
North Coast Regional Water Quality Control Board

June 10, 2024

This ruling addresses Bo Dean's May 24, 2024, request to conduct depositions that may exceed seven hours or extend over multiple days.

The Prosecution Team submitted objections to the request on May 24th, (objection was included as an attachment to Bo Dean's request and submitted by Bo Dean) May 28th, and May 29, 2024. Bo Dean submitted an additional reply to the objections on May 29th.

For the reasons discussed below, this ruling affirms the Advisory Team's May 28, 2024, direction that the Board will not unduly restrict the length of necessary deposition testimony to fairly examine a witness and rejects the Prosecution Team's argument that depositions must be limited to seven hours.

I. Procedural Background

A. Bo Dean's Request to Allow Depositions that May Exceed Seven Hours

On May 24, 2024, Bo Dean submitted a request to the Advisory Team asserting that depositions exceeding one full day may be necessary in the case of Farzad Kasmaei and Paul Nelson, who are both Prosecution Team witnesses. Bo Dean filed the request after the Prosecution Team served an objection to the proposed two-day deposition of Mr. Kasmaei. To support its assertion, Bo Dean cites the complexity of the case including the 93 pages of the Administrative Civil Liability Complaint that alleges 507 violations and seeks a penalty of \$8,589,406. Bo Dean asserts that Mr. Kasmaei conducted seven inspections from 2019-2023 and issued reports documenting site inspections. Regarding Mr. Nelson, Bo Dean asserts that he conducted ten inspections between 2018-2020 and prepared reports.

In the Prosecution Team's May 20, 2024, objection to Mr. Kasmaei's deposition subpoena¹, the Prosecution Team cited Code of Civil Procedure Section 2025.290 as limiting depositions to seven hours, and objected to any deposition that may exceed seven hours. The Prosecution Team's objection did not provide additional bases for objecting to a potential two-day deposition.

¹ The Prosecution Team's objection was signed and provided to Bo Dean, not the Advisory Team.

In its request for an Order that would allow depositions to exceed seven hours, Bo Dean asserts that section 2025.290 does not explicitly control in these proceedings and that even if it did, it provides for exceptions to the limit. Bo Dean did not request a specific time extension, stating that it sought an order that would ensure there would be no obstacles to continuing depositions beyond one day in the event they cannot be completed. Bo Dean stated they would meet and confer with the Prosecution Team and attempt to resolve any issues before seeking an order if depositions take longer than one day to complete.

After reviewing the request, the Board Advisory Team notified the parties on May 28, 2024, that based on the information provided in Bo Dean's request that it "does not see a compelling reason to unduly limit the time necessary to complete an adequate examination of a witness. If any deposition extends to an unreasonable or unsupported amount of time, objections will be evaluated on a case-by-case basis."

The Prosecution Team objected to this determination in an initial response sent May 28, 2024, and submitted a more extensive response the following day, May 29, 2024.

II. Ruling

A. Water Code section 1100 Not the APA controls Witness Depositions

The Hearing Procedure for this case was issued on March 29, 2024. The Hearing Procedure lists the applicable statutes and regulations for this proceeding. As relevant here, the Procedure states that the hearing will be conducted in accordance with Chapter 4.5 of the Administrative Procedures Act (APA) (Gov. Code §11400 et seq.), Water Board regulations, (title 23 §§ 648-648.8 and 649.6) and Water Code sections 1075-1106.

The discovery provisions in Chapter 4.5 allow for witness subpoenas and document subpoenas. (Gov. Code § 11450.10, 11450.20.) Chapter 4.5. does not explicitly discuss additional discovery. Despite the Prosecution Team's assertions, however, Chapter 4.5 does not limit the applicability of other discovery provisions, and as relevant here, the parties right to depose witnesses. Government Code section 11415.10 states that the governing procedures by which an agency conducts an adjudicative hearing is determined by the regulations applicable to that hearing. In addition, Government Code section 11415.20 states that a state statute or regulation applicable to a particular agency or decision shall prevail over a conflicting or inconsistent provision of Chapter 4.5. The fact that Chapter 4.5 of the APA only discusses discovery in the context of subpoenas and document subpoenas does not negate the applicability of Water Code section 1100 and a party's ability to depose witnesses in accordance with that section.

