ORDER ON OBJECTIONS AND REQUESTS CONCERNING HEARING PROCEDURES AND PROCESS

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT FOR MUNICIPAL SEPARATE STORM SEWER SYSTEM (MS4) DISCHARGES WITHIN THE COASTAL WATERSHEDS OF LOS ANGELES COUNTY, WITH THE EXCEPTION OF DISCHARGES ORIGINATING FROM THE CITY OF LONG BEACH (NPDES PERMIT NO. CAS004001)

The Los Angeles Regional Water Quality Control Board (Los Angeles Water Board or Board) set forth the procedures and process the Board will use at the hearing on the tentative NPDES Permit for MS4 discharges within the Coastal Watersheds of Los Angeles County, with the exception of discharges originating from the City of Long Beach (Tentative Order) in a Notice of Opportunity for Public Comment and Notice of Public Hearing dated June 6, 2012 (hereafter, Notice). Pursuant to the Notice, the Board received various timely requests and objections concerning the hearing procedures and process to be used at this proceeding. The Chair, having reviewed the various requests and objections, rules as follows:

NATURE OF HEARING

Objection:
The County of Los Angeles (County) and the Los Angeles County Flood Control District (LACFCD) made a general objection to any procedure contrary to or inconsistent with any provision contained in 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 County and LACFCD did not specify which procedure(s) allegedly is contrary to or inconsistent with any of the aforementioned statutes or regulations.

Ruling:
To the extent the County and LACFCD is objecting to any procedure outlined in the Notice, this objection is 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 the aforementioned statutes and regulations. The procedures outlined in the Notice are consistent with all applicable laws and regulations. The County and LACFCD have not specified which procedure(s) allegedly are contrary to or inconsistent with these applicable laws and regulations. Further, the 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."

AVAILABILITY OF DOCUMENTS

Objection:
Signal Hill objects to any attempt by Board staff to limit the evidence that is made available to the Board at the hearing, and objects to any assertion that evidence that was not made available to the Board at the hearing is part of the administrative record. Signal Hill requests that all documentation and other evidence that relates to the reissuance of the Tentative Order be made available at the time of the hearing to the Board and witnesses. Signal Hill asserts that it is legally inappropriate for the decision maker to base its decision at a formal adjudicative hearing on evidence not presented to the decision maker during the hearing process and that material that is not available at the hearing cannot be included as a part of the administrative record. Signal Hill further asserts that not providing the evidence to the Board constitutes a violation of due process of law.

Ruling:
This objection is OVERRULED. The administrative record for a proceeding before the Board consists of all documents and materials directly or *indirectly* considered by the Board in rendering its decision. (*Bar MK Ranches v. Yuetter* (10th Cir. 1993) 994 F.2d 735, 739.) The Board has an obligation to gain a "substantial understanding of the record" prior to rendering a decision, but may do so "by any reasonable means." (*Allied Comp. Ins. Co. v. Ind. Acc. Com.* (1961) 57 Cal.2d 115, 119.) The Board need not directly review the entire administrative record, nor must all of the documents and evidence included in the administrative record be presented to the Board either before or during the hearing. The procedural and due process requirements of a hearing may be satisfied even though the Board members "do not actually hear, or even read, *all* of the evidence." (*Ibid.* [internal citations omitted].) The practicalities alone prevent such a requirement. The administrative record related to the Tentative Order exceeds several thousands of pages of documents, and the Board members are part-time lay members with other full-time responsibilities. It would be impracticable for each Board member to directly review every relevant document and piece of evidence.

Rather, the Board relies on its staff to analyze the relevant evidence. Evidence "may be sifted and analyzed by competent subordinates," and recommendations based thereon transmitted to the Board. (*Allied Comp. Ins. Co.*, *supra*, 57 Cal.2d at pp. 119-20.) "An agency may. . . rely upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as constituting substantial evidence." (*Browning-Ferris Indus. v. City Council* (1986) 181 Cal.App.3d 852, 866.) Thus, "[a] document need not literally pass before the eyes of the final agency decisionmaker to be considered part of the administrative record." (*Clairton Sportsmen's Club v. Pennsylvania Turnpike Com.* (W.D. Pa. 1995) 882 F.Supp. 455, 465.) Board members also need not be physically present when evidence is produced. (*Old Santa Barbara Pier Co. v. California* (1977) 71 Cal.App.3d 250, 256 [citing *Cooper v. State Bd. of Medical Examiners* (1950) 35 Cal.2d 242, 246].) The staff of the Los Angeles Water Board reviewed the documents and other evidence contained in the administrative record for the Tentative Order. The documents and evidence are also available to the Board at all times. In addition, individual members of the Board have the opportunity to consult with staff regarding the content of the administrative record, and the staff will provide a general summary of significant factual matters raised by the relevant documents and evidence at the hearing.

