August 22, 2016

VIA EMAIL ONLY

Lawrence Bazel
Briscoe Ivester & Bazel LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104

Laura Drabandt
Office of Enforcement
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Subject: Hearing Procedure for Administrative Civil Liability Complaint No. R2-2016-1008

Dear Mr. Bazel and Ms. Drabandt:

The Advisory Team and Chair of the San Francisco Bay Regional Water Quality Control Board (Regional Board) have considered the Dischargers' August 12, 2016 request and the Prosecution Team's August 17, 2016 request for additional time to present evidence at the December 14, 2016 hearing before the Regional Board on Administrative Civil Liability Complaint No. R2-2016-1008 (ACL Hearing). In addition, the Advisory Team has considered the Prosecution Team's August 18, 2016 request to modify the briefing schedule agreed upon by the parties. The 120-minute time limit and briefing schedule in the Hearing Procedure, included here as Attachment A, reflect the Board Chair's rulings on these requests. Below, please find the rationale for these rulings.

I. REQUESTS FOR ADDITIONAL TIME

A. Due Process Does Not Require a Three-Day Hearing or an Allotment of Ten and One-Half Hours for Each Party to Present Evidence.

The Dischargers suggested in their August 12, 2016 email that they would be "greatly prejudiced" by hour-long time limits at the ACL Hearing and proposed a three-day hearing or 10.5 hours to present testimony instead. The Advisory Team interprets this as a claim that time limits shorter than the proposed amounts would violate due process. The Board Chair, in consultation with the Advisory Team, disagrees that a time limit of 120 minutes violates due process and denies the Dischargers' request for a multiday hearing.

As the Advisory Team noted in response to similar objections to the procedures at the hearing on the tentative Cleanup and Abatement Order, the process due parties to Regional Board actions is flexible (See *Machado v. State Water Resources Control Bd.* (2001) 90 Cal. App. 4th 720, 725.) The Water Code neither requires the full regional board to participate in an ACL hearing, nor that formal adjudicative procedures apply to ACL hearings. (Water Code § 13223; Cal. Code Regs., tit. 23, § 648.7). Water Board hearings are not governed by court rules or

procedures (Cal Code Regs., tit. 23, § 648), nor must the time allotted to parties to present evidence approximate the time allotted to litigants at trial.

The Advisory Team agrees that $4.6 million, the amount the Dischargers face in administrative civil liability, is substantial. However, the process that Dischargers have already been afforded, and will be afforded before liability may be imposed, is robust. The Dischargers received notice of the ACL Complaint in May and, as set forth in the attached Hearing Procedure, have the opportunity to submit evidence challenging the findings in the Complaint and to rebut the Prosecution Team's arguments and conclusions. All Regional Board members will receive the evidence and rebuttals for their review in advance of the hearing, and the hearing itself will be governed by the formal procedures outlined in California Code of Regulations, title 23, sections 648 through 648.5.1. The Hearing Procedure's 120-minute time limit is four times longer than the amount of time ordinarily accorded to parties at comparable proceedings before the Regional Board. (Standard Hearing Procedure, p. 3.) Accordingly, the Board Chair finds that these procedures are constitutionally adequate, and that a three-day hearing or 10.5 hours of testimony is not necessary to satisfy due process.

B. <u>The Complexity of the Case Does Not Require a Three-Day Hearing or Ten and One-Half Hours for Each Party to Present Evidence.</u>

The Dischargers also suggest that a three-day hearing or 10.5 hours of testimony is necessary because of the complexity of the case. They compare the December 14, 2016 hearing to the three-day-long Byron-Bethany hearing, held March 21-23, 2016 before the State Water Resources Control Board (State Board).

The Board Chair, in consultation with the Advisory Team, disagrees that this case is particularly complex. The questions for the Regional Board's consideration – whether the Dischargers illegally discharged fill into waters of the state and/or United States, and whether the circumstances of the discharge, if found to have occurred, would support the liability the Prosecution Team has proposed, are relatively narrow and straightforward.

