



State Water Resources Control Board



Executive Office

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Arnold Schwarzenegger
Governor

Linda S. Adams

Secretary for
Environmental Protection

April 3, 2007

Mr. Daniel Kelly
Somach, Simmons & Dunn
813 Sixth Street, Third Floor
Sacramento, CA 95814-2403

Dear Mr. Kelly:

VINEYARD CLUB, INC. ENFORCEMENT PROCEEDING

I have received your letter to me dated March 29, 2007, in which you ask me to disqualify both the prosecution and hearings teams. With respect to the prosecution team, your letter and previous correspondence raise a number of issues that are best argued between the parties to this proceeding and developed on the record during the hearing. With respect to the hearing team, I am denying your request for the reasons provided below.

With respect to the disqualification of the prosecution team, you raise two issues: 1) the prosecution team's allegedly punitive behavior, and 2) the Board's failure to disclose all members of the prosecution team. As stated in my letter dated March 27, 2007, I have taken the first issue under submission. Addressing your concerns involves factual matters that cannot be decided prior to the evidentiary hearing. Regarding the second issue, it is customary to state in the notice of hearing the staff members participating in the hearing and their function (prosecution team or hearing team). We do not customarily state who the supervisors are, nor are we legally required to do so in the notice of hearing.

Staff on the hearing team is governed by the prohibition on ex parte communications with parties, including the prosecution staff and staff supervising the prosecution staff. The ethical wall referenced in the hearing notice extends up the reporting chain so that a staff member is assigned a supervisor for a particular adjudicative matter that is on the same side of the ethical wall. I am told that persons supervising or assisting the prosecution team not named in the hearing notice are: Jim Kassel, John O'Hagan, and Andrew Sawyer. I am told that the hearing team has observed an ethical wall with respect to these individuals and has not had prohibited ex parte communications with these persons.

With respect to the disqualification of the hearing team, you also raise two issues: 1) an alleged inappropriate supervision of the Division staff by staff of the prosecution team, and 2) an alleged ex parte communication resulting in an alleged attempt to introduce evidence into the evidentiary record by the hearing team.

Regarding the first issue, you allege that Larry Lindsay, who was recently promoted to the Chief of the Hearing Unit, is supervising Jean McCue, who is a member of the hearing team for this proceeding. The hearing notice indicates that an ethical wall separates the prosecution team

California Environmental Protection Agency



and the hearing team. Since the inception of this proceeding and for the purposes of this proceeding, Ms. McCue is being supervised by Les Grober, Chief, Hearings and Special Projects Section. Other than submissions received by all the parties, I am told that Larry Lindsay has had no involvement with Jean McCue or the hearing team regarding this proceeding.

Regarding the second issue, you allege that Jean McCue and Barbara Katz behaved inappropriately regarding an email that was sent to your client in response to an inquiry he submitted to Ms. McCue.¹ Both Ms. McCue and Ms. Katz were attempting to cure an apparent inadvertent ex parte communication from your client to Ms. McCue. The cure for such an ex parte communication is to disclose the communication in the administrative record. You seem to be confusing a record of the proceeding with the evidentiary record. Nothing has been accepted into evidence yet because the evidentiary hearing has not commenced. Ms. McCue was not in any capacity investigating or expanding the evidentiary record in the proceeding. I refer you to Government Code, section 11430.40 as support for the actions taken by Ms. McCue and Ms. Katz.

The conduct of the hearing team regarding separation of functions and ex parte communications is consistent with Chapter 4.5 of the Administrative Procedure Act. (Gov't Code, sections 11400 *et seq.*; see also *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Board* (2006) 40 Cal.4th 1, 16-17 [50 Cal.Rptr 3rd 585] [recognizing that the Act only requires a "limited internal separation of functions"].) Therefore, I deny your request to disqualify the hearing team.

If you have any further issues, you may raise them at the hearing.

Sincerely,



Gary Wolff, P.E., Ph.D.
Vice Chair

cc: Michael Lauffer, Esq.
Matt Bullock, Esq.
Barbara Katz, Esq.
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¹ Your March 29, 2007 submittal does not include a copy of Ms. Katz's email to you concerning this issue, although you included copies of many other emails concerning this issue. You are also shown as being copied on the originating and subsequent email from your client to Ms. McCue (see Attachment 3 to your March 29, 2007 submittal.) Ms. Katz explained in her e-mail how and why the communication you have expressed concern about occurred.