Materials that are not physically available at the hearing may be included in the administrative record. Documents need not be formally introduced into evidence to be considered by the Board in making a final decision. (*Today's Fresh Start, Inc. v. Los Angeles County Office of Educ.* (2011) 128 Cal.Rptr.3d 822, 844, review granted October 26, 2011; see also *Ray v.*

Parker (1940) 15 Cal.2d 275, 310; *In re Los Angeles County Municipal Storm Water Permit Litigation* (Sup. Ct. Los Angeles County, March 24, 2005, Case No. BS 080548) ["The Court disagrees with Petitioners' contention that an agency must reference each specific item in a record during the hearing."].)

Board staff created a preliminary index identifying documents to be included in the administrative record when it released the Tentative Order for public comment on June 6, 2012. This preliminary index of documents is posted on the Board's website. The documents and other evidence that tentatively make up the administrative record for this permit are and have been available to the Board and to the public at the Board's office. If Signal Hill sought to bring any particular document to the attention of the Board, those documents could have been submitted or cited during the written comment period, or could have requested that Board staff bring specific documents to the hearing as provided for in Part IV of the Notice.

Nevertheless, although not required, the Board will bring the currently available administrative record to the hearing. Due to the size of the administrative record to date, the Board will arrange for the administrative record, as it exists on the date of the hearing, to be available electronically via CD or by online access during the hearing. The Board may add further documents and evidence to the administrative record as may be necessary, or to respond to comments and testimony, or inquiries prior to or at the hearing.

Request:
Signal Hill also requested that Board staff bring to the hearing the July 23, 2012 comment letter from Signal Hill City Manager Kenneth Farfsing, including 3 attachments.

Ruling:
This request is GRANTED. Board staff will bring the requested documents to the hearing. The documents were also provided to the Board in their agenda binder.

Objection:
The County and LACFCD object to the absence of portions of the administrative record and request that the entire administrative record be present for the entirety of the hearing. The County and LACFCD further state that, should the Board deny their request, then the Parties request that at least certain documents set forth in their objection be available at the hearing.

Ruling:
The objection concerning the absence of portions of the administrative record is OVERRULED. For the reasons set forth above pertaining to the objection raised by Signal Hill, the Board is not required to bring to the hearing the entire administrative record. Nevertheless, as noted above, the Board will arrange for the current administrative record, as it exists on the date of the hearing, to be made available electronically via CD or by online access during the hearing. The Board will also bring hard-copies of the documents specifically requested in Attachment A of the County and LACFCD's letter dated August 23, 2012 to the hearing.

REQUESTS FOR PARTY STATUS

Request:
The Board designated the LACFCD, the County, and 84 cities as parties to this proceeding. Pursuant to the Notice of Public Hearing, the Board received 2 timely additional requests for party status in this matter.

Ruling:
The request for party status made by the LA Permit Group is DENIED. The LA Permit Group, which is not a legal entity, is a collaborative group of 62 municipalities[1] that are each subject to the permit and are already each individually designated as parties in the Notice. The LA Permit Group has not adequately demonstrated why the existing designated parties (which include all of the LA Permit Group's own member cities) do not adequately represent LA Permit Group's interest. Although the LA Permit Group itself is not a party to this proceeding, the LA Permit Group may still make a joint oral presentation, present evidence, and cross-examine other parties' witnesses on behalf of the individual cities that are parties to this proceeding. As indicated in the Notice, the Board encourages parties and interested persons with similar concerns or opinions to choose one representative to speak, coordinate their presentations with each other, and to summarize their written comments. The Board appreciates the LA Permit Group's efforts to represent the collaborative and consolidated comments of the 62 cities participating in the LA Permit Group in order to avoid repetitive comments and to ensure a more efficient hearing.

