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*Of Counsel*

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December 15, 2015

Via Electronic Mail and U.S. Mail

Dr. Henry Abarbanel  
Chair, San Diego Regional Water Quality Control Board  
2375 Northside Drive, Suite 100  
San Diego, CA 92108

**Re: Request to Extend Hearing Schedule for ACL Complaint No. R9-2015-0110  
issued to San Altos – Lemon Grove, LLC for Valencia Hills Construction Site**

Dear Dr. Abarbanel:

I am a partner with the law firm of Opper & Varco, LLP, and I represent San Altos - Lemon Grove, LLC (“San Altos”) for purposes of the Administrative Civil Liability Complaint No. R-2015-0110 (the “Complaint”) issued by the San Diego Regional Water Quality Control Board (the “San Diego Board”) on October 19, 2015.<sup>1</sup> I am sending this letter to you at the direction of Ms. Hagan as stated in her letter of December 4, 2015 (attached as “Exhibit A” hereto, ¶ 8, p. 3)(the “Final Hearing Procedures”) setting forth the final procedures and schedule for the Administrative Hearing of this matter. For the sake of affording San Altos the due process it is entitled to in a hearing of this nature, we respectfully ask you to reconsider three of Ms. Hagan’s decisions.

The Complaint alleges one hundred thirty-six (136) separate and distinct violations of the Construction General Permit 2009-0009-DWQ amended by 2010-0014-DWQ & 2012-0006-DWQ (the “Permit”). In response, San Altos engaged in initial settlement discussions with members of the San Diego Water Board Prosecution Team (the “Prosecution”), and met with the Prosecution on December 9, 2015 at the offices of the San Diego Board. At the conclusion of that conference, the Prosecution indicated it had no interest in settling the matter at this time.

The Administrative Hearing on this matter is currently scheduled for February 10, 2016. Based on the schedule set by Ms. Hagan, all evidence that San Altos intends to submit for consideration by the Board in this matter must be submitted by January 4, 2016.<sup>2</sup> This includes all evidence other than rebuttal evidence and witness testimony to be presented orally at the hearing.<sup>3</sup> As it now appears more than likely

<sup>1</sup> California Regional Water Quality Control Board – San Diego Region, Complaint No. R9-2015-0110 for Administrative Civil Liability (October 19, 2015)(hereinafter the “Complaint”).

<sup>2</sup> Letter from Catherine G. Hagan, Senior Staff Counsel, San Diego Regional Water Quality Control Board, to S. Wayne Rosenbaum and Laura Drabandt (December 4, 2015), at p. 9 (hereinafter “Final Hearing Procedures”) (“January 4, 2015 – [San Altos’] Deadline for submission of all information required under “Evidence and Policy Statements” . . . ).

<sup>3</sup> Final Hearing procedures at p. 9; *Id.* at p. 6.

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&  
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LLP**  
THE ENVIRONMENTAL  
LAW GROUP

this matter will come before the San Diego Board, we request you address three significant items in the Final Hearing Procedures.

First, San Altos requests that all of the hearing dates be extended by at least sixty (60) days so that San Altos has an opportunity for a full and fair hearing. Based on the current schedule, and the evidentiary procedures established by the San Diego Board, it is impossible for San Altos to collect and submit all of the evidence necessary to respond to a Complaint that the Prosecution acknowledges took over two hundred hours of staff time spread over more than six months to prepare.<sup>4</sup>

Second, San Altos requests that the time for each party to present evidence be extended to four (4) hours. It will be impossible for San Altos to present its case in the 90 minutes allotted by Ms. Hagan given the 136 alleged violations of the Complaint.

Third, San Altos requests that you confirm that written testimony submitted under penalty of perjury, or testimony provided under oath during a deposition, be admitted without the witness having to appear in person at the hearing to affirm the testimony. Again, given the limited time San Altos has to prepare and present its case, further requiring attendance of witnesses at the hearing will cause unnecessary hardship on various witnesses, and further result in unnecessary time delays during the hearing, particularly when sworn testimony under penalty of perjury provides all the protections such witness appearances are intended to provide.

San Altos' due process right requires, at a minimum, you address these three issues.

1. San Altos needs more time to collect and submit evidence.

“Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest.” *Mohilef v. Janovici* (1996) 51 Cal.App.4th 267, 286 (citations omitted). “[T]here is no precise manner of hearing which must be afforded; rather the particular interests at issue must be considered in determining what kind of hearing is appropriate.” *Id.* (citation omitted). The requirements of due process vary “according to specific factual contexts” and must be evaluated depending upon the type of administrative hearing and its governing procedures and requirements. *Id.* Regardless, “[t]he fundamental requirement of due process is an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked.” *Blinder, Robinson & Co., Inc. v. Franklin Tom* (1986) 181 Cal.App.3d 283, 289 (citation omitted).

The procedural requirements of a hearing before the San Diego Board, as set forth in Ms. Hagan's letter of December 4 and as stated, in part, in 23 Cal. Code Reg. § 648.4(b), require, among other things, San Altos to submit the following information by January 4, 2015:

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<sup>4</sup> See Technical Analysis for the Complaint , Exhibit No. 29.