In addition, the Board Chair rejects the comparison of this hearing to the State Board's Byron-Bethany hearing: the two proceedings involve different tribunals, different statutory violations, and have completely different facts. In addition, the Byron-Bethany hearing combined two separate enforcement actions, while the ACL hearing will involve only one. Accordingly, the complexity of the issues considered at each hearing cannot be directly compared, and the time limits at the Byron-Bethany hearing do not provide guidance here.

As the Prosecution Team points out in its August 17, 2016 proposal to increase the time limits to 90 minutes, the ACL hearing is an opportunity for the parties "to highlight particular evidence, and to afford the Board Members an opportunity to clarify any evidence, technical issues, or legal arguments." In view of the magnitude of the liability, the Board Chair will provide 120 minutes to each side to accomplish these tasks. The Advisory Team and Board Chair emphasize that the parties have no obligation to make use of the full two hours and encourage the parties to economize their time.

For the foregoing reasons, the Board Chair, in consultation with the Advisory Team, denies without prejudice the Dischargers' request for additional time to present their case. The Dischargers may renew their request for additional time before the deadlines set forth in the Hearing Procedure.

II. REQUEST TO MODIFY THE BRIEFING SCHEDULE.

On August 18, 2016, the Prosecution Team requested that the Advisory Team modify the Hearing Procedure to require both parties to respond to interested person/public comments, if any, on October 17, 2016. The Hearing Procedure currently does not specify by when the Prosecution Team must respond to public comments, and the Advisory Team notes that the Dischargers have no obligation to respond to public comments. The Board Chair therefore denies the Prosecution Team's request to incorporate a new deadline, but encourages the Prosecution Team to respond to public comments by October 17, 2016. To the extent that any comment letters received before the ACL Hearing was moved to December address the proposed liability, they will be considered part of the record of the ACL proceeding.

Sincerely,

Digitally signed by Marnie Ajello
Date: 2016.08.22 11:23:33 -07'00'

Marnie Ajello

Attachment:
Attachment A_Hearing Procedure for ACL Complaint No. R2-2016-1008

cc:
Advisory Team:
Shin-Roei Lee, Assistant Executive Officer, North Coast Regional Water Quality Control Board; Shin-Roei.Lee@waterboards.ca.gov; (707) 570-3769
David Elias, Section Leader; David.Elias@waterboards.ca.gov; (510) 622-2509
Liz Morrison, Technical Staff; Elizbeth.Morrison@waterboards.ca.gov; (510) 622-2330
Elizabeth Wells, Technical Staff; Elizabeth.Wells@waterboards.ca.gov; (510) 622-2440
David Coupe, Attorney IV; David.Coupe@waterboards.ca.gov; (510) 622-23-6
Marnie Ajello, Attorney; Marnie.Ajello@waterboards.ca.gov, (916) 327-4439

Prosecution Team:
Agnes Farres, Technical Staff; Agnes.Farres@waterboards.ca.gov; (510) 622-2401
Benjamin Martin, Technical Staff; Benjamin.Martin@waterboards.ca.gov; (510) 622-2116
Brian Thompson, Section Leader; BThompson@waterboards.ca.gov; (510) 622-2422
Dyan C. Whyte, Assistant Executive Officer, DWhyte@waterboards.ca.gov, (510) 622-2441
Keith Lichten, Division Chief; Keith.Lichten@waterboards.ca.gov; (510) 622-2380
Tamarin Austin, Attorney IV; Tamarin.Austin@waterboards.ca.gov; (510) 622-2490
Julie Macedo, Attorney IV; Julie.Macedo@waterboards.ca.gov; (916) 323-6847
Laura Drabandt, Attorney III; Laura.Drabandt@waterboards.ca.gov; (916) 341-5180

Persons Not Serving on Either the Advisory or Prosecution Teams:
Frances McChesney, Acting Assistant Chief Counsel; Frances.McChesney@waterboards.ca.gov; (916) 341-5174
Matthew Bullock, Deputy Attorney General; Matthew.Bullock@doj.ca.gov; (415) 703-1678