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ATTORNEYS FOR SAN ALTOS – LEMON GROVE, LLC

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

IN THE MATTER OF: ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R9-2015-0110 AGAINST SAN ALTOS – LEMON GROVE, LLC	**SAN ALTOS – LEMON GROVE, LLC'S COMMENTS ON TENTATIVE ORDER**

I. INTRODUCTION

After almost a year of litigation, the Tentative Order dated August 10, 2016 ("Tentative Order") finally concedes that of 136 allegations in the original complaint, at least 54 are without merit. While San Altos – Lemon Grove, LLC ("San Altos") appreciates the Advisory Team's attempt to address the concerns raised by San Altos in the original Administrative Civil Liability Complaint, the Tentative Order[1] is still replete with of legal and factual inaccuracies and should be remanded for further consideration based on the comments below. Moreover, should the San Diego Regional Water Quality Control Board ("SDRWQCB") choose to adopt the Tentative Order as written, it should first require that the Advisory Team provide substantive responses to these comments to be made part of the record or, in the alternative, accept these comments as being both legally and factually accurate for the purposes of appeal.[2]

II. DUE PROCESS

The Tentative Order continues to ignore the importance of substantive and procedural due process in administrative proceedings and how such rights have been disregarded in this matter. Both the United States and the California Constitutions provide that the State of California may not deprive any person of life, liberty, or property without due process of law. U.S. Const. Amend. XIV, § 1; U.S. Const. Amend. V, Cal. Const., art. I, §7. The exercise of a quasi-judicial power requires that an agency must satisfy at least minimal requirements of procedural due process. *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612. Minimum due process requires some form of notice and an opportunity to be heard. *Id.* Due process includes "the right to present legal and factual issues in a deliberate and orderly manner." *White v. Board of Medical Quality Assurance* (1982) 128 Cal.App.3d 699, 705. It also includes a reasonable opportunity to know the claims of the adverse party and to present objections. *See Ryan v. California Interscholastic Federation - San Diego Section* (2001) 94 Cal.App.4th 1048, 1072. When an administrative agency conducts a hearing, the party must be "apprised of the evidence against him so that he may have an

[1] San Altos received the Tentative Order on July 20, 2016 with an order to provide its written response by August 1, 2016 at noon. This unreasonably compressed schedule is another violation of San Altos' due process rights.

[2] Even if not specifically stated here, San Altos reserves and restates all of the objections and arguments previously made in this matter.

opportunity to refute, test, and explain it . . . ." *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171-72. An agency decision based on information of which the parties were not apprised and which they had no opportunity to controvert amounts to a denial of a hearing. *Id.*

Here, San Altos' due process rights have been routinely violated. San Altos' rights were violated by limiting its ability to present its case at the hearing when it was given limited time to both present its case and to conduct discovery regarding Surprise Evidence.[3] San Altos' right to a reasonable opportunity to know the claims of the adverse party and, "have an opportunity to refute, test, and explain it" was violated when the Presiding Officer admitted hundreds of new pieces of evidence submitted by the Prosecution without any explanation as to how the evidence related to any of the claims. San Altos' due process right to be apprised of the evidence against it was similarly violated when Chiara Clemente refused to answer factual questions regarding the unique aspects of the project that led the Prosecution team to employ a penalty strategy that was completely inconsistent with other similar enforcement actions. Finally, the Tentative Order itself violates San Altos' due process rights when it proposes new and increased penalties based on evidence and theories that San Altos has not had an opportunity to refute or test.

A. Surprise Evidence.

The Tentative Order misconstrues San Altos' objection to the Prosecution's Surprise Evidence. While the Prosecution may have the right to amend its ACLC and supporting analysis, such amendment should have identified how the evidence related to the claims so that San Altos would have a fair opportunity to, "refute, test, and explain" such evidence. San Altos was deprived of that right and was therefore completely unable to respond to the Surprise Evidence at the hearing, resulting in a significant violation of its due process rights.[4]

The Tentative Order attempts to gloss over this deprivation of due process rights by arguing that "the Prosecutions Team's [Surprise] evidence was submitted more than four weeks before the

[3] The day after San Altos submitted its Legal and Technical Analysis, the Prosecution submitted more than 100 pieces of new evidence (hereinafter referred to as "Surprise Evidence") without identifying which claims the evidence supported.