- 1) All evidence (other than witness testimony presented orally at the hearing or rebuttal evidence) that San Altos would like the San Diego Water Board to consider;
- 2) All legal and technical arguments or analysis; and
- 3) The name of each witness, if any, whom San Altos' intends to call at the hearing, the subject of each witness' proposed testimony, and the estimated time required by each witness to present direct testimony.

Based on Ms. Hagan's letter of December 4 which was only received on December 7, this schedule provides less than 30 days to collect, prepare, and submit the evidence San Altos wishes to submit for this Board's consideration. However, the Complaint is based on 136 separate and distinct alleged violations, which in turn rely on inspections, reports, and citations produced by new fewer than ten different individuals (collectively, the "Inspectors"), including eight who are not San Diego Board staff.

The Prosecution relies on Notices of Violation issued by current and former employees of the City of Lemon Grove and independent contractors. Given the high number of alleged violations, and the fact the San Diego Water Board is seeking penalties greater than \$800,000, due process requires that San Altos be given a reasonable amount of time to conduct discovery from these individuals.<sup>5</sup>

In fact, the Final Hearing Procedures *require* San Altos to conduct such discovery to reasonably comply with the current schedule. As stated in Ms. Hagan's letter of December 4 and in 23 Cal. Code Reg. § 648.4(b), San Altos must name each witness it wishes to call, the subject of each witness' proposed testimony, and the estimated time required by each witness to present such testimony by January 4. The only way San Altos can provide such information is if it has an opportunity to interview each witness to determine what information, if any, San Altos may wish to present from each of these Inspectors.

Finally, Water Board procedures state, "It is the policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits." 23 Cal. Code Reg. § 648.4(a). In order to comport with this policy, San Altos must conduct adequate discovery in advance of the hearing. This is especially important when the Prosecution and San Diego Board have such preferential and immediate access to the San Diego Board Inspectors San Altos' intends to rely on as witnesses for this case.

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<sup>5</sup> As noted above, the Water Board required more than 200 hours of staff time to prepare the Complaint. I received Ms. Hagan's letter on December 7, providing San Altos with 19 working days to submit its evidence. At 8 hours a day (assuming San Altos works a full 8 hours on December 24 and December 31), this deadline provides San Altos with only 152 hours to collect, prepare and submit all of its evidence and legal arguments.

The magnitude and complexity of the Complaint, alleged violations, suggested penalties, and various individuals relevant to the facts in these proceedings, coupled with the Water Board's dislike of "surprise testimony" require San Altos be given a fair and reasonable opportunity to interview both San Diego Board staff and the other Inspectors in advance of the hearing.

As Chairman of the San Diego Water Board, it is within your power to make sure these proceedings and associated discovery practices comply with the dictates of due process. "The extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency . . ." *Mohilef v. Janovici*, (1996) 51 Cal.App.4th at 302 (citations omitted). The Water Board procedures, which require identification of witnesses and the subject of their testimony, as well as the submission of all legal and technical arguments in advance, must contemplate that some discovery will occur in advance. Therefore, "because the due process clause ensures that an administrative proceeding will be conducted fairly, "discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process.'" *Id.* (citation omitted).

A reasonable period for discovery is also necessary because the Final Hearing Procedures currently restrict each Designated Party, including San Altos, to only 90 minutes at hearing. This means an insufficient period for discovery, and the opportunity to present evidence to the San Diego Board prior to the hearing leaves San Altos with *40 seconds* to address the factual and legal infirmities of each of the 136 alleged violations. Given this extremely limited time, it is imperative San Altos be allowed to submit written testimony from each of the Inspectors to address the alleged violations, and the creation of this written testimony takes time. Therefore, San Altos must be given a reasonable opportunity to conduct depositions of at least all of the Inspectors that issued citations or conducted inspections relied on by the Prosecution for the alleged violations. This is proving impossible to accomplish with less than 30 days to submit this evidence.

San Altos only first learned of the Complaint on October 19. Since that time, counsel has attempted in good faith to work with the Prosecution to extend the dates and engage in settlement conferences, with limited results.<sup>6</sup> Under the Final Hearing Procedures San Altos is being asked to respond to 136 distinct allegations, derived from almost a dozen different inspectors, in 67 days, including weekends and at least four federal holidays. This schedule violates San Altos' due process right to the opportunity for a full and fair hearing. The only way that San Altos will have fair

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<sup>6</sup> I submitted a letter on November 25 objecting to some of the administrative hearing procedures set forth in documents from Ms. Hagan dated October 19, 2015. In that letter I included a schedule that suggested the January 4 date to submit evidence; however, this schedule was suggested in response to clear direction from Water Board staff that the dates would not be extended beyond the settlement conference scheduled for December 9. During and subsequent to those settlement discussions we again asked that the dates be extended after the Prosecution Team indicated that it was not interested in settlement. Our request to extend dates at that time was and continues to be denied by the Prosecution, thus resulting in this appeal to you.

opportunity to respond is for the San Diego Board to extend this schedule at least 60 days to allow San Altos a reasonable opportunity to conduct the significant discovery this process requires. Refusing to allow is prejudicial to San Altos, and denial of due process.

