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## Los Angeles Regional Water Quality Control Board

**TO:** Parties and Interested Persons

**FROM:** Lawrence Yee  
Chair

**LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD**

**DATE:** July 7, 2021

**SUBJECT: ORDER ON COMMENTS, OBJECTIONS, AND REQUESTS  
CONCERNING HEARING PROCEDURES**

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 proposed Regional Phase I MS4 NPDES Permit for the Los Angeles Region (Revised Tentative Regional MS4 Permit) in a Notice of Public Hearing dated June 4, 2021 (Notice).

The Board received various timely comments, objections and one request concerning the hearing procedures and process to be used at this proceeding. The Chair, having reviewed the various requests and objections, rules as follows:

### **Objections to the Hearing Procedures**

Objection 1: The Ventura Countywide Stormwater Quality Management Program (Ventura Permittees) objected to the order of proceedings in section VII of the Notice because questions from the Los Angeles Water Board members, counsel, or staff to designated parties or interested persons followed oral comments by the Parties and interested persons. Specifically, Ventura Permittees were concerned that the lack of Board questions and comments contemporaneous with designated party presentations would result in “issues raised by Ventura Permittees [being] lost and forgotten before the Los Angeles Water Board members [had] the opportunity to ask questions of all presenters.” Ventura Permittees asked that the Order of Proceedings issued on July 2, 2021 (Order of Proceedings) be revised to allow for contemporaneous questions.

Ruling 1: GRANTED. Pursuant to section 648.5, subdivision (a), of Title 23 of the California Code of Regulations, the Board has broad discretion in how it conducts its adjudicative proceedings and "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

LAWRENCE YEE, CHAIR | RENEE PURDY, EXECUTIVE OFFICER

and to the Board." Here, the Board agrees that given the number of parties and interested persons that are scheduled to be heard over the course of a multi-day hearing, that it is appropriate to explicitly allow and encourage board questions on the day that parties and interested persons are scheduled to provide their oral comments. The Order of Proceedings includes a block of time for questions at the end of each session and Board members may ask questions of the Parties at any time. Indeed, section 648.5, subdivision (b), of Title 23 of the California Code of Regulations provides that "[q]uestions from Board members or Board counsel to any party or witness ... shall be in order at any time." The Chair will provide additional instructions concerning the conduct of the hearing at the beginning of each day of the hearings.

Objection 2: Ventura Permittees objected to the order of proceedings in section VII of the Notice because it did not provide time for closing comments by designated parties.

Ruling 2: GRANTED. As reflected in the Order of Proceedings, the Board agrees that closing statements by designated parties are appropriate for this hearing. The Order of Proceedings has allocated 2 hours total to Ventura Permittees as requested. Ventura Permittees further asked to reserve up to 30 minutes of their 2 hours for closing statements. Notably, Ventura Permittees need not use the entire 30 minutes allotted for closing statements, and instead they can change the amount of time they wish to have for closing statements. However, Parties are reminded that their allocated time includes any opening statement, main presentation, rebuttal, cross-examination, and/or closing statement.<sup>1</sup> The Order of Proceedings has been revised to reflect that Ventura Permittees have discretion in the amount of time they wish to use for their presentation and closing statements.

### **Objection to Waiver of Untimely Objections**

Objection 3: Ventura Permittees object to section VIII of the Notice which required objections to "(a) any procedure to be used or not used during the hearing, (b) any document or evidence referenced in the Revised Tentative Regional MS4 Permit, a written comment, or response to comment, or (c) any other matter set forth in this notice" to be received in writing by June 21, 2021 or be deemed waived. Ventura Permittees argue that a petition to the State Water Resources Control Board (State Water Board) is allowed under Water Code section 13320 provided "a Party or interested person has properly exhausted all administrative remedies (i.e., raised an issue before the regional board)."

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<sup>1</sup> To the extent the Ventura Permittees are asserting they are legally entitled to present closing statements at the hearing, the objection is overruled. Pursuant to the California Code of Regulations applicable to this proceeding, "all parties at the hearing *may* be allowed to present a closing statement." (Cal. Code Regs., tit. 23, § 648.5, subd. (d) (emphasis added.) Consistent with this provision, Section 648, subdivision (d), of Title 23 of the California Code of Regulations authorizes the presiding officer to waive any requirements pertaining to conduct of an adjudicative proceeding relating to the order of proceedings.

**Ruling 3:** Objection is OVERRULED. Ventura Permittees appear to conflate administrative exhaustion and issue exhaustion. Exhaustion of administrative remedies generally requires parties seeking judicial review to first challenge agency action by availing themselves of “all available *administrative procedures* before coming to court.” Issue exhaustion requires “that all issues for which judicial relief is sought have been *raised before the agency* in the proceedings below.” Asimow, M. et al., *California Practice Guide: Administrative Law*, Ch. 15-B (The Rutter Guide 2020). The Board does not dispute that any person aggrieved by a regional water board’s *action or failure to act* is entitled to administrative review pursuant to section 13320 of the Water Code. In fact, a person must avail themselves of this administrative remedy prior to seeking any judicial relief. Nevertheless, review by the State Water Board and any court will necessarily be constrained to the issues raised before the regional board. Issue exhaustion (also called forfeiture, waiver, full presentation, or the “exact issue” rule) gives the agency an opportunity to respond and ensures a more complete record. (*Ibid.* Ch. 15-D). Further, it is the policy of the water boards to discourage surprise testimony and exhibits. (Cal. Code Regs., tit. 23, § 648.4, subd. (a).) To that end, section 648, subdivision (c), of Title 23 of the California Code of Regulations authorizes the regional water boards to require testimony to be submitted in writing prior to the hearing. The language objected to by the Ventura Permittees merely provided a deadline for parties and interested persons to raise certain objections relating to the hearing procedures, as well as documents or evidence referenced in the Revised Tentative Order, written comments, and response to comments. This language does not preclude the Ventura Permittees from raising objections to testimony provided for the first time at the hearing—e.g., hearsay, lack of foundation, etc. Nor does this language preclude the Ventura Permittees from petitioning any action of the regional board to the State Water Board.