[4] *See* San Altos – Lemon Grove, LLC's Response to the Amended Technical Analysis for Administrative Civil Liability Complaint No. R9-2015-0110 ("Response to Amended Technical Analysis"), pp. 2-4.

hearing and the Discharger has two prehearing opportunities and a post-hearing opportunity to address the evidence in writing. The record shows that the Discharger already had in its possession all but the San Diego Water Board photographs in Exhibit 33 prior to the hearing."[5] But this sophistry does not address the basic due process depravation of rights that resulted from the introduction of the Surprise Evidence.

First, whether or not San Altos had some of the Surprise Evidence in its possession is irrelevant because, prior to the hearing, the Prosecution Team never apprised San Altos of what the Surprise Evidence was intended to prove.[6] Thus, San Altos never had an opportunity to refute, test or explain the Surprise Evidence in light of the allegations it was intended to support.

Second, contrary to Finding 28 that "the procedures also allowed for unlimited prehearing discovery", when San Altos requested an opportunity to cross examine the Prosecution Team regarding the Surprise Evidence and its relevance to the alleged violations prior to the hearing, the Advisory Team barred any additional discovery by San Altos explaining that San Altos would have to use its 90 minutes at the hearing to cross examine Prosecution Team members regarding the how the Surprise Evidence related to the alleged violations.[7]

Third, San Altos never had a prehearing opportunity to meet and confer with the Prosecution Team regarding the Surprise Evidence. In fact, while San Altos requested an opportunity to meet and confer over multiple issues including the Surprise Evidence, those requests were specifically denied by the Presiding Officer for Prehearing Proceedings.[8]

Finally, allowing the Prosecution to submit an amended ACLC *after* the hearing, which identified which pieces of the Surprise Evidence actually supported each of the allegations clearly demonstrated that even the Board was confused as to which evidence supported which allegation. If the Board couldn't understand the evidence, then it's unreasonable to expect that San Altos could have. Submission of the amended ACLC without allowing San Altos to conduct discovery

[5] Tentative Order Finding 28.

[6] San Altos – Response to Amended Technical Analysis, p. 2:21-28

[7] February 8, 2016 Ruling on Prosecution Team's February 2, 2016 Request to Submit Additional Evidence, p. 3.

[8] February 26, 2016 Denial of Request for a Prehearing Conference.

or formally respond violated San Altos' due process rights.

B. New Allegations.

Finding 40 states that "neither the statutes authorizing imposition of administrative civil liability in this case nor Water Quality Enforcement Policy . . . require that a complaint for administrative civil liability identify unique facts to distinguish one administrative civil liability matter from others; nor do they require the Board make findings regarding unique facts or consistency with other orders imposing administrative civil liability." This is incorrect.

As provided in the following quotes, the Enforcement Policy requires that the SDRWQCB consider the unique facts of a case prior to the imposition of penalties.[9]

> It is the policy of the State Water Board that the Water Boards shall strive to be fair, firm, and consistent in taking enforcement actions throughout the State, while recognizing the unique facts of each case.[10]

> While it is a goal of this Policy to establish broad consistency in the Water Boards' approach to enforcement, the Policy recognizes that, with respect to liability determinations, each Regional Water Board, and each specific case, is somewhat unique.[11]

The Tentative Order now proposes to increase the proposed penalties on 38 of the remaining violations by an average of $842 per violation, or a total of over $69,000, based on completely new and unique allegations. These new penalties are based on new allegations of repeated and persistent failure to implement the necessary BMPs[12] and not adequately implementing BMPs over several months.[13] San Altos was never apprised of these allegations nor did it have an opportunity to controvert them through discovery or at the hearing.

And once again, the Board fails to identify what (if any) "unique facts" it relied on to seek these increased penalties against San Altos (beyond facts stated in the ACLC, Technical Analysis, or attachments). San Altos has never had an opportunity to respond to these new allegations and any suggestion that San Altos can respond to such facts in these comments or at a hearing to adopt

[9] State Water Resources Control Board Enforcement Policy, May 20, 2010 (hereafter "Policy").

[10] Policy, p. 9 (underline added).