2. San Altos needs more time to present its case at the hearing.

As noted above, the Final Hearing Procedures limits San Altos to presenting for 90 minutes.<sup>7</sup> The Complaint alleges 13 different types of violations, and a total of 136 separate and distinct alleged violations. This provides San Altos with *less than 1 minute to address the legal and factual issues associated with each alleged violation*. Considered another way, if San Altos wanted to cross-examine each of the “inspectors” (as permitted by 23 Cal. Code Reg. § 648.5(a)), San Altos would only have 9 minutes to cross-examine each inspector, and have no time to otherwise present evidence or all San Altos’ to make a closing statement.

Such time limitations do not provide San Altos with a full and fair opportunity to present its case. Given that the Water Board staff is seeking a penalty of more than \$800,000, due process demands a hearing time allowing each side up to four hours to present its case.

3. The Board should agree to accept written testimony without requiring witnesses to appear in person.

Given the extremely limited time in which San Altos has been requested to present its case, including addressing 136 alleged violations involving almost a dozen Inspectors, San Altos requests the Board agree to accept written testimony, submitted either under penalty of perjury or stated in deposition, without each witness having to appear in person to affirm the testimony. Even assuming the Chair grants San Altos’ request to extend the time for discovery and length of time afforded each party at hearing to four hours, the time limitations that San Altos has to present its case will cause unnecessary hardship on various witnesses, and may cause unnecessary time delays during the hearing itself, especially if solely used for the purpose of each witness affirming testimony already provided under oath.

4. Due Process Requires that the Board Approve these Requests.

“[T]he extent to which due process relief will be available depends on a careful and clearly articulated balancing of the interests at stake in each context.” *People v. Ramirez* (1979) 25 Cal.3d 260, 269. “More specifically . . . due process generally requires consideration of (1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and

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<sup>7</sup> Exhibit A, at p. 6 (“To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: each designated party shall have a combined ninety (90) minutes to present evidence, cross-examine witnesses (if warranted) and provide a closing statement . . .”)

consequences of the action and in enabling them to present their side of the story before a responsible governmental official, and (4) the governmental interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Id.* (citations omitted).

Balancing these interests directs that due process requires the reasonable accommodations requested by San Altos. San Altos requests an additional sixty days to respond to the Complaint. This would give San Altos approximately 120 days (four months) to respond to hundreds of allegations seeking penalties of almost one million dollars. The risk of a due process violation is extremely high in not allowing San Altos sufficient time to collect and submit its evidence, as this would result in the denial of a full and fair opportunity to present its side of the story to the San Diego Board. On the other hand, delaying this matter for 60 days places no additional administrative burden on the Prosecution or the San Diego Board generally. Allowing for discovery under such unreasonable and artificial constraints is equivalent to a denial of an opportunity to conduct reasonable discovery, and thus a de facto denial of due process. We do not believe the San Diego Board intended to afford San Altos the opportunity for discovery and simultaneously render that discovery meaningless by an aggressive hearing schedule.

Similarly, allowing San Altos to have four hours to present its case preserves San Altos’ dignitarian interest to fully and fairly present its side of the story. In a case of this magnitude, with the multitude of evidence and witnesses involved, 90 minutes is simply insufficient. Again, the administrative cost to the Prosecution and Water Board of allowing San Altos an additional two and half hours to present its case is insignificant. Forty seconds per violation would makes the hearing more akin to a game show with thousands at stake every minute rather than a method to engage in the serious and unbiased fact-finding this matter requires.

Due process protections require that San Altos be given sufficient time to conduct discovery and prepare its evidence. This is not possible given the January 4 deadline. San Altos requests at least an additional sixty (60) days to conduct discovery, four hours to present evidence at the hearing, and the reasonable allowances for written testimony requested to ensure it has a “full and fair opportunity” to present this matter to you and your fellow Board Members.

Thank you for your consideration of this matter.

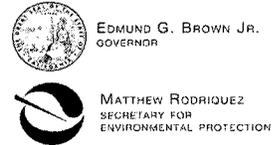
Sincerely,

OPPER & VARCO LLP

A handwritten signature in blue ink, appearing to read "S. Wayne Rosenthal". The signature is fluid and cursive, with the first name "S. Wayne" and the last name "Rosenthal" clearly legible.

S. Wayne Rosenbaum

cc: Catherine Hagen, Senior Staff Counsel, State Water Resources Control Board  
Laura Drabandt, Senior Staff Counsel, State Water Resources Control Board



EDMUND G. BROWN JR.  
GOVERNOR

MATTHEW RODRIGUEZ  
SECRETARY FOR  
ENVIRONMENTAL PROTECTION

## San Diego Regional Water Quality Control Board

December 4, 2015

VIA E-MAIL ONLY

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**Subject: ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R9-2015-0110, SAN ALTOS-LEMON GROVE, LLC**

Mr. Rosenbaum and Ms. Drabandt:

The purpose of this letter is to rule on objections submitted by San Altos–Lemon Grove, LLC (San Altos) in correspondence dated November 20 and 25, 2015, and to distribute final hearing procedures for Administrative Civil Liability Complaint (ACLC) No. R9-2015-0110, issued by the San Diego Regional Water Quality Control Board's (San Diego Water Board) Prosecution Team to San Altos on October 19, 2015. The prehearing rulings herein are by Executive Officer David Gibson, head of the Advisory Team, acting as the San Diego Water Board Chair's designee for prehearing matters in the above ACLC.<sup>1</sup> San Altos's objections are to the proposed hearing procedures, including proposed procedural schedule, distributed by the Prosecution Team on November 13, 2015. The rulings are as follows.