The requests made by the Natural Resources Defense Council, Los Angeles Waterkeeper, and Heal the Bay (collectively, Environmental Groups) is GRANTED. The Environmental Groups are each hereby designated as additional parties to this proceeding, pursuant to section 648.1(a) of Title 23 of the California Code of Regulations. In their request, the Environmental Groups state that they represent numerous members[2] who recreate in the waters affected by the discharges regulated by the Tentative Order and whom are impacted by pollution in stormwater runoff and its resulting health impacts. Like the other designated parties, the Environmental Groups have an interest in, and will be affected by, the Board's decision in this proceeding. The Environmental Groups have also demonstrated that the existing designated parties (the 86 municipal and county entities that will be regulated by the Tentative Order) do not adequately represent the Environmental Groups' interests. As noted in their request for party status, the Environmental Groups have presented arguments that are different from or in opposition to positions taken by the existing designated parties. The Environmental Groups have also presented arguments that are different from or in opposition to positions taken by the Board; thus, the Board does not adequately represent the Environmental Groups' interests either. Accordingly, the Board finds that the Environmental Groups' perspective and participation as a party will be beneficial to further develop the issues before the Board. In addition, because all parties and interested persons will be subject to reasonable time limits to make presentations, there is no impact on the efficient conduct of the hearing itself.

Request:
The County and LACFCD requested the opportunity to comment and be heard on any request by any entity to be designated as a party to this proceeding before such designation occurs. The County and LACFCD stated that they have the right to comment because designation of additional parties could unduly complicate and lengthen this hearing without substantial benefit and that it is critical that any additional time needed to allow for the participation of third parties not limit the time given to the permittees to address their substantive issues.

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[1] Exhibit A to the LA Permit Group's comment letter dated July 23, 2012 identified 62 cities as members of the LA Permit Group.
[2] Unlike the LA Permit Group, the Environmental Groups' individual members are not designated as parties to this proceeding.

Ruling:
This request is DENIED. The authority to designate additional parties lies within the Board's discretion. Section 648.1(a) of Title 23 of the California Code of Regulations states that the "party or parties to an adjudicative proceeding before the Board shall include the person or persons to whom the agency action is directed and *any other person whom the Board determines should be designated as party*." (emphasis added.) This section also expressly authorizes the establishment of procedures for designating parties to a particular proceeding in the hearing notice. The Board established such procedures in the Notice, including the criteria on which determinations will be based. In addition, the designation of the Environmental Groups as parties to this proceeding will not unduly complicate or lengthen this hearing. As noted above, the Board has determined that the Environmental Groups' participation as parties will be beneficial to further develop the issues before the Board and will provide a substantial benefit to the Board and the public. Lastly, the amount of time provided to the parties to address their substantive issues is based on a variety of factors, including the complexity and the number of issues under consideration, the extent to which the parties have coordinated, the number of parties and interested persons, the opportunity to submit written comments that are part of the administrative record, the extent to which the parties have identified unique interests, and the time available for the hearing. Even if the Environmental Groups request for party status had been denied, the Environmental Groups perspective in this matter would still warrant additional time for an oral presentation. Lastly, as noted above, because all parties and interested persons will be subject to reasonable time limits to make presentations, there is no impact on the efficient conduct of the hearing itself.

PARTICIPATION OF LOS ANGELES WATER BOARD STAFF AND ATTORNEYS

Objection:
The County, LACFCD, Signal Hill, and the Environmental Groups made various objections concerning the Board's assertion in Part V.C. of the Notice that the Los Angeles Water Board staff is not a party to this proceeding. The County, LACFCD, and Signal Hill allege that the use of the same attorney by both the Board and Board staff is a violation of the Administrative Procedure Act. Signal Hill and the Environmental Groups assert that the Board must provide separate counsel to serve as advisors to the Board. Signal Hill also asserts that the writ of mandate in *County of Los Angeles and Los Angeles County Flood Control District v. State Water Resources Control Board and Los Angeles Regional Water Quality Control Board*, Los Angeles County Superior Court Case No. BS122724, expressly forbids the Board from allowing the same counsel to advise both the Board and the Board staff for the incorporation of the Santa Monica Bay Bacteria TMDL and that allowing the same counsel to advise both Board staff and the Board may subject the Board to being held in contempt of Court.

