 2016

Dear Ms. Ajello:

On behalf of Point Buckler Club, LLC and John D. Sweeney (jointly the "Club"), I wrote to you on 25 May and 27 May. You responded on 8 June, and among other things granted our request to have Bruce Wolfe removed from the hearing team. The Club thanks you for that, anf for granting our request to have the hearing on the administrative civil liability ("ACL") complaint postponed.

I am writing now to request additional time for the hearing on the tentative cleanup and abatement order now scheduled for 10 August. The Club requests a three-day hearing, with 1½ days for the Club's time. As you can see from the attached table of contents to the 65-page opposition brief we have filed, there are many factual and legal issues that must be decided before the Regional Board issues the order.

We are in discussions with the prosecution team about a hearing on the ACL complaint in December, and have tentatively agreed on a briefing schedule. There is a great deal of overlap among the issues in the tentative cleanup and abatement order, and in the ACL complaint, and it would make most sense to hear them together. The Club therefore requests that the tentative cleanup and abatement order be taken off calendar for 10 August, and that the parties be given an opportunity to propose a briefing schedule and joint hearing.

Some of the assumptions on which the decisions in the 8 June letter were based—most notably, that due process does not require a hearing for a cleanup and abatement order—are not

correct. In the following sections, we explain that a hearing *is* required for a cleanup and abatement order, and why the Club needs more than half hour to present its case.

Due Process Requires A Hearing
Before The Issuance Of A Cleanup And Abatement Order

Your letter assumes that due process does not require a hearing:

> In contrast to an ACL complaint, neither due process nor the Water Code requires a hearing at all on a CAO. (See *Machado v. State Water Resources Control Bd.* (2001) 90 Cal. App. 4th 720, 725; compare Wat. Code §13323 with §13304.)
>
> Accordingly, an elaborate or lengthy hearing procedure, such as the one in Byron-Bethany, is not required. (See Machado, supra, 90 Cal. App. 4th, p. 726.)
>
> As described above, due process does not require a hearing on a CAO at all. (See *Machado, supra,* 90 Cal. App. 4th, p. 725.)

(Letter at 4, 5, 6.) But *Machado* stands for the opposite proposition: that a hearing *is* required. The Solano Superior Court implicitly agreed with this conclusion when it stayed the operation of the cleanup and abatement order issued in September 2015.

All administrative agencies, regardless of the method of their creation, are subject to the due process provisions of both the California and U.S. Constitutions. (*Kruger v. Wells Fargo Bank* (1974) 11 Cal.3d 352, 366–367; *Smith v. Bd. of Med. Qual. Assurance* (1988) 202 Cal.App.3d 316, 326–329.) Due process applies to agency "adjudicative" actions. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) Here, the issuance of a cleanup and abatement order is an adjudicatory action because it requires consideration of "facts peculiar to the individual case" and involves the "application of general standards to specific parcels of real property". (*Id*. at 613.)

The petitioner in *Machado* was a dairy discharging manure to the Delta. (*Machado*, 90 Cal.App.4th at 723.) The "[superior] court ordered that the Dairy, at its request, was entitled to a hearing before the RWQCB". (*Id*. at 725.) This decision was consistent with the U.S. Supreme Court's decision in *Mathews v. Eldridge*, which made clear that "some form of hearing is required before an individual is finally deprived of a property interest." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333.)

After the superior court's ruling, the regional board held a hearing, and no appeal from that hearing was taken. (*Machado* at 725.) Nevertheless, the dairy argued that it was entitled to a hearing *before* the order was issued, rather than after.

The *Machado* court applied *to the dairy*—that is, as part of a case-by-case analysis—the three factors set out in *Mathews v. Eldridge*:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

(*Id*. at 725-726, quoting *Mathews v. Eldridge*, 424 U.S. at 334-335.)

For the first factor, the *Machado* court found that the order at issue had only a limited effect. It did not shut down the dairy or "affect the fundamental nature of its business", and did not impose civil or criminal penalties. (*Id*. at 726.) For the second factor, the court concluded that "the risk of erroneous observation or deliberate misrepresentation of the facts by the reporting officer in the ordinary case seems insubstantial". (*Id*. at 727.) For the third factor, the *Machado* court thought that the need for immediate action was "obvious", and that "[u]nlawful discharges threaten public health and safety". (*Id*.)

The *Machado* case says nothing that would question the superior court's decision that a hearing was required. The only question is that case is whether the hearing could be held *after* the cleanup and abatement order was issued, rather than before.