1. San Altos objects to the Prosecution Team's proposed deadlines for submitting objections to the draft hearing procedures and for submitting and opposing requests for designation as a party. The Advisory Team extended these

<sup>1</sup> See Mem. from Michael Lauffer, State Water Resources Control Board, to California Regional Water Board Members (Sept. 30, 2014) at [http://www.waterboards.ca.gov/board\\_reference/2014fall/docs/roles\\_responsibilities\\_of\\_regional\\_water\\_board\\_members\\_and\\_ex\\_officers.pdf](http://www.waterboards.ca.gov/board_reference/2014fall/docs/roles_responsibilities_of_regional_water_board_members_and_ex_officers.pdf).

## EXHIBIT A

deadlines by email dated November 23, 2015. San Altos has submitted two sets of objections and written requests that the Cities of Lemon Grove and San Diego be designated as parties to the ACLC proceeding. It does not appear San Altos requests further extension of these deadlines and no further extension is necessary.

2. San Altos objects to the language in the draft hearing procedures regarding deemed waiver of procedures per section 648(d) of title 23 of the California Code of Regulations.<sup>2</sup> As provided in the proposed and final hearing procedures, section 648(b) is applicable in its entirety to this proceeding. Section 648(b) specifically provides that chapter 4.5 of the Government Code (with exceptions noted in section 648(c)), Evidence Code sections 801-805 and Government Code section 11513 are also applicable to this proceeding.
3. San Altos requests that its proposed schedule(s) be substituted for the Prosecution Team's November 13 proposed schedule. The Advisory Team has considered both proposed schedules and attaches the final hearing procedures for this proceeding. The final hearing procedures provide reasonable intervals between milestones leading up to the evidentiary hearing, and, for the reasons discussed below, do not add new milestones proposed by San Altos.
4. The final hearing procedures do not add milestones and associated deadlines regarding settlement discussions (e.g., meet and confer, settlement discussions and settlement briefs) as proposed by San Altos. The designated parties may engage in settlement discussions in parallel with the procedural schedule issued for the hearing. If at some point the parties jointly inform the Advisory Team that they have finalized a settlement agreement for San Diego Water Board consideration, they may submit a joint request to the Advisory Team to suspend the hearing schedule in favor of considering an order approving a settlement agreement.
5. The final hearing procedures do not add deadlines for issuance of subpoenas or for discovery cut-off. The attorney of record for designated parties may issue subpoenas for attendance at hearing or for deposition in accordance with Article 11 of Chapter 4.5 of the Government Code, commencing with section 11450.05. Attached is a form subpoena for designated party use. The designated parties are advised that absent a change in the final hearing schedule, deposition transcripts must be submitted in accordance with otherwise applicable written submittal deadlines.
6. San Altos requests that the draft hearing procedures be modified to allow for submittal of written testimony. The draft hearing procedures do not preclude submittal of written testimony. However, any written testimony must be

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<sup>2</sup> All regulatory references herein are to title 23 of the California Code of Regulations unless otherwise noted.

submitted in accordance with deadlines for submitting written materials established in the hearing procedures. The designated parties are advised that any witness submitting written testimony must appear in person at the hearing to affirm the truth of the written testimony.

7. San Altos requests that the draft hearing procedures be modified and that the Advisory Team designate the Cities of Lemon Grove and San Diego as parties to the proceeding. The proposed hearing procedures appropriately allow only a person other than an already designated party to provide specified information supporting their request to participate as a party to the proceeding. The Advisory Team did not receive any requests for designation from non-designated parties and notes that the City of San Diego objects to being designated. (See November 23, 2015 e-mail from Ben Carrier on behalf of the City of San Diego.) The Cities of Lemon Grove and San Diego may participate as interested persons with rights as indicated in the hearing procedures and applicable regulations.<sup>3</sup>
8. San Altos objects to lack of specified review procedures for prehearing rulings. If San Altos is dissatisfied with prehearing rulings herein, San Altos may renew objections to the San Diego Water Board Chair upon his return to the United States mid-December and may renew objections to the full Board at the administrative hearing to consider the ACLC.
9. San Altos requests that each designated party be allowed four hours in which to present evidence, cross examine witnesses and make closing statements. The Advisory Team agrees that the parties should have more than 20 minutes each at the evidentiary hearing. At this time, the final hearing procedures allow for 90 minutes per party, inclusive of presentation of evidence, cross-examination and opening and closing statements. The hearing procedures specify that the Advisory Team may modify the procedures to allow more hearing time in advance of the hearing and the San Diego Water Board may, at its discretion, allow more time upon request at the hearing. Decisions to grant more time will ordinarily be based on demonstration of good cause for additional time.

Sincerely,



Catherine George Hagan  
Senior Staff Counsel  
Office of Chief Counsel  
State Water Resources Control Board

Attachments and cc's on next page

<sup>3</sup> If it becomes apparent during a hearing that it may be appropriate to have a complaint directed at additional entities, the San Diego Water Board is free to direct the Prosecution Team to consider reissuing a complaint.