Ruling:
These objections are OVERRULED. Government Code section 11425.10 provides that "[t]he adjudicative function shall be separated from the *investigative, prosecutorial, and advocacy functions* within the agency...." (emphasis added.) This permit proceeding involves none of these functions. This is a proceeding to issue a new permit for MS4 discharges. The proceeding is not an investigation. No investigative order is under consideration, and no investigation functions are involved in this proceeding. Likewise, a permit proceeding does not involve a prosecution. Neither sanctions, liability, nor criminal, civil, or administrative penalties of any sort are being sought during this proceeding. There is nothing to prosecute, and, therefore, no prosecutorial function is involved. Board staff and attorneys also have no advocacy function in this permit proceeding. Signal Hill asserts that Board staff is a party because it "drafted and is recommending, *i.e.,* advocating, the adoption of the Proposed Permit to the decision-maker."

This is incorrect. Typically, the Board does not designate its staff as a party for permit proceedings. Here, as in virtually all permit proceedings, staff's proposals, recommendations, and their participation exists for the purpose of advising and assisting the Los Angeles Water Board. Likewise, attorneys for the Board advise and assist the Board, which includes the Board members and its entire staff. *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1585, held that, "[b]y definition, an advocate is a partisan for a particular client or point of view." Given the nature of this proceeding and the limited facts in dispute, assigning a separate staff to "advocate" on behalf of a particular position would not further the development of the issues before the Board. In a non-prosecutorial, non-investigative proceeding, staff's role is well-settled. Staff merely advises the Board members about policy choices, technical recommendations, and legal issues. Unlike an advocate, Board staff and attorneys provide neutral evaluations and explanations of the pros and cons of all options. This is distinct from an advocate, who picks a particular view and advocates for that view.

The Environmental Groups assert that the potential exists for Board attorneys to be required to fulfill dual roles—acting, on the one hand, to cross examine witnesses or to present evidence before the Board, and, on the other hand, to rule on the admissibility of evidence, on proper procedure for witness conduct, or to otherwise serve in an advisory capacity to the Board on procedural and evidentiary issues. Board attorneys do not have dual roles in this proceeding; rather, the Board attorneys have one role. That role is to advise and assist the Los Angeles Water Board, which includes the board members and its entire staff. While allowed,[3] the Board attorneys will not be cross examining witnesses or presenting evidence during this proceeding. The Board attorneys may, however, ask clarifying questions.

Government Code section 11430.30 expressly allows Board staff to advise the presiding officer on issues in non-prosecutorial adjudicative proceedings. The provisions of Government Code sections 11430.10-11430.80 apply and obviate the need for a separation of functions in non-prosecutorial proceedings. Subject to limited exceptions, Government Code section 11430.10 generally prohibits communications concerning issues in a pending administrative proceeding between the presiding officer and an employee of the agency. One such limited exception is found at Government Code section 11430.30, which provides in relevant part:

> A communication otherwise prohibited by Section 11430.10 from an employee or representative of an agency that is a party to the presiding officer is permissible in any of the following circumstances:
> ...(c) The communication is for the purpose of advising the presiding officer concerning any of the following matters in an adjudicative hearing that is non-prosecutorial in character:
> ...(2) The advice involves an issue in a proceeding of the San Francisco Bay Conservation and Development Commission, California Tahoe Regional Planning Agency, Delta Protection Commission, Water resources Control Board, or a regional water quality control board.

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[3] The State Water Resources Control 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. (Cal. Code Regs., tit. 23, § 648.5, subd. (a)(6).) In addition, "[t]he mere fact that the decision-maker or its staff is a more active participant in the factfinding process...will not render an administrative procedure unconstitutional." (*Howitt,* 3 Cal.App.4th at p. 1581.)

The Law Review Commission noted that this special exemption was necessary and appropriate. It stated:

> Subdivision (c) applies to nonprosecutorial types of administrative adjudications, such as...proceedings...setting water quality protection...requirements. The provision recognizes that the length and complexity of many cases of this type may as a practical matter make it impossible for any agency to adhere to the restrictions of this article, given limited staffing and personnel.