B. Code of Civil Procedure Provisions Apply Where Referenced by Applicable Statute

The Hearing Procedure does not explicitly reference provisions within the Code of Civil Procedure (CCP), however, to the extent a statute or regulation listed in the hearing procedure references a CCP provision, those specific CCP sections apply. For example, Government Code section 11450.20, which applies to the service of subpoenas states that service of the subpoena shall be consistent with CCP sections 1985-1985.4. Accordingly, parties must comply with those sections of the CCP when they issue witness and document subpoenas. The Prosecution Team has Likewise, Water Code section 1100 provides that:

The board or any party to a proceeding before it may, in any investigation or hearing, cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for depositions in civil actions in the superior courts of this state under Title 4 (commencing with Section 2016.010) of Part 4 of the Code of Civil Procedure.

Therefore, with respect to witness depositions, because Water Code section 1100 references Code of Civil Procedure sections 2016.010-2036.050 (“Civil Discovery Act”) those sections apply to the depositions.² The APA provisions in Chapter 4.5, Water Board regulations in Title 23, or final Hearing Procedure do not limit the applicability of Water Code section 1100 and the referenced sections of the Code of Civil Procedure.

C. Code of Civil Procedure Section 2025.090 Allows the Board to Grant Requests for Depositions that Exceed Seven Hours

The Prosecution Team objects to a potential two-day deposition of Mr. Kasmaei that may exceed seven hours citing CCP section 2025.290 subdivision (a). CCP section 2025.290 subdivision (a) states that: “a deposition examination of the witness by all counsel, other than the witness’ counsel of record, shall be limited to seven hours of total testimony.” The Prosecution Team argues that this is an absolute limit and additional time is not allowed despite the second sentence in subdivision (a) that provides: “The court shall allow additional time, beyond any limits imposed by this section, if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination.”

The Prosecution Team’s argument is that the Board may not allow additional time pursuant to this provision because the Board is an administrative agency and not “a court” as referenced in the section. This argument is untenable. First, Water Code section 1100 explicitly states that depositions are to be taken “in the manner prescribed by law” under the applicable provisions of the Civil Discovery Act. The Civil Discovery Act refers to “a court” throughout. It would render Water Code section 1100 and its

² This is noted in the March 29, 2024, Hearing Officer ruling, FN 4 which states, “For example, Water Code section 1100 applies to this proceeding and references Title 4 of Part 4 of the Code of Civil Procedure as applying to depositions taken.”

reference to the Civil Discovery Act meaningless if the provisions did not apply to the Board because it is not “a court”. Accepting this argument, there would be no basis for the Board to apply the first part of section 2025.090 that the Prosecution Team argues limits depositions to seven hours, it would similarly be inapplicable to the Board and only apply to a court.³

Further, the case and ruling cited by the Prosecution Team to support its argument that the Board should limit discovery does not support this position. The case involved a State Water Resources Control Board (State Water Board) water right hearing involving a proposed cease and desist order against Millview County Water District. The State Water Board hearing officer issued a ruling regarding pre-hearing discovery. The ruling acknowledged the applicability of section 1100 and applicable provisions of the CCP stating: “The State Water Board’s prior approval is not required for a party to conduct discovery pursuant to Water Code section 1100...”⁴ The ruling continued, “Water Code section 1100 authorizes parties to adjudicative proceedings before the State Water Board to take the depositions of witnesses in accordance with the Civil Discovery Act.” The ruling goes on to state that parties who utilize section 1100 should be mindful however, that pursuant to the Civil Discovery Act a party may seek a protective order from the Board prohibiting or limiting depositions to protect a party from undue burden and expense. The ruling made no distinction between a court and the board to suggest that only a court could issue a protective order even though the applicable provision of the Civil Discovery Act refers to “a court”.⁵ The Court of Appeal found no error with the hearing officer’s decision that explicitly acknowledged that discovery consistent with Water Code section 1100 was allowed.⁶ The case does not stand for the proposition that the Board must reject prehearing discovery methods that are consistent with applicable statutes and regulations.