**EXHIBIT A**

Mr. Rosenbaum and Ms. Drabandt

- 4 -

December 4, 2015

Attachments: Final Hearing Procedures for ACLC R9-2015-0110  
San Diego Water Board Subpoena Template

cc: David W. Gibson, San Diego Water Board Executive Officer [Via E-mail Only]

Deborah Jayne, San Diego Water Board Advisory Team [Via E-mail Only]

Adriana Nunez, Staff Counsel, Office of Chief Counsel, State Water Resources Control Board [Via E-mail Only]

James G. Smith, San Diego Water Board Asst. Executive Officer [Via E-mail Only]

Ben Carrier, Deputy City Attorney, City of San Diego [Via E-mail Only]

David De Vries, Principal Planner City of Lemon Grove [Via E-mail Only]

## EXHIBIT A

### CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD SAN DIEGO REGION

#### HEARING PROCEDURE FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R9-2015-0110 ISSUED TO

SAN ALTOS-LEMON GROVE, LLC  
VALENCIA HILLS CONSTRUCTION SITE

**SCHEDULED FOR FEBRUARY 10, 2016**

PLEASE READ THIS HEARING PROCEDURE CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY.

#### **Background**

The Assistant Executive Officer of the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) has issued an Administrative Civil Liability (ACL) Complaint pursuant to California Water Code (Water Code) sections 13323 and 13385 against San Altos-Lemon Grove, LLC (Discharger) alleging it has violated California State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, as amended; Water Code section 13376; the Water Quality Control Plan for the San Diego Basin; and Clean Water Act section 301. The ACL Complaint proposes that administrative civil liability in the amount of **\$848,374** be imposed as authorized by Water Code section 13385. Unless the Discharger waives its right to a hearing and pays the proposed liability, a hearing will be held before the San Diego Water Board on **February 10, 2016**, in San Diego.

#### **Purpose of Hearing**

The purpose of the hearing is to receive relevant evidence and testimony regarding the proposed ACL Complaint. At the hearing, the San Diego Water Board will consider whether to adopt, modify, or reject the proposed assessment. The hearing will be held at the San Diego Water Board office at 2375 Northside Drive, Suite 100, in San Diego. An agenda for the hearing will be issued at least ten (10) days before the hearing and will be posted on the San Diego Water Board's web page at: [www.waterboards.ca.gov/sandiego](http://www.waterboards.ca.gov/sandiego).

## EXHIBIT A

Hearing Procedure  
San Altos-Lemon Grove, LLC  
Valencia Hills Construction Site  
ACL Complaint No. R9-2015-0110

December 4, 2015

### Hearing Procedure

The hearing will be conducted in accordance with this hearing procedure. A copy of the procedures governing an adjudicatory hearing before the San Diego Water Board may be found at Title 23 of the California Code of Regulations, section 648 et seq., and is available at <http://www.waterboards.ca.gov> or upon request. In accordance with section 648(d), any procedure not provided by this Hearing Procedure is deemed waived. Except as provided in Title 23 of the California Code of Regulations (CCR), section 648(b), Chapter 5 of the Administrative Procedures Act (commencing with section 11500 of the Government Code) does not apply to adjudicatory hearings before the San Diego Water Board. This Notice provides additional requirements and deadlines related to the proceeding.

THE PROCEDURE AND DEADLINES HEREIN MAY BE AMENDED BY THE ADVISORY TEAM IN ITS DISCRETION. **ANY OBJECTIONS TO THE PROPOSED PROCEDURE MUST BE RECEIVED BY CATHERINE HAGAN, SENIOR STAFF COUNSEL, NO LATER THAN NOVEMBER 20,<sup>1</sup> 2015, OR THEY WILL BE WAIVED.** FAILURE TO COMPLY WITH THE DEADLINES AND REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF DOCUMENTS AND/OR TESTIMONY.

### Hearing Participation

Participants in this proceeding are either "designated parties" or "interested persons." Designated parties to the hearing may present evidence and cross-examine witnesses and are subject to cross-examination. Interested persons may present non-evidentiary policy statements, but may not cross-examine witnesses and are not subject to cross-examination. Interested persons generally may not present evidence (e.g., photographs, eye-witness testimony, monitoring data). Both designated parties and interested persons may be asked to respond to clarifying questions from the San Diego Water Board, staff, or others, at the discretion of the San Diego Water Board.

The following participants are hereby designated parties in this proceeding:

1. San Diego Water Board Prosecution Team; and
2. San Altos-Lemon Grove, LLC.

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<sup>1</sup> By email dated November 23, 2015, this deadline was extended to November 25.

December 4, 2015

Hearing Procedure  
San Altos-Lemon Grove, LLC  
Valencia Hills Construction Site  
ACL Complaint No. R9-2015-0110

### Requesting Designated Party Status

Persons who wish to participate in the hearing as a designated party, and are not already listed above, shall request party status by submitting a request in writing (with copies to the existing designated parties) no later than 5:00 p.m. on **November 20, 2015**,<sup>2</sup> to Catherine Hagan, Senior Staff Counsel, at the address set forth below. The request shall include an explanation of the basis for status as a designated party (e.g., how the issues to be addressed in the hearing and the potential actions by the San Diego Water Board affect the person), the information required of designated parties as provided below, and a statement explaining why the party or parties designated above do not adequately represent the person's interest. Any opposition to the request must be submitted by 5:00 p.m. on **November 23, 2015**. The parties will be notified by 5:00 p.m. on **December 4, 2015**, as to whether the request has been granted or denied.