(Recommendation: Administrative Adjudication by State Agencies (Jan. 1995) 25 Cal. Law. Revision Com. Rep. (1995) p. 166.) Thus, express statutory authority specifically authorizes involved Board staff to communicate with the presiding officer concerning any issues in a pending adjudicative proceeding that is non-prosecutorial in character. As the California Supreme Court has recognized, separations of functions is inextricably linked with the prohibition on ex parte communications. (*Dept. of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeal Bd.* (2006) 40 Cal.4th 1, 10.) But the Legislature has recognized that communications that would customarily be prohibited are appropriate for Board staff during a non-prosecutorial adjudicative proceeding. (Gov. Code, § 11430.30, subd. (c)(2).) By the same token, a separation of functions in such circumstance is not necessary.

In addition, Signal Hill and the Environmental Group's reliance on *Nightlife Partners, LTD. V. City of Beverly Hills* (2003) 108 Cal.App.4th 81, is misplaced and easily distinguishable. *Nightlife Partners* involved a city attorney who served in conflicting functions in different phases of a proceeding about the plaintiff's application for a cabaret license. The attorney advocated to the decision maker (executive staff) that it should determine that the application was incomplete, and the decision maker rejected the application on that basis. Thereafter, the same attorney also served as the advisor to the hearing officer during the plaintiffs' subsequent administrative appeal of that ruling. Unlike the city attorney in *Nightlife Partners,* the Board's attorneys are not tasked with an advocacy function in the instant proceeding. *Nightlife Partners* did not involve the exercise of dual functions in the same proceeding and it certainly did not rule that a public body was required to task its staff with an advocacy function when it issues a permit. Perhaps most significantly, however, unlike the Board staff, the city attorney in *Nightlife Partners* did not have the benefit of an express grant of statutory authority to advise the presiding officer off the record on any issues in a non-prosecutorial adjudicative proceeding. As Board staff is not performing an advocacy function in the instant proceeding, and because Government Code section 11430.30, subdivision(c)(2), allows for such communications and is expressly limited to the Board (and a very small number of other agencies), *Nightlife Partners* has no application to this proceeding.

Lastly, Signal Hill is incorrect in its assertion that the writ of mandate in *County of Los Angeles and Los Angeles County Flood Control District v. State Water Resources Control Board and Los Angeles Regional Water Quality Control Board*, Los Angeles County Superior Court Case No. BS122724, expressly forbids the Board from allowing the same counsel to advise both the Board and the Board staff for the incorporation of the Santa Monica Bay Bacteria TMDL in this proceeding. The Court's Peremptory Writ of Mandate, dated July 23, 2010, states:

> Should [the Los Angeles Water Board] choose to conduct any further hearing upon remand, at such hearing the same person shall not act as both an advocate before the Los Angeles Regional Water Quality Control Board and an advisor to the Los Angeles Water Quality Control Board, and, the individual who

participated as Regional Board counsel in the last Regional Board hearing shall not participate.

As indicated in the Los Angeles Water Board's Supplemental Return to the Peremptory Writ of Mandate, dated April 27, 2011, the Board chose not to conduct any further hearing(s) upon remand to amend the existing MS4 permit (Order No. 01-182). The Board's issuance of a new MS4 permit is required by federal law and is not being done at the order of the Los Angeles County Superior Court. This permit proceeding in this instance is a completely new proceeding, and the writ of mandate is therefore inapplicable to this proceeding. Further, the individual who participated as the Board's counsel in the Board's hearing at which Order No. 01-182 was amended to incorporate the Santa Monica Bay Bacteria TMDL is not participating in this proceeding, and is no longer employed as counsel to the Los Angeles Water Board, or any of the Water Boards. Moreover, as noted above, during the permit proceeding, the same person will not act as both an advocate before the Board and an advisor to the Board.

Public Comments and Submittal of Evidence

Objection:
The County and LACFCD assert that the Notice did not provide the County and LACFCD sufficient time to respond to the Tentative Order. The County and LACFCD allege that "[t]his unrealistic deadline has created a process that is fundamentally unfair, a violation of the California Administrative Procedure Act ('APA'), and due process." The County and LACFCD object to the current manner of proceeding and request that Board staff issue responses to comments as well as a new draft permit and hold a workshop and invite public comments on that draft.