[11] Policy, p. 9 (underline added).

[12] Tentative Order Attachment 1 p.3.

[13] *Id.* at p. 6, 9, 13, 16, 19, 22, 28, and 31.

the Tentative Order does not meet due process standards because due process requires a "reasonable opportunity to know the claims of the adverse party."

Given that due process requires the disclosure of facts on which the Prosecution intends to rely, no "responsible person" could rely on new facts in the conduct of this "serious affair" in which the Tentative Order now seeks more than $600,000 in penalties. Such new facts, therefore, cannot be relevant under Government Code § 11513(c) and cannot be admitted and the proposed increase in penalties cannot be adopted.

C. Testimony of Chiara Clemente.

The Tentative Order both misconstrues and obfuscates San Altos' objections to the testimony, or lack thereof, by Ms. Clemente. First, Finding 40 misstates and is contrary to the requirements for imposing civil liability set forth in the Policy as it concerns the requirement to consider unique circumstances. Second, contrary to Finding 40, Ms. Clemente's testimony at the hearing goes directly to the issues on which she refused to testify at her deposition concerning both the unique circumstances of this case and how the Prosecution determined that its penalty approach in this matter was consistent with other similar enforcement actions.

As demonstrated by the quotes below, the Policy mandates the SDRWQCB to be consistent in its application of the Policy when imposing civil liability.

> The State Water Resources Control Board (State Water Board) and the Regional Water Quality Control Boards (Regional Water Boards) (together "Water Boards") have primary responsibility for the coordination and control of water quality in California. . . . Porter-Cologne grants the Water Boards the authority to implement and enforce the water quality laws, regulations, policies, and plans to protect the groundwater and surface waters of the State. Timely and **consistent** enforcement of these laws is critical to the success of the water quality program and to ensure that the people of the State have clean water.[14]
>
> The goal of this Water Quality Enforcement Policy (Policy) is to protect and enhance the quality of the waters of the State by defining an enforcement process that addresses water quality problems in the most efficient, effective, and **consistent** manner.[15]
> It is the policy of the State Water Board that the Water Boards shall strive to be fair, firm, and **consistent** in taking enforcement actions throughout the State, while

[14] Policy, p. 1 (emphasis added).

[15] *Id.* (emphasis added).

> recognizing the unique facts of each case. [16]
>
> The Water Board orders shall be **consistent** except as appropriate for the specific circumstances related to the discharge and to accommodate differences in applicable water quality control plans.[17]
>
> The Water Boards shall implement a **consistent** and valid approach to determine compliance with enforceable orders.[18]
>
> The Water Boards' enforcement actions shall be suitable for each type of violation, providing **consistent** treatment for violations that are similar in nature and have similar water quality impacts.[19]
>
> The Water Boards have powerful liability provisions at their disposal which the Legislature and the public expect them to fairly and **consistently** implement for maximum enforcement impact to address, correct, and deter water quality violations.[20]
>
> [A]ny assessment of administrative civil liability, whether negotiated pursuant to a settlement agreement or imposed after an administrative adjudication, should: [b]e assessed in a fair and **consistent** manner;[21]

Neither the Policy nor the record here supports the statements in Finding 40 that complaints for civil liability need not be consistent with other such enforcement actions considering the unique facts of each case. Thus, neither Finding 40 nor Finding 65 can be adopted without substantial evidence in the record that the SDRWQCB addressed the issue of consistency with other ACLC orders adopted by this Board or that there are any unique factors in this case that support the proposed penalty.

Whether or not the Prosecution was "fair and consistent" and what "unique facts" it relied on to pursue twice as many penalties against San Altos as any other case, is a significant issue in this case. Discovering these facts was the purpose of taking Ms. Clemente's deposition. But in response to questions on these issues, the Prosecution directed Ms. Clemente not to answer based on attorney-client privilege. Yet, Ms. Clemente testified on these exact issues over San Altos' objections. This is the epitome of denying due process: allowing Surprise Evidence and actively

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[16] *Id.*, p. 2 (emphasis added).

[17] *Id.* (emphasis added).

[18] *Id.* (emphasis added).

[19] *Id.* (emphasis added).

[20] *Id.*, p.9 (emphasis added).