### Contacts

#### **Advisory Team:**<sup>3</sup>

Catherine George Hagan, Senior Staff Counsel  
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c/o San Diego Water Board  
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(619) 516-1990

Deborah Jayne, Senior Environmental Scientist

<sup>2</sup> By email dated November 23, 2015, this deadline and the deadline for opposition to requests were extended to November 25 and November 30 respectively.

<sup>3</sup> Additional staff may be designated as advisory staff with the Final Hearing Procedures or at a later date.

**EXHIBIT A**

**Hearing Procedure  
San Altos-Lemon Grove, LLC  
Valencia Hills Construction Site  
ACL Complaint No. R9-2015-0110**

**December 4, 2015**

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**Prosecution Team:**

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December 4, 2015

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Valencia Hills Construction Site  
ACL Complaint No. R9-2015-0110

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**Separation of Functions**

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the San Diego Water Board (Prosecution Team) have been separated from those who will provide advice to the San Diego Water Board (Advisory Team). Members of the

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Advisory Team<sup>1</sup> include Catherine George Hagan and Adriana Nunez, Staff Counsel, Deborah Jayne, Senior Environmental Scientist and Beatrice Griffey, Engineering Geologist. Members of the Prosecution Team are: Laura Drabandt, Senior Staff Counsel; James Smith, Assistant Executive Officer; Jeremy Haas, Environmental Program Manager; Chiara Clemente, Senior Environmental Scientist; Laurie Walsh, Senior Water Resource Control Engineer; Wayne Chiu, Water Resource Control Engineer; and Frank Melbourn, Water Resource Control Engineer.

### Ex Parte Communications

The designated parties and interested persons are forbidden from engaging in *ex parte* communications regarding this matter with members of the Advisory Team or members of the San Diego Water Board. An *ex parte* contact is any written or verbal communication pertaining to the investigation, preparation, or prosecution of the ACL Complaint between a member of a designated party or interested party on the one hand, and a San Diego Water Board member or an Advisory Team member on the other hand, unless the communication is copied to all other designated and interested parties (if written) or made at a proceeding open to all other parties and interested persons (if verbal). Communications regarding non-controversial procedural matters are not *ex parte* contacts and are not restricted. Communications among the designated and interested parties themselves are not *ex parte* contacts.

### Hearing Time Limits

To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: each designated party shall have a combined ninety (90) minutes to present evidence, cross-examine witnesses (if warranted), and provide a closing statement; and each interested person shall have three (3) minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. Participants who would like additional time must submit their request to the Advisory Team no later than **January 20, 2016**. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the San Diego Water Board (at the hearing) upon a showing that additional time is necessary.

### Submission of Evidence and Policy Statements

The following information must be submitted in advance of the hearing:

1. All evidence (other than witness testimony to be presented orally at the hearing) that the Designated Party would like the San Diego Water Board to consider. Evidence and exhibits already in the public files of the San Diego Water Board may be submitted by reference as long as the exhibits and their location are clearly identified in accordance with Title 23, California Code of Regulations, section 648.3.
2. All legal and technical arguments or analysis.

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3. The name of each witness, if any, whom the designated party intends to call at the hearing, the subject of each witness' proposed testimony, and the estimated time required by each witness to present direct testimony.
4. The qualifications of each expert witness, if any.
5. (Discharger only) If the Discharger intends to argue an inability to pay the civil liability proposed in the Complaint (or an increased or decreased amount as may be imposed by the San Diego Water Board), the Discharger should submit supporting evidence as set forth in the "ACL Fact Sheet" under "Factors that must be considered by the Board."
6. (Discharger only) If the Discharger would like to propose a Supplemental Environmental Project (SEP) or Enhanced Compliance Action (ECA) in lieu of paying some or all of the civil liability in accordance with the State Water Board's Water Quality Enforcement Policy, the Discharger shall submit a detailed SEP or ECA proposal including a specific implementation timetable.

The Prosecution Team shall submit two (2) hard copies and one (1) electronic copy of the information to Catherine Hagan, Senior Staff Counsel, so that it is received no later than 5:00 p.m. on **November 30, 2015**.<sup>4</sup>

The remaining designated parties shall submit two (2) hard copies and one (1) electronic copy of the information to Catherine Hagan, Senior Staff Counsel, so that they are received no later than 5:00 p.m. on **January 4, 2016**.

In addition to the foregoing, each designated party shall send one (1) copy of the above information to each of the other designated parties by 5:00 p.m. on the deadline specified above.

Interested persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to Catherine Hagan, Senior Staff Counsel, as early as possible, but they must be received by **January 20, 2016**. Interested persons do not need to submit written comments in order to speak at the hearing.