Ruling:
This objection is OVERRULED. The County and LACFCD, as well as other permittees and stakeholders, were provided 45 days to review and comment on the Tentative Order. Federal regulations only require that the Board provide at least 30 days for public comment. Accordingly, permittees and stakeholders were provided with more time than federal law requires. In addition, the County and LACFCD submitted comment matrices comprising 117 and 54 pages, respectively, not including cover letters and attachments. Based on the extensive nature of the comments submitted by the County and LACFCD, it appears that the County and LACFCD had sufficient time to respond to the Tentative Order. Moreover, the Board has made extraordinary efforts to make the Tentative Order development process open, transparent, and inclusive. The permit development process began in May 2011. Since that time, the Board has provided countless opportunities for permittees and stakeholders to raise concerns, ask questions, and engage in dialogue with Board staff regarding permit provisions. As the County and LACFCD are well aware, the Board has held five staff-level workshops and three Board workshops. Board staff has also regularly met with several permittees, either individually or jointly, including the County and/or LACFCD. Board staff also recognized the value of providing permittees and other stakeholders with working proposals of the permit prior to issuing the Tentative Order. Board staff released working proposals for the five principal sections of the permit, and allowed for informal written and oral comments. As a result, the draft Tentative Order was revised to address many of the concerns raised by permittees and stakeholders during meetings, as well as the written and oral comments received on the working proposals. The Tentative Order that was released for a 45-day public comment period reflects these changes.

Lastly, the deadlines and procedures established in the Notice are not unfair and do not violate the Administrative Procedure Act and/or due process. Government Code section 11425.10, subdivision (a)(1), requires that an administrative agency provide "the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence." The Law Revision Commission Comments to that subdivision further states: "Subdivision (a)(1), providing a person the opportunity to present and rebut evidence, is subject to reasonable control and limitation by the agency conducting the hearing, including the manner of presentation of evidence, whether oral, written, or electronic, limitation on lengthy or repetitious testimony or other evidence, and other controls or limitations appropriate to the character of the hearing." Government Code section 11425.10, subdivision (a)(1), also does not equate any specific procedures with an "opportunity." (*Drummey v. State Bd. Of Funeral Directors* (1939) 13 Cal.2d 75, 80-81.) Rather, as administrative adjudicatory proceedings, hearing officers are conferred substantial discretion and explicit authority to waive any requirement relating to adjudicative proceedings, except where in conflict with statutory or constitutional guarantees. (Cal. Code Regs., tit. 23, section 648, subd. (d); Cal. Code Regs., tit. 23, section 648.5., subd. (a). ["Adjudicative proceedings shall be conducted in a manner as the Board deems most suitable to the particular case with a view towards securing relevant information expeditiously without unnecessary delay and expense to the parties and to the Board."].) This regulatory flexibility to control a proceeding is completely consistent with the statutory right to "notice and an opportunity to be heard." (Gov. Code, § 11425.10, subd. (a)(1).) Courts have likewise acknowledged the ability of agencies to streamline hearings, while preserving the right to notice and comment. As the U.S. Supreme Court has noted, what constitutes a fair hearing before an administrative body varies with the circumstances. (*Gilbert v. Homer* (1997) 520 U.S. 924, 930.). Courts should also give "substantial weight" to the good-faith judgments of the hearing officer. (*Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 46.) This is particularly true where the permit process, which grants a privilege, is only subject to minimal due process. (See, e.g., *Sucn. Suarez v. Gelabert* (D.P.R. 1982) 541 F.Supp. 1253, 1264 [citing *Mathews v. Eldridge* (1976) 424 U.S. 319, 335]; see also Wat. Code, § 13263 ["All discharges of waste into waters of the state are privileges, not rights."].) Consistent with these standards, the County and LACFCD has had, and will continue to have at the hearing, its "notice and opportunity to be heard."

Objection:
The County and LACFCD object to the second paragraph[4] of Part VI of the Notice concerning untimely submittal of written comments or evidence to the extent that it is inconsistent with section 648 *et seq.* of Title 23 of the California Code of Regulations, Chapter 4.5 of the Administrative Procedure Act, and Government Code section 11513. The County and LACFCD state that it reserves the right to present evidence at the hearing consistent with these provisions, including the right to subpoena witnesses.

