

Central Coast Regional Water Quality Control Board

TO: Designated Parties

FROM: Jeffrey Young, Central Coast Water Board Chair and Hearing Officer

DATE: September 27, 2012

**SUBJECT: RULING ON OBJECTIONS TO CONDUCT OF ADMINISTRATIVE HEARING,
ACL COMPLAINT NO. R3-2012-0030, SOUTH SAN LUIS OBISPO COUNTY
SANITATION DISTRICT**

Introduction

The Assistant Executive Officer of the Central Coast Regional Water Quality Control Board (Central Coast Water Board or Board), as part of the Prosecution Team, issued an Administrative Civil Liability (ACL) Complaint No. R3-2012-0030 pursuant to Water Code section 13385, subdivision (e) to the South San Luis Obispo Sanitation District (District) alleging discharges of waste in violation of its National Pollutant Discharge Elimination System (NPDES) Permit No. CA0048003 and Sanitary Sewer Collection System Order 2006-0003-DWQ. The Central Coast Water Board at a hearing on September 7, 2012, heard all evidence and comments from the parties and interested persons and continued the hearing to October 3, 2012 to complete its deliberations on the evidence. On September 12, 2012, Melissa Thorme, on behalf of the District, filed objections to the conduct of the hearing. On September 21, Julie Macedo, on behalf of the Prosecution Team, filed a response to the District's objections to the conduct of the hearing. On September 21, Melissa Thorme, on behalf of the District, filed a reply to the Prosecution Team's response.

Length of Hearing

Objection:

The District asserts that the Regional Board's decision to conduct the hearing in one day was fundamentally unfair to the District for several reasons, including that the hearing lasted for 17 hours, the District did not present its case in chief until after 6:30 pm, its designated representative testified in the evening at the end of the long hearing and was fatigued, the temperature in the room was uncomfortable, and that the witnesses, counsel and board members were affected by the lengthy hearing and temperature.

The Prosecution Team responds that due process was provided, pointing out that the District clearly had notice of the charges brought against it, that the District specifically requested to cross-examine each witness after the completion of their testimony which added to the length of the hearing, that the District was provided more time than requested to present testimony, and that the District made strategic, elective decisions within the control of the District's counsel in how it presented its case.

Ruling:

The District's objections to the conduct of the hearing are OVERRULED. Pursuant to section 648(b) of Title 23 of the California Code of Regulations, all adjudicative proceedings before the Board shall be governed by section 648 et seq. of Title 23 of the California Code of Regulations, Chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code), Government Code section 11513, and Evidence Code sections 801-805. The hearing was consistent with all applicable laws and regulations. The Central Coast Water Board has broad discretion in how it conducts its adjudicative proceedings. Pursuant to section 648.5 of Title 23 of the California Code of Regulations, "adjudicative proceedings shall be conducted in a manner as the Board deems most suitable to the particular case with a view toward securing relevant information expeditiously without unnecessary delay and expense to the parties and to the Board." The conduct of the hearing was consistent with section 648.5 and other applicable statutes and regulations and provided adequate due process to the parties, including the District.¹

Allowing the parties to complete their testimony, cross examination, rebuttal, and closing statements in one day avoided unnecessary delay and expense to the parties and allowed the Board to hear all the evidence at one time. The Board provided more time than requested by the parties to present their cases. The Board allowed the District, at its request, to cross examine each Prosecution Team witness following each witness' testimony rather than at the conclusion of the Prosecution Team's case, as is the usual process. The Board cannot second guess how the parties choose to present their testimony. In this case, the Board allowed one of the District's witnesses to present testimony out of turn for the witness' convenience and the District chose the order of its other witnesses. The fact that the hearing was long and the participants may have been tired is not an issue of due process. The parties had ample opportunity to submit written testimony and evidence and to present their cases in full. The assertion is not consistent with the District's request to the Chair that the Board complete the hearing following the conclusion of testimony.

California courts have held that due process does not require any particular form of notice or method of procedure; the only requirements are reasonable notice and an opportunity to be heard. *Drummey v. State Bar of Funeral Directors & Embalmers* (1939) 13 Cal.2d 75, 80; *Saleeby v. State Bar* (1985) 39 Cal.3d 547, 565; see *Coleman v. Dept. of Personnel Administration* (1991) 52 Cal.3d 1 102.

The District was afforded reasonable notice and a reasonable opportunity to be heard consistent with the applicable laws and regulations. As stated by the Prosecution Team in its response to the objection, the District clearly had notice of the charges brought against it and the Prosecution Team chose to forego certain alleged violations. The District had the opportunity and did submit written testimony, argument and evidence prior to the hearing and was afforded more time than it requested to present its case. The District had the opportunity to present its position to Board members who were actively engaged in the process.

¹ Several objections ruled upon in this Order assert violations of due process. The Central Coast Water Board notes that, as political subdivisions of the State, the South San Luis Obispo County Sanitation District is not a "person" and therefore has no constitutional right to due process, as such. Nevertheless, public agencies are entitled to fair and adequate adjudication procedures before the Central Coast Water Board, (Stats. 2006, ch. 404 (S.B. 1733), § 1.) which the Board has provided. The public agency's rights in this regard emanate from statutory provisions, such as the California Administrative Procedures Act.

