San Francisco Bay Regional Water Quality Control Board

July 19, 2016

Lawrence S. Bazel
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155 Sansome Street, Seventh Floor
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SUBJECT: AUGUST 10, 2016 HEARING ON TENTATIVE CLEANUP AND ABATEMENT ORDER NAMING POINT BUCKLER CLUB, LLC AND JOHN D. SWEENEY

Dear Mr. Bazel:

The Advisory Team has received your letter dated July 11, 2016 and your email dated July 12, 2016, as well as the Prosecution Team's email response dated July 18, 2016. This letter memorializes rulings made by Board Chair Young after consultation with the Advisory Team.

The Board Chair has ruled to DENY your request to reschedule the hearing on the tentative cleanup and abatement order naming your clients, John Sweeney and the Point Buckler Club. The Board Chair has also ruled to DENY your request for a three-day "special" hearing. The Board Chair has ruled to increase the total time each designated party[1] has to present evidence and a closing statement at the August 10 hearing from thirty minutes to one hour. Additional explanation concerning these rulings is provided in the following sections.

1. Whether or Not a Hearing is Constitutionally Required is Moot.

The Advisory Team disagrees with your assertion that due process always requires a hearing before the issuance of a cleanup and abatement order (CAO) or that *Machado v. State Water Resources Control Board* (2001) 90 Cal. App. 4th 720 stands for this principle. In our view, *Machado* affirms the agency's long-held position that dischargers' due process rights may be satisfied without a pre-CAO hearing. (See *Machado*, 90 Cal. App. 4th, p. 725 ["The Dairy contends its due process rights were violated because it was not afforded a hearing before the issuance of the cleanup and abatement order. Due process does not require such a hearing."])

The issue of whether your clients are constitutionally entitled to a pre-CAO hearing here, moreover, is moot because they are receiving one. The Regional Board will determine whether or not to issue the tentative CAO following review of the designated parties' submittals and testimony at the August 10, 2016 hearing. The Advisory Team declines to analyze the claimed constitutional necessity of this already-scheduled hearing using the factors enunciated in *Matthews v. Eldridge* (1976) 424 U.S. 319.

[1] The designated parties are (1) the Prosecution Team and (2) the Dischargers, John D. Sweeney and Point Buckler Club, LLC. (Revised Hearing Procedure, p. 2.)

2. A Three-Day Hearing is Not Required by Due Process.
In this case, given that due process does not require a hearing prior to issuance of a pre-CAO, the Advisory Team disagrees that the hearing must last 3 days to give your clients an adequate opportunity to contest the CAO.[2] As you assert, due process in administrative proceedings may require certain "irreducible minimums," including "an opportunity to be heard in person, to present witnesses and documentary evidence, and to confront and cross-examine available adverse witnesses." (See Bazel Letter, p. 4 (July 11, 2016)). In fact, the statutes and regulations applicable to regional board adjudicative proceedings guarantee these rights. (See *inter alia*, Gov't Code § 11513(b) [providing parties with the right "to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matter relevant to the issues even though that matter was not covered in the direct examination, to impeach any witness regardless of which party first called him or her to testify; and to rebut the evidence against him or her"]; Cal. Code Regs., tit. 23, §§ 648, 648.5.1 [providing that § 11513 applies to regional board proceedings]). The Revised Hearing Procedure specifies that the August 10 hearing will be conducted in accordance with these statutes and regulations and will afford parties the above-mentioned rights. (See Revised Hearing Procedure, p. 1-2.)

The Advisory Team finds no support for your claim that in addition to these "irreducible minimums," due process also requires a hearing of a particular length.

3. A Three-Day Hearing is Not Warranted by the Complexity of the Case.
The Advisory Team disagrees with your conclusory assertion that the complexity of the issues to be discussed warrants a three-day hearing, especially given your apparent acknowledgement of the need to "get[] the island permitted." (Bazel Letter, p. 7.) As set forth in the tentative CAO, the hearing will focus on the changes that have taken place at the island as a result of work done by your clients, the legality of this work, and whether the tasks set forth in the CAO are required to return the island to its condition prior to these changes. There appears to be some agreement about the nature of your clients' work, and whether or not permits were required to carry out such work. As a result, the Advisory Team does not consider the other issues to be too complex or contentious to resolve within the time limits provided in the Revised Hearing Procedure.

The Advisory Team also disagrees that "it will take hours to explain what the legal issues are to the lawyers and nonlawyers on the Regional Board." (Bazel Letter, p. 6.) Regional Board members will have had the opportunity to review the extensive evidentiary submittals of each party in advance of the hearing. The hearing itself will allow the parties to highlight salient facts and persuasive legal and technical arguments for the Regional Board's consideration. Three days is not necessary for this task.

The Prosecution Team, in its July 18 email, expressed its non-opposition to allowing the parties additional time, suggesting an hour. After consultation with the Board Chair, the Board Chair has ruled to increase the time for each designated party from 30 minutes to one hour "to present evidence, cross-examine witnesses (if warranted), and provide a closing statement." (Revised Hearing Procedure, p. 4.) The Board Chair has discretion to allow for additional time, if necessary.

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[2] If your clients are dissatisfied with the results of the CAO hearing, they still have the opportunity to petition the State Board for review, and, if denied review, file a petition for a writ of mandate in superior court. (Water Code §§ 13320; 13330; see also *Machado*, 90 Cal App. 4th, p. 726.)

4. The CAO Hearing Need Not be Held in Conjunction with the ACL Hearing.
The Advisory Team also disagrees that the CAO and Administrative Civil Liability Complaint hearings must or ought to be held together. Although the Advisory Team agrees that there appears to be factual overlap between the CAO and the Administrative Civil Liability (ACL) Complaint, the Regional Board has an interest in evaluating alleged threats to water quality and ordering any necessary corrective actions as expeditiously as possible. The Advisory Team also reminds you that hearings on the CAO and ACL Complaint were originally scheduled together, and that the ACL hearing was postponed in response to your request. Given that the date for objecting to the hearing procedure has long since passed, your renewed request to postpone the CAO hearing is not well taken.

5. Conclusion
In light of the foregoing, the Board Chair, after consultation with the Advisory Team, DENIES your requests to: 1) postpone the hearing on the CAO to a future Regional Board Meeting and 2) lengthen the hearing to three days. The Revised Hearing Procedure has been amended to reflect the increase in time for each designated party from thirty minutes to one hour and has been included as Attachment A to this letter.

Sincerely,

Marnie Ajello

Attachment:

Attachment A_Second Revised Hearing Procedure

cc:

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