Ruling:
This objection is OVERRULED. The second paragraph of Part VI of the Notice is consistent with section 648 *et seq.* of Title 23 of the California Code of Regulations, Chapter 4.5 of the Administrative Procedure Act, and Government Code section 11513. The Board has discretion

[4] The second paragraph of Part VI reads: "Pursuant to section 648.4, Title 23 of the California Code of Regulations, untimely submittal of written comments or evidence will not be allowed or accepted into the Administrative Record without a showing of good cause for the delay, and in no event if any party or the Board would be unduly prejudiced by the late submittal or if staff or the Los Angeles Water Board would not have an adequate opportunity to review, consider, and respond to the comments or evidence."

to control the submission of both written and oral evidence in administrative proceedings. (Cal. Code Regs., tit. 23, section 648, subd. (d). ["The presiding officer may waive any requirements...pertaining to the conduct of adjudicative proceedings including but not limited to the introduction of evidence, the order of proceedings, the examination or cross-examination of witnesses, and the presentation of argument, so long as those requirements are not mandated by state or federal statute or by the state or federal constitutions."].) Further, it is "the policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits." (Cal. Code Regs., tit. 23, section 648.4, subd. (a).) Accordingly, the Board may require that evidence be submitted in writing prior to the hearing, and may refuse to admit untimely evidence where there is a showing of prejudice to any party or the Board. (Cal. Code Regs., tit. 23, section 648.4, subd. (c) and (e).)

While no further written comments or evidence will be allowed on the Tentative Order, the County and LACFCD may provide oral evidence at the hearing either by direct testimony or cross-examination of witnesses.

Untimely Written Comments

Ruling on the Chair's own motion:
The Board received three (3) untimely written comments in response to the Notice. These written comments were from:

- Jason E. Uhley, on behalf of Riverside County Flood Control and Water Conservation District (sent by email on July 24, 2012);
- Steven M. Zurn, on behalf of City of Glendale Water and Power (sent by email on July 25, 2012); and
- Johnathan Fernandez (sent by email on August 9, 2012).

Pursuant to section 648.4, Title 23 of the California Code of Regulations, the Board will not consider or respond to these untimely written comments, nor include the written comments into the administrative record. None of the commenters showed good cause for their delay in submitting the written comments. While these written comments will not be considered, these commenters may make oral comments at the hearing on the permit.

Hearing Procedures

Request:
The County and LACFCD request that the Chair hold a pre-hearing conference with Board staff and all parties to address procedural issues.

Ruling:
This request is DENIED. While the Chair may hold a pre-hearing conference to address procedural issues, doing so is not required. In addition, in this matter, holding a pre-hearing conference is logistically difficult given time constraints and the possible number of parties and interested persons that may want to participate in such a conference. The Notice provided an opportunity to submit written objections, and it is unclear what benefit a prehearing conference would provide. Accordingly, the objections are ruled upon in this Order.

Objection:
The County and LACFCD make a general objection to hearsay evidence being used for any purpose other than supplementing or explaining other evidence. The County and LACFCD object to any finding that is supported solely by hearsay (citing Gov. Code, § 11513, subd. (d).)

The County and LACFCD did not specify which evidence or finding allegedly is solely supported by hearsay evidence.

Ruling:
To the extent the County and LACFCD is objecting to any finding in the Tentative Order or any document identified in the preliminary index of documents to be included in the administrative record, this objection is OVERRULED. Government Code section 11513, subdivision (d), provides that "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." The County and LACFCD have not specified which finding(s) or document(s) allegedly are supported solely by hearsay. Without this information, the County and LACFCD have not provided the Board an opportunity to address this objection. Nevertheless, the Board will comply with Government Code section 11513.

Request:
The County and LACFCD suggest that the hearing be divided into at least 3 segments based on subject matter. The County and LACFCD also request the right to make a short opening statement before the presentation of evidence, and reserve the right to make a closing statement after the conclusion of the presentation of all evidence.

Ruling:
The Chair declines to use the County and LACFCD's suggestion concerning segmentation of the hearing. The 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." While the Board has allocated 2 days for the hearing on this matter, it is customary for the Board to provide speakers one block of time in which to make their comments. Following the suggested segmented approach would be logistically difficult given the large number of speakers and would unnecessarily delay the hearing. Accordingly, the Board will employ its usual custom of providing speakers with one block of time in which to comment. Parties may use their allocated block of time for an opening statement, main presentation, rebuttal and/or cross-examination, and closing statement.

