

ITEM: 5.a and 5.b

Streamlining and Considerations for Enforcement

DISCUSSION:

In this item, the Regional Water Board will (a) consider adopting a resolution explicitly delegating to the Executive Officer (EO) the ability to hold hearings on and issue mandatory minimum penalties (MMPs) and (b) discuss and provide general input on the use of hearing panels for administrative civil liabilities (ACLs).

5.a. Resolution to Delegate Authority to the Executive Officer to Hold Hearings on and Issue Mandatory Minimum Penalties

Section 13223 of the Water Code allows a Regional Water Board to delegate certain powers and duties to its EO. The Board may delegate to its EO any of its powers and duties under the Porter-Cologne Act, except for the following:

- a. The promulgation of any regulations;
- b. The issuance, modification, or revocation of any water quality control plan, water quality objective, or waste discharge requirement;
- c. The issuance, modification, or revocation of any cease and desist order;
- d. The holding of any hearing on water quality control plans; and
- e. The application to the Attorney General for judicial enforcement but excluding cases of specific delegation in a cease and desist order and excluding the cases described in subdivision (c) of Section 13302, 13304, and 13340.

In Resolution No. 70-11, the Board delegated all duties and powers allowed by the Water Code to the EO. It implicitly delegated to the EO the authority to issue ACL orders; however, since the Board had not historically exercised that authority, in 2008, the Board adopted Resolution No. 2008-0055 to expressly delegate to the EO the authority to issue final ACL orders where no hearing is required, such as when a discharger does not contest the ACL and waives its right to a hearing or there has been a settlement.

The proposed resolution (Appendix A) expressly delegates to the EO the authority to issue another type of ACL order: MMPs sought pursuant to Water Code section 13385 (h) and (i) for NPDES permit effluent limit and reporting violations and Water Code section 13399.33 for storm water permit coverage and annual reporting violations. These MMPs typically generate minimal public interest, have a standard rather than complex penalty assessment, and individually tend to present a minor threat to beneficial uses or a minor potential for harm. The Board has little discretion to reject MMPs in cases where the Water Code requires them. Therefore, to promote efficiency and minimize the Board's time hearing matters on which it has little discretion, it is desirable to expressly delegate to the EO the authority to hold hearings on and issue MMPs. Many other regional water boards have delegated this function to their EOs.

While Resolution No. 70-11 implicitly delegates this authority to the EO, it is prudent for the delegation to be explicit so that the authority for this new practice is clearly expressed to the public and the regulated community.

5.b. General Discussion on the Use of Hearing Panels

Water Code section 13228.14 allows hearings for certain Board matters to be conducted by a panel of three or more members of the Board, with the final action in the matter to be taken by the Board at a subsequent hearing. This includes hearings on ACLs. In 2004, when the Board was having quorum problems, it authorized the use of hearing panels when a quorum of the Board could not be convened.¹ In case the Board would like to see an expanded use of hearing panels beyond when a quorum cannot be convened, I am bringing this to the Board's attention for the Board's general discussion and input.

How do ACL hearing panels work?

A panel of three or more Board members would conduct a noticed hearing in which it would hear testimony and consider the evidence on the ACL complaint. The hearing would be subject to the Bagley-Keene Open Meeting Act. After the hearing, the panel must:

- report its proposed decision and draft order to the Board; and
- supply a copy to all parties who appeared at the hearing and requested a copy.

Thereafter, at a subsequent Board hearing, the full Board (or a quorum thereof) must:

- make an independent review of the record;
- take additional evidence as may be necessary; and
- consider the panel's proposed decision and draft order.

A party who appeared before the panel is not precluded from appearing before the Board at the subsequent hearing. The Board may adopt, with or without revision, or reject, the proposed decision and draft order of the panel.

What are the pros and cons of using ACL hearing panels?

The pros of using ACL hearing panels include:

- holding hearings outside the normal monthly Board meeting schedule;
- freeing up monthly Board meetings for other business; and
- enabling Board members willing and able to serve on panels to develop expertise in conducting ACL hearings.

Panel hearings would also enable Board members to consider ACLs when a quorum of the Board cannot be convened; however, as stated earlier, the Board has already authorized this.

The cons of using ACL hearing panels include:

- having two hearings for an ACL complaint: (1) a panel hearing and (2) a subsequent Board hearing;
- increased time and work commitment from Board members who serve on panels (e.g., to participate in the panel, propose a draft ACL order, and participate in the

¹ Since 2004, the need never arose to convene a hearing panel.

- subsequent Board meeting for the final Board decision); and
- more work for staff in preparing for two hearings and establishing a process for conducting panel hearings.

In addition, conducting ACL hearings is a core Board function with which all Board members should have experience, and developing expertise on ACL hearings only among select Board members who serve on panels may be inconsistent with this goal.

Other regional boards have not widely used hearing panels, mostly because of the need for two hearings. In theory, the subsequent Board hearing should not be as time-consuming as the one before the hearing panel. A counter argument is that having two hearings is itself time-consuming and inefficient.

Other Considerations and Next Steps

Assuming the Board is receptive to ACL hearing panels, another consideration for the Board to discuss is under what circumstances hearing panels should be used beyond when a quorum cannot be convened. For instance, panel hearings could be used to hear ACL complaints for less than a certain dollar figure, or panels could hear batches of similar, uncomplicated cases, ideally making the full Board hearing more efficient. It may be advisable to retain flexibility on what goes to the panel first and for me to work with the Chair.

If the Board generally desires to convene hearing panels for ACLs beyond when a quorum cannot be convened, staff will bring for Board action a future resolution authorizing the Chair to appoint panel members so that one may be convened without having to go to the full Board.

APPENDIX:

A. Draft Resolution Delegation of Authority to the Executive Officer

