
North Coast Regional Water Quality Control Board

Presiding Officer Ruling on September 6, 2024, Motion to Dismiss Amended Administrative Civil Liability Complaint R1-2021-0047A

Bo Dean Co. Inc. (Bo Dean) requests that the Board Presiding Officer dismiss amended Administrative Civil Liability Complaint R1-2021-0047A (Complaint). Bo Dean's primary assertion is that the Prosecution Team has not provided evidence and argument to support the allegations in the Complaint in accordance with the Hearing Procedure and a prior Presiding Officer ruling. For the reasons discussed below, Bo Dean's Motion to Dismiss is denied.

I. Background

The Prosecution Team issued the amended Complaint, including Attachment A to the Complaint, to Bo Dean on September 14, 2023. The Complaint alleges seven violations of the Water Code and/or Clean Water Act related to the operation of Mark West Quarry (Facility) and unauthorized stormwater discharges associated with the Facility. The violations and penalties sought primarily stem from Bo Dean's alleged failure to comply with the Industrial General Stormwater Permit (Permit) and the alleged discharges of sediment-laden stormwater in violation of that permit. The Prosecution Team seeks a total penalty of \$8,589,406. The North Coast Regional Water Quality Control Board (Regional Water Board or Board) issued a draft Hearing Procedure and Notice of Hearing on March 29, 2024. Following comment and revision, the final Hearing Procedure was issued on September 6, 2024. The Board has scheduled a public hearing on the Complaint to be held February 4, 5, 6, 2025.

In accordance with the Hearing Procedure¹, the Prosecution Team submitted the evidence, witness list and other information to support its Complaint on August 9, 2024. On September 6, 2024, Bo Dean submitted a Motion to Dismiss the Complaint. The Motion is based on the assertion that the Prosecution Team failed to comply with the Hearing Procedure and a Presiding Officer ruling because Bo Dean does not have the "entire case" including all the evidence and argument that the Prosecution Team intends to introduce at the hearing to support its allegations. (Motion to Dismiss p.1) Bo Dean asserts that the Prosecution Team intends to surprise Bo Dean at the hearing and

¹ The [Hearing Procedure](https://www.waterboards.ca.gov/northcoast/public_notices/public_hearings/pdf/2024/bodean-pn-procedure.pdf) (https://www.waterboards.ca.gov/northcoast/public_notices/public_hearings/pdf/2024/bodean-pn-procedure.pdf) is available at the North Coast Regional Water Quality Control Board website.

introduce new evidence and argument foreclosing Bo Dean's opportunity to review the evidence and argument submitted in advance of the hearing as required by the Hearing Procedure. Bo Dean asserts this results in a fundamentally unfair hearing. (Motion to Dismiss, p.4, 6.)

In its Opposition to the Motion to Dismiss (Opposition) the Prosecution Team asserts that the legal authorities supporting the Prosecution Team's case are "described in full in the Complaint Including Attachment A." (Opposition p. 2.) The Prosecution Team asserts that the "Complaint and Attachment A, comprise the Prosecution Team's technical arguments with legal citations and adequately puts Bo Dean on notice of the Prosecution Team's position." (Opposition p. 4). The Prosecution Team states, "The Prosecution Team's pre-hearing submittal, provided in full on August 9, 2024, satisfies the requirements of the Hearing Procedure. (Opposition, p.3.)

II. Discussion

A. The Prosecution Team Has Submitted Sufficient Information to Inform Bo Dean of the Bases Underlying the Complaint, and the Evidence and Argument it Intends to Rely on to Support the Complaint

Water Code section 13323 applies to the issuance of administrative civil liability complaints. It states that, "The complaint shall allege the act or failure to act that constitutes a violation of law, the provision of law authorizing civil liability to be imposed pursuant to this article, and the proposed civil liability." In its Opposition, the Prosecution Team states that "the Complaint, including Attachment A, allege with specificity the seven violations and the acts and failures to act giving rise to those violations. The Complaint cites to the provisions of law authorizing civil liability, includes the proposed administrative civil liability and, therefore, meets the standard established in Water Code section 13323." (Opposition p. 2.)