Disclosure of Prosecution Evidence

Objection:

The District asserts that it was severely handicapped going into the hearing because of the Prosecution Team's failure to turn over the results of its investigation against the District under a Public Records Act request or subpoena.

The Prosecution Team responds that it was not obligated to turn over its investigatory files in response to a Public Records Act request by the District.

Ruling:

The objection to the Prosecution Team's response to discovery and Public Records Act requests is **OVERRULED**. The objection raised by the District has been addressed by the Sacramento County Superior Court in the matter of *South San Luis Obispo County Sanitation District v. State Water Resources Control Board*, Sacramento County Superior Court. Case No. 34-2012-80001209.

Questions by Executive Officer

Objection:

The District objects to the Central Coast Water Board allowing Interim Executive Officer, Kenneth Harris, to question witnesses in the hearing, asserting that the Interim Executive Officer was improperly acting as a prosecutor.

Ruling:

The objection to questioning by a member of the Advisory Team is **OVERRULED**. The State Water Resources Control Board's (State Water Board's) hearing regulations specifically contemplate that Board staff who are assisting the Board or the hearing officer with the hearing may cross examine parties' witnesses. See 23 Cal. Code Regs. § 648.5(a)(6). In addition, "[t]he mere fact that the decision-maker or its staff is a more active participant in the fact finding process...will not render an administrative procedure unconstitutional." (*Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1581.)

Government Code section 11425.10 provides that "[t]he adjudicative function shall be separated from the investigative, prosecutorial, and advocacy functions within the agency...." There is no evidence that Mr. Harris was ever a part of the prosecution team or engaged in any investigative, prosecutorial, or advocacy functions regarding this matter. In fact, until a few weeks prior to the hearing Mr. Harris was not a member of the staff of the Central Coast Water Board; he worked in Sacramento for the State Water Board in a different capacity with no involvement in this matter. Mr. Harris is solely acting as an advisor to the Board and in the hearing acted consistent with section 648.5, subdivision (a)(6) of the regulations.

Public Commenter

Objection:

The District objects to the decision by the Central Coast Water Board to exclude Mr. Bill Nicholls from speaking during the public comment period in violation of Government Code section 11125.7. The District requests that the Board allow Mr. Nicholls to speak as a member of the public prior to its deliberations.

Ruling:

The District's request is partially GRANTED. It was not clear at the hearing on September 7, 2012, whether Mr. Nicholls was intending to testify as a percipient witness or make a policy statement. If he was intending to speak as a percipient witness he should have been identified by the District as a witness in its case. It appears from the District's objection that Mr. Nicholls' intent is to make a policy statement as a member of the public. The Central Coast Water Board will allow Mr. Nicholls to speak for up to three minutes at the continued hearing on October 3, 2012 prior to the Board's adjournment to closed session to deliberate on the evidence. The District did not identify Mr. Nicholls as a witness and therefore any statement he makes must be of a policy nature; Mr. Nicholls may not provide evidence nor rebut evidence presented by the Prosecution Team. If Mr. Nicholls intends to appear at 9:00 am on October 3, 2012, to make his statement, the Chair requests that the District notify Mr. Harris and the Prosecution Team by noon on October 2, 2012.

Notice of Closed Session

Objection:

The District objects to the Central Coast Water Board's conduct of deliberations in closed session at the hearing on September 7, 2012 because the hearing notice did not include notice that the Board would go into closed session.

Ruling:

The objection is OVERRULED. The Notice of Public Meeting, attached as Exhibit A to the District's objections, includes the following statement under the heading "Closed Session:"

"Deliberation on Decision after HearingClosed Session
The Board may also meet in Closed Session to deliberate on a decision to be reached based upon evidence in a hearing, as authorized by [Government Code] Section 11126(c)(3)."

The hearing notice, therefore, did provide notice that the Central Coast Water Board might meet in closed session to deliberate on the evidence.

Deliberations in Closed Session

Objection:

The District objects to the Central Coast Water Board's conduct of deliberations at the hearing on September 7, 2012 in closed session and the Board's intention to conduct further deliberations in closed session on October 3, 2012 on the grounds that such deliberations are not permitted to be conducted in closed session under the Bagley-Keene Act.

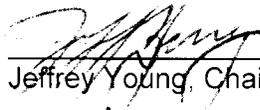
Ruling:

The objection to the Central Coast Water Board's deliberations in closed session is OVERRULED. The Bagley-Keene Act authorizes closed sessions for "proceedings required to be conducted under Chapter 5 of the Government Code or *another similar provision of law.*" See Govt. Code § 11126, subd. (c)(3) (emphasis added). The procedures set forth in the State Water Board regulations contained in Title 23 California Code of Regulations, §§ 647 *et seq.* are similar provisions of law to those conducted under Chapter 5 of the Government Code. Section 647 of Title 23 of the California Code of Regulations states that the State Water Board regulations are "intended to establish minimum standards of practice and procedure" and are a "supplement to the requirements" of the Bagley Act. Section 648, subdivision (b) requires all

adjudicative proceedings before the regional boards to be governed by the regulations, chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. These provisions are similar in nature to Chapter 5 of the Government Code but tailored to the types of proceedings conducted by the Water Boards.

Advisory Team Staff is directed to provide notice of this Order to all parties.

IT IS SO ORDERED.



Jeffrey Young, Chair

9/26/2012

Date