[21] *Id.*, p. 10 (emphasis added).

preventing San Altos from rebutting that evidence. Her testimony should be excluded.

The record is clear: San Altos tried to find out how the Prosecution distinguished this matter from other cases and staff refused to answer. However, at the hearing, Ms. Clemente said, "[F]or my presentation, I'd like to explain how the methodology was used in this case, how and why it's different from Encinitas but consistent with more recent cases, and in so doing I hope to demonstrate why the penalty amount is appropriate."[22] She presented slides that compared the San Altos case to four other cases, cases they refused to identify in deposition. It is a violation of due process to refuse to disclose facts in discovery, and then turn around and present those exact facts at a hearing.

Because Ms. Clemente refused to testify about these facts at her deposition, any testimony at the hearing regarding the unique circumstances of this case or the consistency of enforcement between this case and other ACLCs must be struck from the record. Therefore, while San Altos believes that Ms. Clemente's testimony does not provide the substantial evidence needed for the SDRWQCB to find "unique facts" to support the ACLC, without her testimony, which must be excluded, there is no evidence to support the finding that the SDRWQCB considered the "unique facts" of this case or strove for consistent results by applying the Policy's penalty calculator methodology in this case.

III. LEGAL STANDARDS

A. Stockpiles: Active vs Actively Being Used.

In Finding 44, the Tentative Order alleges eight (8) instances in which San Altos violated the General Construction Storm Water Permit by failing to implement material stockpile BMPs. The proposed penalty for these violations is $41,860. These penalties are not supported by either the record or the Tentative Order.

The Tentative Order attempts to support the alleged violations by asserting a new claim. That is, that "the discharger did not have sufficient plastic onsite to cover the stockpile."[23] This

[22] Testimony of Chiara Clemente, San Diego Regional Water Quality Control Board, San Diego Region, Public Hearing, March 9, 2016, Item 12, ("Hearing"), p. 123:18-24, p. 55:15-19.

[23] Tentative Order, p. 12.

novel claim has never been asserted before. San Altos has never been apprised of these alleged facts and has never had an opportunity to respond. The Tentative Order cannot rely on these claims to support the proposed penalty without first giving San Altos a reasonable opportunity to investigate and respond. San Altos received the Tentative Order on July 20, 2016 and was ordered to provide written response by August 1, 2016 at noon. This unreasonably compressed schedule makes it impossible for San Altos to investigate this new claim and respond by August 1, 2016 at noon.

These alleged violations also highlight the problem with the Prosecution's new (and incorrect) interpretation of the term "active" as applied to stockpiles. Mr. Melbourn testified that he interprets the term "active" for stockpiles to mean that a stockpile is "active" if, "when I'm there on the site, are they actively pulling material from the stockpile or are they actively adding material to the stockpile."[24] However, that definition is not stated in the Permit, nor in any Water Board policy or the California Stormwater Quality Association ("CASQA") Handbook.[25] In fact, this definition is contradicted by the Permit, which defines "inactive" as areas "that are not scheduled to be re-disturbed for at least 14 days"[26] as well as the CASQA Handbook which also defines stockpiles as inactive only if they haven't been used for 14 days.[27] Finally, multiple third parties have contributed that this is not the standard used in the industry.[28]

The new interpretation of the term "active" proposed by the Prosecution and the Tentative Order is not supported by any guidance from the State Water Resources Control Board, the entity that drafted the General Construction Stormwater Permit.[29] San Altos is also not aware that any of the other eight Regional Water Boards have adopted this interpretation. There is no substantial evidence to support this new interpretation of the permit language.

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[24] Testimony of Frank Melbourn, March 9, 2016 hearing, p. 83:16-22.

[25] Testimony of Frank Melbourn, March 9, 2016 hearing, p. 84:13-21.

[26] Permit, Attachment D., p. 5, fn. 1.

[27] *See* Declaration of S. Wayne Rosenbaum in Support of San Altos response to Amended Technical Analysis, March 30, 2016, ¶ 7, Ex. E.

[28] Hearing, p. 146:13-25, 147:1-24; Declaration of S. Wayne Rosenbaum in Support of San Altos response to Amended Technical Analysis, March 30, 2016, ¶ 9, Ex. G.