Requests for Time to Speak at Hearing

Requests:
Pursuant to Section VIII of the Notice, the Los Angeles Water Board received timely requests from several parties to this proceeding requesting extra time to present their oral comments at the hearing.

Ruling:
After consideration of all requests, taking into account the complexity and number of issues under consideration, the extent to which the parties have coordinated, the number of parties and members of the public, the opportunity to submit written comments that are part of the administrative record, the extent to which the parties have identified unique interests, and the time available for the hearing, the following times are allocated to each party, unless the Board makes a modification for cause. The times granted to each party below are adequate to summarize written comments and present oral comments and evidence.

Party	Time Requested	Time Granted
Agoura Hills	5 minutes	5 minutes
Claremont	15 minutes	15 minutes
County of Los Angeles and Los Angeles County Flood Control District	5 hours	1 hour, 30 minutes
Environmental Groups	4 hours	1 hour, 30 minutes
LA Permit Group (on behalf of 62 designated parties)	3 hours	1 hour, 30 minutes
Monrovia	25 minutes	15 minutes
Norwalk	15 minutes	15 minutes
Pomona	15 minutes	15 minutes
Santa Monica	10 minutes	10 minutes
Signal Hill	30 minutes	15 minutes
Vernon	20 minutes	15 minutes
Westlake Village	3 minutes	3 minutes

All other parties not identified above will be limited to 3 minutes maximum each. The time allocated to the parties includes any opening statement, main presentation, rebuttal and/or cross-examination, and closing statement. Questions from the Board and the time to answer them will not be charged against the parties' allocated time.

Oral comments from interested persons are limited to 3 minutes each. The Board may reduce the time for each interested person to comment depending on the number of persons wishing to be heard and the available time for the hearing.

Parties and interested persons with similar concerns or opinions are encouraged to choose one representative to speak, and are encouraged to coordinate their presentations with each other, and to summarize their written comments. Repetitive comments will not be allowed.

Designation of Time or Date Certain for Public Comment

Request:
The Environmental Groups requested that the Board designate a date and time certain for public comment at the hearing on this matter. The Environmental Groups asserted that the lack of such a schedule would create significant hardship for members and partners of Environmental Groups in presenting testimony and could result in a member of the public being required to take two full days off from work in order to present testimony, with no guarantee of whether their comments would be heard on the first or second day of the Permit Hearing.

Ruling:
This request is GRANTED. Comments from members of the public will not occur earlier than 9:00 am on Friday, October 5, 2012.

Availability of Board Staff at the Hearing

Request:
The Environmental Groups requested that Board staff be available for cross-examination by the parties as necessary.

Ruling:
Board staff members Samuel Unger, Deborah Smith, Renee Purdy, Ivar Ridgeway, and Rebecca Christmann will be present at the hearing on October 4th and 5th. If the Environmental Groups, or any other designated party, desire any other staff person(s) to be present at the hearing to answer questions, the designated party must notify the Los Angeles Water Board staff, as provided in Section X of the Notice, no later than October 1, 2012.

Participation of Board Member Mary Ann Lutz in this Proceeding

Objection:
Natural Resources Defense Council (NRDC) and Los Angeles Waterkeeper (Waterkeeper) request that Board Member Mary Ann Lutz be recused from participating in the hearing on the permit and any further Board process concerning the permit. As the Mayor of the City of Monrovia, a waste discharger subject to the Permit, Board Member Lutz was prohibited by Water Code section 13207 from participating in the proceedings in this matter. Based on recent changes to section 13207 that were made effective June 27, 2012, the Board transmitted a letter dated July 6, 2012 stating, "[u]nder the new law, Board Member Lutz is not prohibited from participating as a discharge . . ." NRDC and Waterkeeper disagree with the conclusion reached by the Board and assert, that in order to ensure a fair hearing, Board Member Lutz must be recused from the proceedings on this matter for due process considerations including bias and presence of ex parte communications.

Ruling:
This objection will be addressed separately, and no later than at the beginning of the hearing on October 4, 2012.

Board staff is directed to provide notice of this Order to all parties and interested persons.

IT IS SO ORDERED.

Maria Mehranian, Chair

9/26/2012
Date