A review of the Complaint shows that it includes section headings titled "Background", "Allegations", "Legal and Regulatory Background" and "Proposed Liability". In the allegations section, the Prosecution Team alleges seven violations over a total of 507 days (Complaint, "Allegations" paragraphs 1-7.) The allegations are listed separately in each paragraph. For example, Violation 1 is outlined in paragraph one, Violation 2 in paragraph 2 and so on. In the legal and regulatory background section, the Complaint lists the applicable provisions of the Water Code and Clean Water Act that apply to the alleged violations and states that the details of the violations and application of the statewide Enforcement Policy to the violations are set forth in Attachment A to the Complaint. (Complaint, "Legal and Regulatory Background" paragraph 13.) In the proposed liability section, the Prosecution Team lists its total recommended liability as described in further detail in Attachment A.

A review of the Complaint and Attachment A shows that for each violation, the Complaint lists the legal authority under which the Prosecution Team is assessing penalties and details regarding the alleged violation and recommended penalty.

For example, for Violation 1, which seeks penalties for alleged unauthorized discharges of waste, the Complaint alleges that Bo Dean “violated Industrial General Permit Section III.A, Water Code sections 13376 and section 301 of the Clean Water Act when it discharged approximately 10,519,608 gallons of sediment-laden stormwater not otherwise specifically authorized by the Permit for 73 days.” (Complaint, “Allegations” paragraph 1). The Complaint further lists the specific days of the alleged violations. Attachment A provides additional detail for each violation and cites evidence that the Prosecution Team claims will support the violation. The Prosecution Team then applies the Enforcement Policy methodology to the violation to calculate a proposed penalty amount.² The other violations in the Complaint are presented in a similar format.

The Complaint and Attachment A to the Complaint includes the information required by Water Code section 13323. The Presiding Officer finds that the Complaint and Attachment A provide Bo Dean notice of the alleged violations, the legal authority that underpins those violations, and the methodology that the Prosecution Team applied in determining a recommended penalty for those violations.

1. Bo Dean’s Primary Argument in its Motion Appears to be More Appropriately Framed as One that the Prosecution Team has not Submitted Sufficient Evidence and Argument to Support its Allegations in the Complaint.

In support of its motion to dismiss, Bo Dean states, “Despite alleging that Bo Dean was in violation of the IGP [Industrial General Permit] and Investigative Order for a total of 150 days, the Complaint only cites 18 inspection reports, which cover 20 days when investigators were onsite. The Complaint does not provide any evidence supporting the alleged violations on the 134 days (covering 457 violations) when the Regional Board investigators were not onsite.” (Motion to Dismiss pp. 2-3). Bo Dean claims it cannot ascertain the bases for the allegations in the Complaint because the Prosecution Team has failed to submit evidence and argument in accordance with the final issued Hearing Procedure that required the Prosecution Team to submit documentary evidence to support its case by August 9, 2024. Bo Dean also cites the Presiding Officer’s March 29, 2024, ruling that notes, “Pursuant to the hearing procedure and deadlines, Bo Dean will have the Prosecution Team’s entire case, including all the evidence that it will rely on to support its allegations roughly two months before Bo Dean must submit its case.”³ (March 29, 2024, Hearing Officer Ruling p.9)

² For example, the application of the Enforcement Policy to Violation 1 is discussed in Attachment A, pages 9-32.

³ Under the final Hearing Procedure Bo Dean has slightly more than three months between the Prosecution’s required submittals and Bo Dean’s pre-hearing evidence submittal deadline.

The September 6, 2024, final Hearing Procedure requires the Prosecution Team to submit: 1) documentary evidence to support the Complaint, and 2) a witness information sheet identifying the name of witnesses, subject matter of their testimony and estimated time required for each witness.⁴ The Hearing Procedure further states that a party may submit a memorandum articulating the party's legal arguments and technical analyses in support of its position on the Complaint.