³ The Prosecution Team also highlights the clause “in the manner of” in Water Code section 1100 and that this clause limits the applicability of other provisions in the Civil Discovery Act, including the provision that allows for additional time. Manner is defined as “a way in which a thing is done or happens”. Deponent time limits and exceptions to those limits are clearly related to the “manner of” a deposition.

⁴ [Hearing Officer ruling](#) on Water Right Hearing Regarding Proposed Cease and Desist Order Against Millview County Water District, Thomas P. Hill, and Steven L. Gomes, available at:

(https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/millview/docs/hearofficerruling120309.pdf)

⁵ Such a protective order was issued by the State Water Board in another proceeding: [Cachuma Project Hearing -Applications 11331 and 11332](#).

(https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/cachuma/phase2/discoverymotion2003sept26.pdf)

⁶ *Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App. 4th 879, 906.

D. The Prosecution Team General Argument that Discovery Should be Limited for Efficiency Reasons is Unsupported

The Prosecution Team broadly asserts that there is no need for depositions to extend beyond seven hours because the administrative process is intended to be more efficient than the civil judicial process and Bo Dean has utilized other discovery processes in this proceeding.

The Board does not directly address the Prosecution Team's general arguments regarding efficiency, citing the number of witnesses that Bo Dean proposes to depose, and Bo Dean's utilization of document subpoenas⁷ in this ruling because a protective order has not been sought. Bo Dean's request is for the Board to allow a deposition to exceed seven hours when necessary to fairly examine the witness and the Prosecution Team objects to that request.

Bo Dean has the right to utilize the discovery procedures authorized by statute and the hearing procedure. If discovery results in undue burden or expense, or if the discovery would be otherwise unreasonable the Prosecution Team may seek a protective order.⁸ At this stage, the Prosecution Team has not provided support for the issuance of a protective order, or the statement that a deposition that exceeds seven hours would result in "substantial inconvenience to the witnesses and unreasonable burden to the Water Board". Based on the parties' submissions, the Board cannot foreclose the possibility that a fair examination of Mr. Kasmaei and Mr. Nelson may exceed seven hours.

III. Conclusion

The Board need not set a limit on deposition length in this ruling. It is not clear how many hours will be necessary to complete Mr. Kasmaei's examination or the deposition of Mr. Nelson. In the case of Mr. Kasmaei, the parties have conducted nearly a full day of deposition testimony. Bo Dean has asserted that additional time will be necessary and that the parties have agreed to schedule an additional day of deposition. The

⁷ The Prosecution Team's argument that the lower maximum penalty amounts provided for in administrative hearings before the Regional Water Board as compared to the statutory maximums that apply in the civil judicial context support limiting discovery is also not directly addressed here. However, it is unclear how administrative penalty amounts serve as a limit on the discovery provisions explicitly applicable to this hearing.

⁸ A party may utilize applicable provisions of Chapter 4.5 of the APA or Civil Discovery Act and seek a protective order if warranted in specific circumstances. With respect to depositions, Code of Civil Procedures sections 2025.420 and 2019.030 subds. (a) & (b) allow for protective orders if the Board finds certain criteria are met. Likewise, Government Code section 11450.30 allows for a protective order to protect a person served with a subpoena or subpoena duces tecum from "unreasonable or oppressive demands, including violations of the right to privacy".

parties may stipulate to this additional time to complete the deposition as provided for in section 2025.090 subdivision (b).

If the parties cannot reach agreement on the deposition length, Bo Dean shall propose to the Prosecution Team how much time will be necessary to complete Mr. Kasmaei's deposition, Mr. Nelson's, and any other witness whose deposition may exceed seven hours. If the parties cannot agree on a limit, Bo Dean shall submit its proposed request to the Advisory Team for a ruling.

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