[29] *See* Tentative Order, p. 13

While the SDRWQCB may be able to adopt more stringent requirements than those set forth in the Permit, "A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, [or] standard of general application . . . unless it has been adopted as a regulation pursuant to [the Government Code]." Govt. Code § 11425.50(e). There is no evidence that this definition of "active" as applied to stockpiles has been incorporated into the Permit or any other regulation. The SDRWCB may not impose any penalties based on this definition.

SDRWQCB staff has been notified on multiple occasions of stockpiles that were not actively being used at other project sites and were not covered and bermed.[30] San Altos is not aware of any other situation in which this unique definition of "actively being used" has been applied. Even assuming that this new requirement is enforceable without adoption per the Government Code, its application to one and only one project in the region is arbitrary and capricious.[31]

Finally, in assessing a penalty, the Tentative Order is required to consider the culpability of the alleged violator.[32] In determining the alleged violators degree of culpability regarding the violation, the first step is to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test is what a reasonable and prudent person would have done or not done under similar circumstances.[33] Adjustment should result in a multiplier between 0.5 to 1.5, with the lower multiplier for accidental incidents, and higher multiplier for intentional or negligent behavior.[34]

Here, there is substantial evidence in the record that San Altos adopted prevailing industry practices regarding the coverage of stockpiles.[35] It was not until the deposition of Frank Melbourn

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[30] Declaration of Wayne Rosenbaum in Support of San Altos' Comments on Tentative Order ("Rosenbaum Dec."), ¶ 2, Ex. A.

[31] Policy, p. 9 ("The Water Boards have powerful liability provisions at their disposal which the Legislature and the public expect them to fairly and consistently implement for maximum enforcement impact to address, correct, and deter water quality violations").

[32] Policy, p. 17.

[33] *Id.*

[34] *Id.*

[35] *See* San Altos Legal and Technical Arguments and Analysis in Opposition to Administrative Civil Liability Complaint No. R9-2015-0110, February 3, 2016, p. 21:7-15.

that San Altos was even aware of this interpretation of the Permit. On these facts the culpability multiplier should be 0.5 and not 1.3 as proposed by the Tentative Order. Applying the correct culpability multiplier the Tentative Order should be adjusted to reflect a penalty for violation 2 (two) of not more than $16,100.

IV. EVIDENTIARY STANDARDS AND FACTUAL MISSTATEMENTS

A. There no substantial evidence for 20 of the alleged violations.

The Tentative Order declares "that substantial evidence in the record [to] support each and every violation established by this Order."[36] However, 20 of the remaining 72 alleged violations are supported by no evidence at all, simply inference based on assumptions.[37] The Tentative Order proposes a cumulative penalty for these alleged violations of $145,810.00, or approximately twenty-four percent (24%) of the total proposed assessment.

Inference, argument, speculation, unsubstantiated opinion or narrative, standing alone is not substantial evidence.[38] The inference must be supported by relevant information to even begin to provide the necessary substantial evidence to support a finding. Here the inferences drawn have no factual basis or support. The fact that a driver was stopped for speeding on Monday and again on Friday does not provide any relevant information as to whether the driver was speeding on Tuesday, Wednesday or Thursday. The same is true here: allegations of a violation on one day, followed by allegations of a violation a week later do not provide a reasonable inference of violations for every single day in between. These twenty penalties should be removed from the Tentative Order.

B. There is no substantial evidence to support the allegations regarding violations in "active" vs. "inactive" areas.

Findings 47 and 49, asserting that San Altos had insufficient BMPs in active and inactive areas, still do not provide substantial evidence of these alleged violations. For example, the evidence in support of alleged Violation No. 4 for December 1 – 4 all rely on reports from the

[36] Tentative Order Finding 57 (emphasis added).

[37] Tentative Order Findings 45, 47, 49, and 52.

[38] Public Resources Code section 21083.

City, which identify areas as "inactive." However, many of the photographs show access roads as inactive. Second, the Tentative Order, p. 16, asserts that "the difference in definitions of "active areas" in the Permit and the City's ordinance is not dispositive." However, the Tentative Order fails to account for the discrepancy for these first four days in any way. There is no substantial evidence identifying which areas of the site were active and which areas were inactive on these four days. The Tentative Order seeks penalties of almost $63,000 for alleged Violations 4 and 6 for these four days. Given that the City inspectors were applying a different standard of "active" vs. "inactive," the Prosecution must provide evidence (beyond testimony from a staff member who learned of the project scheduled four months later) of which areas were active and inactive in order to apply these penalties.