The State Board has agreed that due process applies to the issuance of a cleanup and abatement order, although it believes that the hearing can be held after issuance:

> The Porter-Cologne Water Quality Control Act…does not require notice and an opportunity to be heard before issuance of a cleanup and abatement order. Due process is provided by an opportunity for a hearing after the order is issued.

(In the Matter of the Petition of BKK Corporation, State Board Order No. WQ 86-13 at 4.)

The Solano Superior implicitly agreed that due process applies to the issuance of a cleanup and abatement order. The Club applied for a stay of the September 2015 cleanup and abatement order on the ground that due process required a hearing. (The Club's application will be provided as exhibit 13 to the Declaration of Lawrence S. Bazel ("Bazel Decl."), which will be submitted today.) The court granted the stay. (*Id*., ex. 14.) Mr. Wolfe apparently recognized that due process applies when he rescinded the September 2015 order "[i]n order to address the procedural due process claims". (*Id*., ex. 16.)

Although there may be differences on the question of when the hearing must be held, everyone—the Solano Superior Court, the State Board, Mr. Wolfe, and the Club—appears to agree that due process applies to the issuance of a cleanup and abatement order, and that a hearing is required.[1]

Why The Club Needs More Than A Half Hour To Present Its Case

"'The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.'" (*People v. Litmon* (2008) 162 Cal.App.4th 383, 395, quoting *Mathews v. Eldridge*, 424 U.S. at 333, citations and quotation marks omitted.) To ensure that the opportunity is meaningful, the United States Supreme Court has identified some aspects of due process as irreducible minimums. When a party challenges actions as resting on incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases, due process requires an opportunity to be heard in person, to present witnesses and documentary evidence, and to confront and cross-examine available adverse witnesses.

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[1] In some "extraordinary" situations, a "prompt" post-deprivation hearing can pass Constitutional muster. "[Courts] tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. (*People v. Litmon* at 395, quoting *Gilbert v. Homar* (1997) 520 U.S. 924, 930–931.) "When summary action is justified, due process is satisfied as long as there is a prompt postdeprivation hearing to review the agency's determination." (*Tyler v. County of Alameda* (1995) 34 Cal.App.4th 777, 783-784, citing *Ewing v. Mytinger & Casselberry* (1950) 339 U.S. 594.) "'[A]t some point, a delay in the post-termination hearing would become a constitutional violation.'" (*Id*. quoting *Cleveland Bd. of Educ. v. Loudermill* (1985) 470 U.S. 532, 547.) Here there was no need for immediate action, as staff implicitly acknowledged by waiting nearly a full year after the levee repair was done before issuing the September 2015 order.

(*Goldberg v. Kelly* (1970) 397 U.S. 254, 267-70; *Morrissey v. Brewer* (1972) 408 U.S. 471, 488-489.)

Here the Club has been given only a half hour in total to make its opening statement, cross-examine the prosecution team's witnesses, present its own witnesses, and make its closing argument. One half hour is not enough to accomplish these tasks.

Your letter asserts that the hearing on the cleanup and abatement order should be fairly straightforward:

> Only the hearing on the CAO, which does not impose liability, remains on the calendar for August. The Regional Water Board and its presiding officer need not weigh the evidence underlying the alleged violations giving rise to the $4.8 million in civil liability in order to issue the CAO, so the August hearing should be fairly straightforward. Accordingly, a lengthy special hearing is not necessary.

(Letter at 3. reference omitted.) But the Tentative Order does indeed impose liability. The word "liability" means "the state of being responsible for something, especially by law". (Google.) The Tentative Order would require the Club to submit reports, obtain permits, and engage in construction. The prosecution team calculates the cost of permitting, alone, at $1.1 million. (ACL Complaint, Appendix A at A-12.) By making the Club responsible for these costs, the Tentative Order would impose liability.

Although the Regional Board does not need to weigh the evidence related to the ACL complaint during the August hearing, it will need to weigh the evidence related to the Tentative Order. That evidence is extensive and complicated, as can be seen from the prosecution team's submission of a 463-page technical report, and the Club's submission of a 65-page opposition brief raising dozens of factual and legal issues.