On August 9, 2024, the Advisory Team to the Board received notice that the Prosecution Team had submitted the information as required by the Hearing Procedure. A cursory review of the documents submitted shows that the Prosecution Team has submitted an evidence list, request for official notice, a witness list, and evidentiary exhibit files and folders numbered 1-87. In accordance with the Hearing Procedure, these submittals along with the Complaint and Attachment A comprise the evidence and argument the Prosecution Team intends to rely on to support its case. The Prosecution Team confirms this in its Opposition stating, "Together the Complaint, Attachment A, and the Prosecution Team's annotated index [index that lists evidence submitted and which alleged violations the evidence supports] provide Bo Dean with the evidence and argument supporting the Prosecution Team's position in this matter..." (Opposition p.4.)⁵

In response to Bo Dean's assertion that the Prosecution Team has not submitted evidence to support all days of alleged violations, the Prosecution Team states that a "detailed description of the alleged violations is articulated in Attachment A [to the ACLC], including citations for many of the documents relied on to support the analysis in the footnotes."⁶ (Opposition p. 4.) Bo Dean asserts that the cited documents, however, only cover a small portion of the days in which the Prosecution Team alleges violations occurred.

With respect to the total days of violation and the evidence to support alleged violation days, the Prosecution Team provides the following rationale:

For example, for Violations 2-5, Attachment A states, in part: "In determining the days of violations for Violations 2 through 5, the Prosecution Team evaluated the window of time between the first date of inspection where failure to implement

⁴ Although the final Hearing Procedure was issued on September 6, the parties had agreed to, and the Board approved a schedule of deadlines for pre-hearing submittals prior to the finalization of the Hearing Procedure.

⁵ Bo Dean has not alleged that it cannot access this evidence or that the Prosecution Team did not submit the evidence by the required deadline.

⁶ Whether or not it was included as a citation in the Complaint or Attachment A, any document that the Prosecution Team intends to rely on to support the violations alleged in the Complaint was required to be submitted by the August 9, 2024 deadline as specified in the agreement reached between the parties and reflected in the final Hearing Procedure.

BMPs was observed (December 17, 2018), and the last date of inspection in the violation period covered by the original Complaint where significant BMP deficiencies were observed (August 13, 2020). Within this window of time the Prosecution Team identified those rain events which generated 0.1 inch or greater. All days within those rain events are alleged as days of violation regardless of the total rainfall on each discrete day.” (p. 34). Attachment A goes on to explain “considering the same violations were observed at each inspection, it is reasonable to conclude the BMPs were not implemented and maintained in a sufficient manner throughout the 2018-2019 rainy season.” (*Ibid.*). A similarly detailed description of the days of alleged violations is included for all violations. (See Complaint pp. 11-12, 68, and 74-75). (Opposition p. 4.)

Apparently, the Prosecution Team is relying on an inference that if an alleged violation was noted during an earlier inspection that was not corrected at the time of a later inspection, then the violation continued between the inspections. In ruling on the motion, there is no need for the Presiding Officer to decide whether the Prosecution Team’s argument is reasonable or supported by the evidence submitted. Bo Dean has notice of the argument that the Prosecution Team will advance to support certain days of alleged violations and the evidence it has submitted to support that argument.

At the hearing, (and/or in a brief submitted before the hearing in accordance with the hearing procedure) Bo Dean may assert many or all the same arguments it has raised in its motion.⁷ It may assert that the Prosecution Team’s evidence and argument do not support any of the alleged violations or proposed penalties. It is premature, however, to ask the Presiding Officer to weigh the Prosecution Team’s evidence prior to holding the evidentiary hearing before the Regional Water Board. Whether the Prosecution Team has provided sufficient evidence to meet its burden of proof to support the alleged violations by a preponderance of the evidence is a question for the Board to decide following an evidentiary hearing and its review of all the testimony and evidence submitted.

B. The Presiding Officer Has No Information to Suggest that the Prosecution Team is Withholding Evidence and Will Submit Surprise Evidence to Support the Complaint

Bo Dean asserts that the Prosecution Team must be holding back additional evidence or argument that supports the alleged violations and will attempt to surprise Bo Dean and the Board with new evidence at the hearing. With the exception of a request on September 20, 2024, to admit late evidence not submitted by the August 9, 2024

⁷ The Prosecution Team elected not to file a pre-hearing brief further articulating the legal arguments and technical analysis in support of its position in the Complaint. It is unknown why the Prosecution Team chose not to file a brief, as noted in the Hearing Procedure it is optional for either party to submit such a brief.

deadline⁸, the Prosecution Team has not suggested it will attempt to present additional evidence or argument to support its case. As noted earlier, the Prosecution Team confirms as much in its Opposition stating, “Together the Complaint, Attachment A, and the Prosecution Team’s annotated index, provide Bo Dean with the evidence and argument supporting the Prosecution Team’s position in this matter...” (Opposition p. 4.)