In accordance with Title 23, California Code of Regulations, section 648.4, the San Diego Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the San Diego Water Board may exclude evidence and testimony that is not submitted in accordance with this hearing procedure. Excluded evidence and testimony will not be considered by the San Diego Water Board and will not be included in the administrative record for this proceeding. PowerPoint and other visual presentations may be used at the hearing, but their content may not exceed the scope of other submitted written material. A copy of such material intended to be presented at the hearing must be submitted to the Advisory Team at or before the hearing for inclusion in the administrative record. Additionally, any witness who has submitted written testimony for the hearing shall

<sup>4</sup> By email dated November 23, 2015, this deadline was extended to December 4, 2015.

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appear at the hearing and affirm that the written testimony is true and correct, and shall be available for cross-examination.

### **Request for Pre-hearing Conference**

A designated party may request that a pre-hearing conference be held before the hearing in accordance with Water Code section 13228.15. A pre-hearing conference may address any of the matters described in subdivision (b) of Government Code section 11511.5. Requests must contain a description of the issues proposed to be discussed during that conference, and must be submitted to the Advisory Team, with a copy to all other designated parties, no later than 5:00 p.m. on **January 15, 2016**.

### **Evidentiary Objections**

Any designated party objecting to written evidence or exhibits submitted by another designated party must submit a written objection so that it is received by 5:00 p.m. on **January 15, 2016**, to the Advisory Team with a copy to all other designated parties. The Advisory Team will notify the parties about further action to be taken on such objections and when that action will be taken.

### **Evidentiary Documents and File**

The Complaint and related evidentiary documents are on file and may be inspected or copied at the San Diego Water Board office at 2375 Northside Drive, Suite 100, San Diego, California 92108. This file shall be considered part of the official administrative record for this hearing. Other submittals received for this proceeding will be added to this file and will become a part of the administrative record absent a contrary ruling by the San Diego Water Board. Many of these documents are also posted online at [www.waterboards.ca.gov/sandiego](http://www.waterboards.ca.gov/sandiego). Although the web page is updated regularly, to ensure access to the latest information, you may contact Catherine Hagan, Senior Staff Counsel.

### **Questions**

Questions concerning this proceeding may be addressed to Catherine Hagan, Senior Staff Counsel.

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IMPORTANT DEADLINES

October 19, 2015	Prosecution Team issues ACL Complaint to Discharger and Advisory Team, sends proposed Hearing Procedure to Discharger and Advisory Team, and publishes Public Notice.
November 20, 2015 <sup>5</sup>	Objections due on proposed Hearing Procedure.
November 20, 2015	Deadline for submission of request for designated party status.
November 23, 2015 <sup>6</sup>	Deadline for opposition to request for designated party status.
November 30, 2015 <sup>7</sup>	Prosecution Team's deadline for submission of all information required under "Evidence and Policy Statements," above.
December 4, 2015	Advisory Team issues Hearing Procedure, and issues decision on requests for designated party status, if any.
January 4, 2015	Remaining Designated Parties' Deadline for submission of all information required under "Evidence and Policy Statements," above.
January 15, 2016	All Designated Parties' deadline for submission of request for pre-hearing conference.
January 15, 2016	All Designated Parties' deadline for submission of rebuttal evidence (if any) and evidentiary objections.
January 20, 2016	Interested Parties' deadline for submission of non-evidentiary policy statements.
February 10, 2016	Hearing.

  
\_\_\_\_\_  
CATHERINE GEORGE HAGAN  
Senior Staff Counsel

  
\_\_\_\_\_  
Date

<sup>5</sup> By email dated November 23, this and the next deadline were extended to November 25.

<sup>6</sup> By email dated November 23, this date was extended to November 30.

<sup>7</sup> By email dated November 23, this date was extended to December 4.

**EXHIBIT A**

**BEFORE THE SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD  
SUBPOENA FOR ADJUDICATIVE ACTION**

**EXHIBIT A**

ATTORNEY OR PARTY WITHOUT ATTORNEY REQUESTING SUBPOENA ( <i>name, address, and telephone no.</i> ):  REPRESENTING:  TITLE OF THE PROCEEDING:  <input type="checkbox"/> SUBPOENA <input type="checkbox"/> RE HEARING <input type="checkbox"/> SUBPOENA DUCES TECUM <input type="checkbox"/> RE DEPOSITION	FOR REGIONAL WATER BOARD USE ONLY
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THE PEOPLE OF THE STATE OF CALIFORNIA, TO (*name*):

1. YOU ARE ORDERED TO APPEAR AS A WITNESS in this proceeding as follows unless you make special agreement with the person named in item 3:

a. Date:	Time:
b. Address:	

2. AND YOU ARE:

- a.  Ordered to appear in person. (Wat. Code, § 1080; Gov. Code, § 11450.10; Cal. Code Regs., tit. 23, § 649.6.)
- b.  Not required to appear in person if you produce the records described in the accompanying affidavit in compliance with Evidence Code sections 1560 and 1561. (Wat. Code, § 1080; Gov. Code, § 11450.10(b); Cal. Code Regs., tit. 23, § 649.6.)
- c.  Ordered to appear in person and to produce the records described in the accompanying affidavit. The personal attendance of the custodian or other qualified witness and the production of the original records is required by this subpoena. The procedure authorized by subdivision (b) of section 1560, and sections 1561 and 1562, of the Evidence Code will not be deemed sufficient compliance with this subpoena. (Wat. Code, § 1080; Gov. Code, § 11450.10; Cal. Code Regs., tit. 23, § 649.6.)