Factual weighing will be required because the factual disputes are fundamental to the procedure. Take, for example, the issue of the high tide line. To be clear that the Regional Board members understand the significance of this term, the Club must explain where it comes from (regulations issued by the U.S. Army Corps of Engineers), how it is defined (it includes seasonal high tides but not storm-related tides), how it is determined (generally from a "debris line" or "wrack line" present on the shore, but it can also be determined from an analysis of data), and why it is relevant to this matter (the prosecution team concedes that the Regional Board has no authority to regulate levee repair above the high tide line here). Having explained

what the issue is, the Club must then explain the dispute, including how the prosecution team's technical report set the location of the high tide line (both by identifying elevations of selected debris, and by evaluating data from Port Chicago and then applying a conversion factor for Point Buckler), why their elevations must be wrong (if they were true, there would be erosion marks on the levee because water would have flowed over the levee and into the center of the island), the fact that they ignored the true high tide line (which can be seen as a white line in the many aerial photographs provided in the technical report, and is seen to be mostly light-colored wood and vegetation in photographs taken by the Club), and the fact that nearly all of the levee repair at issue was done above the high tide line (as can be seen from the aerial photographs, and corroborated by testimony from the Club).

If the Regional Board concludes that any of the work is above the high tide line, then that should be the end of the hearing, because the Regional Board should not act when it has no authority to act. But if the Regional Board were to conclude that all the work were below the high tide line, then it must go on to the next issue, which is whether the island was tidal marsh. And then there is the question of whether the prosecution team's lead consultant is so biased against the Club that he cannot provide a dispassionate assessment of the facts. And then there is the question of whether the levee repair has harmed beneficial uses, or on the contrary building the levee and proceeding to establish duck ponds would promote beneficial uses, whereas the Tentative Order would harm beneficial uses by destroying the Club's ability to maintain duck ponds with duck-friendly food and habitat. And then there is the question of whether there has been a change in vegetation at the island since the levee has been repaired.

And then there are all the legal issues, including issues arising under the Suisun Marsh Preservation Act, the Porter-Cologne Act, the due-process clause of the Constitutions of the United States and the State of California, and the California Environmental Quality Act. It will take hours to explain what the legal issues are to the lawyers and nonlawyers on the Regional Board, and to argue them.

Please see the attached table of contents, which provide a short summary of the key issues, and please review the Club's opposition brief for more detail. It should be obvious that the Regional Board cannot provide fair consideration of these issues in an hour, or even in a day. Even people of exceptional intelligence who have spent some time preparing for the hearing will need time to absorb the information, understand its significance, ask questions, understand the answers, think through the problems, and reach a conclusion.

As a result, this case at least as complex and substantial as Byron-Bethany. In that set of cases, the West Side Irrigation District faced only a cease and desist order, which is less intrusive and imposes less liability than a cleanup and abatement order. Any element of due process afforded to the West Side Irrigation District should be afforded here. The Club is requesting that the advisory team reconsider its decision. (Bazel Decl., ex. 39.)

Your letter asserts that Byron-Bethany needed more time because there were more parties:

> The consolidated Byron Bethany hearing, which took place in March, involved an ACL and cease and desist orders against two irrigation districts. Numerous interested parties offered written and oral testimony, and the hearing continued for three days.
>
> Here, by contrast, only the Prosecution Team and the Dischargers are expected to participate in the CAO hearing, which does not impose liability, but prohibits the discharge of pollution and sets forth a timeline for implementation of corrective actions, restoration of the property, and mitigation and monitoring. Accordingly, an elaborate or lengthy hearing procedure, such as the one in Byron-Bethany, is not required. (See *Machado, supra,* 90 Cal. App. 4th, p. 726.)

(Letter at 4-5, citation omitted.) Although there may have been more parties in the Byron-Bethany matter, here the issues are much more complex. Byron-Bethany was resolved with a decision on a single issue. Although that could happen here if an issue is resolved in the Club's favor, much more time will be needed if the Club is to receive a fair opportunity to present its factual and legal objections to the order.

A cleanup and abatement order is not needed to protect the environment here. The Club is meeting with the prosecution team to discuss permitting, and expects to be submitting permit applications in the near future. As part of these discussions, the Club expects to work with staff to develop a process in which the island moves from its existing condition to one that that will be satisfactory to staff. A cleanup and abatement order will focus the parties on litigation and adversarial proceedings rather than on the business of getting the island permitted.

Once again, the Club requests that this matter be taken off the 10 August calendar, and that the parties be given an opportunity to present a schedule for a joint hearing on the Tentative Order and the ACL complaint.

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

Sincerely,

Lawrence S. Bazel

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STATE OF CALIFORNIA

REGIONAL WATER QUALITY CONTROL BOARD, SAN FRANCISCO BAY REGION

In the matter of: TENTATIVE ORDER ADOPTION OF CLEANUP AND ABATEMENT ORDER for: POINT BUCKLER ISLAND, SOLANO COUNTY	OPPOSITION TO ISSUANCE OF CLEANUP AND ABATEMENT ORDER Hearing Date: August 10, 2016

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