In its Reply to the Opposition, Bo Dean nevertheless asserts that the deposition of Claudia Villacorta supports its argument that it “can only guess as to the witness(es), documents, or other evidence, and legal arguments connected to each individual alleged violation.” (Reply to Opposition, p.6: 20-21). During a deposition of Ms. Villacorta, when asked to provide the evidentiary bases underlying the Complaint, Bo Dean asserts that Ms. Villacorta did not provide substantive answers and simply referred Bo Dean back to the Complaint. Bo Dean asserts that this shows the Prosecution Team has not provided specific evidence and argument to support the alleged violations.

There is nothing in Ms. Villacorta’s statements that the Presiding Officer reads as an attempt to hide information or to suggest that the Prosecution Team intends to introduce yet to be revealed evidence or argument to support the allegations in the Complaint. Ms. Villacorta stated, “the rationale...to support the liability assessed is detailed in the complaint.” Ms. Villacorta went on to state “I believe the allegations [in the complaint] are well supported and true.” (Draft Deposition Transcript, p. 100:18-19) Instead, the testimony confirms that the Prosecution Team’s bases for the alleged violations are detailed in the Complaint, Attachment A, and the evidence submitted by the Prosecution Team.⁹

Again, whether allegations presented in the Complaint and Attachment A and evidence submitted by the pre-hearing deadline is sufficient for the Board to find violations occurred and to assess liability is unknown at this stage. Bo Dean’s belief that the Prosecution Team’s case is insufficient to support the allegations does not support the inference that the Prosecution Team intends to submit late evidence or new argument to support the Complaint. Bo Dean’s arguments reflect its assessment of the strength of the Prosecution Team’s case, not that the Prosecution Team has failed to present a case in accordance with Water Code requirements, applicable regulations, and the Hearing Procedure.

⁸ The Prosecution Team may also submit rebuttal evidence and argument in accordance with the Hearing Procedure.

⁹ Ms. Villacorta is identified on the Prosecution Team’s witness list for the hearing. Whether the Prosecution Team calls her as a witness at the hearing to provide her personal observations at the Facility is unknown, however the Presiding Officer cannot speculate that Ms. Villacorta is planning to testify at the hearing with personal observations that differ from those she provided at the deposition.

The Board has no additional insight into Bo Dean's claim that the Prosecution Team intends to introduce new evidence and argument at the hearing. The Presiding Officer can only conclude that the Prosecution Team's arguments submitted in its Complaint and Attachment A, and the evidence submitted on August 9, 2024, is the evidence and argument that the Prosecution Team intends to rely on to support the violations outlined in the Complaint. If the Prosecution Team introduces late evidence, or surprise testimony as Bo Dean anticipates will occur, Bo Dean may formally object to the proposed evidence. As noted in the Hearing Procedure, the Presiding Officer has the authority to refuse admission of evidence that fails to comply with the Hearing Procedure and must refuse admission of evidence "where there is a showing of prejudice to any party or the Board" (Cal. Code Regs., tit.23, § 648.4 (e).)¹⁰

III. Conclusion

Bo Dean's argument that the Prosecution Team has not articulated bases for the allegations in the Complaint is unsupported. Bo Dean has notice of the violations and the argument and evidence the Prosecution Team will advance to support the allegations. The Prosecution Team has listed the violations, the legal authority that applies to those violations and submitted argument and evidence that it asserts supports the violations and proposed liability. Whether the Prosecution Team's case and rationale is supported by the evidence, and it can show by a preponderance of the evidence that the violations occurred is a separate question. The Board can only address that question following deliberation and an evaluation of all the evidence and testimony presented at the hearing.

Accordingly, the motion to dismiss is denied.

Valerie Quinto

Executive Officer

For Hector Bedolla

Chair, North Coast Regional Water Quality Control Board

¹⁰ As discussed, on September 20, 2024, the Prosecution Team submitted a request that the Board allow late evidence. The Presiding Officer has not ruled on the admissibility of that evidence. Bo Dean has not formally objected to including this evidence and has stated it will consider filing an objection by the deadline to file written objections of December 23, 2024.