### **Request that Board Designate a Date for Public Comment at the Hearing**

**Request:** Pursuant to the Notice, the Board received comments from the Natural Resources Defense Council (NRDC), Los Angeles Waterkeeper (Waterkeeper), and Heal the Bay (collectively, Environmental Groups) requesting that the Board provide more specific information on the time and date that the public could provide comments at the hearing.

**Ruling:** The request is GRANTED. A date and time for public comment was specified in the Order of Proceedings issued on July 2, 2021.

### **NRDC and Los Angeles Waterkeeper’s Request that Board Issue Subpoenas For Board Staff for Examination During the Hearing**

**Request:** On July 2, 2021, NRDC and Los Angeles Waterkeeper submitted a letter requesting subpoenas of Board staff for examination during the hearing. NRDC and Waterkeeper challenged the explanation in section V.C. of the Notice that Board staff is not a party to this proceeding, asserting that the California Administrative Procedure Act

(APA) “affirms that the agency” ‘taking action’ is a party to the adjudicative proceeding it holds” (citing Government Code section 11405.60), and that the Board itself is a party to the proceeding such that both the Board members and staff are “subject to examination or cross-examination” by parties during the hearing. (July 2, 2021 Letter at p. 1.) NRDC and Waterkeeper then formally requests that the Board issue a subpoena to certain Board staff (Renee Purdy, Jennifer Newman, Dr. LB Nye, and Ivar Ridgeway) to appear at or during the hearing “for examination” by NRDC and Waterkeeper.

Ruling: The request is DENIED. Neither the Board nor its staff is a party in this proceeding. NRDC and Waterkeeper misconstrues Government Code section 11405.60, asserting that the Board is a party because it is “the agency that is taking action.” That is incorrect as the Board, and its staff, is not “taking action.” Rather, the Board is the agency that is conducting the adjudicative proceeding. Section 11405.60 makes clear that “the agency that is conducting the adjudicative proceeding is not a party.” In addition, section 648.1, subdivision (a), of Title 23 of the California Code of Regulations state that the “party or parties to an adjudicative proceeding before the Board shall include the person or persons as to whom the agency action is directed and any other person whom the Board determines should be designated as a party.” Notably, the Board has not designated its staff as a separate party to this proceeding.

The Board agrees with NRDC and Waterkeeper that this permitting action is an adjudicative proceeding. But in a “permitting action, water board staff have an advisory role, not an investigative, prosecutorial, or advocacy role. Permitting actions are not investigative in nature and there is no consideration of liability or penalties that would make the action prosecutorial in nature. Further, while ... staff are expected to develop recommendations for their boards, the role of ... staff is not to act as an advocate for one particular position or party concerning the permitting action, but to advise the board as neutrals, with consideration of the legal, technical, and policy implications of all options before the board.” (State Water Board Order WQ 2015-0075 at p. 71; *see, also*, State Water Board Order WQ 2020-0038 at pp. 146-147 (“To paint this as an adversarial proceeding would be equivalent to saying that the Los Angeles Water Board itself was both a party and the hearing officer.”) [addressing claims that Board counsel acted inappropriately by advising the Board, and before that, staff, on the approval of nine Watershed Management Programs and one Enhanced Watershed Management Program]; *Howitt v. Superior Court* (1992) 3 Cal.App.4th 1575, 1585 (defining an advocate as a partisan for a particular client or point of view); and Government Code §11430.30 (allowing Board staff to advise the presiding officer on issues in non-prosecutorial adjudicative proceedings such as this one).<sup>2</sup> The advisory function of Board staff takes staff out of a prosecutorial or adversarial role, where they might otherwise be considered a separate party and subject to cross-examination in a

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<sup>2</sup> The Law Revision Commission comments on Government Code section 11430.30, subdivision (c), state that “[s]ubdivision (c) applies to *nonprosecutorial* types of administrative adjudications, such as . . . proceedings . . . *setting water quality protection...requirements.*” (Emphasis added.) The notes further state that “[t]he 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 [ex parte communications], given limited staffing and personnel.” (25 Cal.L.Rev.Comm. Reports 711 (1995).)

proceeding where the Board has determined that cross examination is appropriate or suitable.<sup>3</sup>

Finally, and most importantly, granting the request to issue a subpoena is unnecessary, and the denial of the request will not prejudice NRDC or Waterkeeper. As designated parties, NRDC and Waterkeeper have the right to examine witnesses, and Board staff will be providing testimony at the hearing. (Cal. Gov. Code, § 11513(a).) This right has not been abridged. Board staff identified in the July 2, 2021 Letter will be at the hearing on all of the noticed days; and as specified in the Order of Proceedings, issued on July 2, 2021, all Parties to the proceeding were advised that their allocated time “includes any opening statement, main presentation, rebuttal and/or cross-examination of other parties *or questioning of Board staff* and closing statement.” (Order of Proceedings, p. 2 [emphasis added].) Therefore, even though the Board will not issue a subpoena for its own staff, and even though the Board and its staff is not a party in this proceeding, Board staff that testify will be available to NRDC and Waterkeeper for examination, so long as NRDC and Waterkeeper budget their allocated time (shared with Heal the Bay) to include questions of staff accordingly.

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

**IT IS SO ORDERED.**

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<sup>3</sup> Cross-examination is not mandatory in any adjudicative proceeding. (Cal. Code Regs., tit. 23, § 648.5(a)).