3. IF YOU HAVE ANY QUESTIONS ABOUT WITNESS FEES OR THE TIME OR DATE FOR YOU TO APPEAR, OR IF YOU WANT TO BE CERTAIN THAT YOUR PRESENCE IS REQUIRED, CONTACT THE FOLLOWING PERSON BEFORE THE DATE ON WHICH YOU ARE TO APPEAR:

a. Name:	b. Telephone number:
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*(Gov. Code, § 11450.20(a); Code Civ. Proc., § 1985.2.)*

- 4. **WITNESS FEES:** You are entitled to witness fees and mileage actually traveled, both ways, as provided by law. Request them from the person who serves this subpoena or from the person named in item 3. (Wat. Code, §§ 1081, 1083, 1084; Gov. Code, §§ 11450.40, 68070 et seq.; Code Civ. Proc., §§ 1986.5, 2065.)
- 5. If you object to the terms of this subpoena, you may file a motion for a protective order including a motion to quash. Motions must be made within a reasonable period after receipt of the subpoena, and shall be made with written notice to all parties, with proof of service upon all parties attached. In response to your motion, the hearing officer may make an order quashing the subpoena entirely, modifying it, or directing compliance with it, or may make any order needed to protect the parties or witnesses from unreasonable or oppressive demands, including unreasonable violations of the right to privacy. (Gov. Code, § 11450.30.) (Send motions to: San Diego Regional Water Quality Control Board, 2375 Northside Drive, Suite 100, San Diego, CA 92108, Attn: David Gibson, with copies to all parties and to Catherine George Hagan, State Water Resources Control Board, Office of Chief Counsel, c/o San Diego Water Board, 2375 Northside Drive, Suite 100, San Diego, CA 92108.)

**DISOBEDIENCE OF THIS SUBPOENA MAY CAUSE YOU TO BE LIABLE FOR CONTEMPT AND OTHER PENALTIES PROVIDED BY LAW**

*(Wat. Code, §§ 1090-1097; 23 CCR §648.8; Gov. Code, §§ 11450.20(b), 11455.10-11455.30.)*

Dated:

\_\_\_\_\_  
*(signature)*

Name:

Title:

# EXHIBIT A

## PROOF OF SERVICE OF SUBPOENA

(Gov. Code, § 11440.20; Code Civ. Proc., §§ 1987, 1987.5, 1988, 1989, 2015.3, 2015.5.)

1. I served this  subpoena  subpoena duces tecum and supporting affidavit by:

personally delivering a copy to the person served as follows:

a. Person served ( <i>name</i> ):	b. Date of delivery:
c. Address where served:	d. Time of delivery:
e. Witness fees and mileage both ways ( <i>check one</i> ):  (1) <input type="checkbox"/> were paid. Amount: \$ _____ (2) <input type="checkbox"/> were not paid. (3) <input type="checkbox"/> were tendered to the witness's public entity employer as required by Government Code § 68097.2. The amount tendered was \$ _____	f. Fees for service.  Amount: \$ _____

- delivering true copies thereof by certified mail, return receipt requested, to the address as shown below.
- delivering true copies thereof enclosed in a sealed envelope to a messenger for immediate personal delivery to the address as shown below.
- delivering true copies thereof enclosed in a sealed envelope to a mail delivery service for overnight delivery to the address as shown below. [Specify name of mail service and tracking no.: \_\_\_\_\_.]
- Other method allowed by Gov. Code §11440.20. Specify: \_\_\_\_\_

Address where served:

2. I certify that I received this  subpoena  subpoena duces tecum for service on \_\_\_\_\_  
*Date*

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed on:  

<i>Date</i>	<i>at (place)</i>	<i>Signature</i>
	, California	

*(For California sheriff, marshal, or constable use only)*  
 I certify that the foregoing is true and correct and that this certificate is executed on:  

<i>Date</i>	<i>at (place)</i>	<i>Signature</i>
	, California	

**NOTE: THE ATTORNEY OR PARTY WITHOUT AN ATTORNEY REQUESTING THIS SUBPOENA MUST PROVIDE A COPY OF THE SUBPOENA TO EVERY PARTY IN THE HEARING, AND FILE A COPY WITH THE REGIONAL WATER QUALITY CONTROL BOARD. THE COPY PROVIDED TO THE REGIONAL WATER QUALITY CONTROL BOARD MUST BE ACCOMPANIED BY A CERTIFICATE OF SERVICE LISTING THE NAMES AND ADDRESSES OF PARTIES WHO WERE PROVIDED COPIES IN ACCORDANCE WITH GOVERNMENT CODE § 11440.20.** (Gov. Code, § 11440.20; Cal. Code Regs., tit. 23, § 648.4(c).) (Send to: San Diego Regional Water Quality Control Board, 2375 Northside Drive, Suite 100, San Diego, CA 92108: Attn David Gibson, with copies to all parties and to Catherine George Hagan, State Water Resources Control Board, Office of Chief Counsel, c/o San Diego Water Board, 2375 Northside Dr., Suite 100, San Diego, CA 92108.)