With respect to December 8, the evidence in support of Violation No. 4 relies on photographs attached to a City inspection report (PT Ex. 4, middle row photos). However, the first photo identifies the area as active, not inactive, and the second photograph is not previously identified by the Prosecution as evidence of this allegation. For Violation No. 6 for December 8, the Tentative Order identifies a road as the active area without BMPs. But rain was not forecasted for the next 48 hours and therefore BMPs on the road were not required.

Next, all of the evidence relied on by the Prosecution for alleged Violation No. 4 for December 9 and 16, January 6 and 14 are reports by City inspectors. However, while the site was under a stop-work notice, there is no evidence regarding whether the developer was working in these areas to develop further BMPs, or whether the developer was still working in this area despite the stop work notice. The Tentative Order proposes penalties of $34,320 for these four days. Evidence that these areas were inactive must be more than an assumption that it was inactive because of a stop-work notice.

San Altos also objects to the use of the statement that "Tim [Anderson] stated that he had been on site since 6 a.m. and that he and his work crews had been adjusting BMPs throughout the day to improve their effectiveness during the storm event" as evidence that "there were ongoing violations on intervening days of May 9 – 12 and 14, 2015. (Tentative Order, p. 15.) First, improving the effectiveness of BMPs is not evidence that they were necessarily inadequate.

Second, relying on evidence that a party is improving something as evidence that it was insufficient violates Evidence Code Section 1151.[39]

Finally, the admission of the amended ACLC underscores San Altos' violation of due process, especially with these alleged violations. For alleged Violation 4, the Prosecution identified more than 40 pieces of new evidence, and for alleged Violation 6, the Prosecution identified more than 30 pieces of new evidence. San Altos had no ability to investigate and respond to this new evidence.

C. Paragraph 22 is not supported by evidence.

Paragraph 22 of the Tentative Order states that, "on May 14, 2015, San Diego Water Board staff spoke by telephone with the Site Superintendent about the approaching storm event, the inadequacy of existing Site BMPs, the strong likelihood of administrative civil liability and that Board staff would inspect the Site again the next day." There is no information about such a telephone call in PT Ex. 20 or anywhere else in the record. This sentence should be removed from the Tentative Order.

D. There is no substantial evidence of impacts to impaired water bodies.

One of the "unique facts" that should have been considered in this matter is whether there were impacts to impaired water bodies. Had San Altos been able to conduct discovery on comparing the facts of this case to those of other cases (which it was not able to do given Ms. Clemente's refusal to answer questions on these issues), the facts would show that the penalty calculator methodology in this case was improperly applied.

Finding 41 states that "The Site lies within the Chollas Hydrologic Subarea (HSA) (908.22) of the Pueblo San Diego Hydrologic Unit. Storm water discharges from the Site flow directly into Encanto Channel and thence Chollas Creek." Finding 43 states that "Chollas Creek is designated as impaired for diazinon, dissolved metals (copper, lead, and zinc), indicator bacteria, nutrients (phosphorus and nitrogen), and trash pursuant to Federal Water Pollution Control Act (Clean

[39] California Evidence Code section 1151 states, "When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event."

Water Act) (33 U.S.C. § 1251 et seq.) section 303(d) (33 U.S.C. § 1313)." However, other than mere speculation by the Prosecution and in contrast to the Encinitas ACLC, there is no evidence that any of the pollutants for which Chollas Creek is impaired were present in the storm water discharged to the Encanto Channel or that any of those pollutants or sediment reached Chollas Creek. Speculation is not substantial evidence.

However, in applying the penalty calculator methodology for discharge violations the Tentative Order assigns a score for Harm or Potential harm to Beneficial Uses of 4 (above average) without any substantial evidence to support this conclusion. Had the unique factors of this case been applied to the calculator as they were in the Encinitas matter, the appropriate Harm or Potential Harm Score would have been no more than 1 based on the lack of evidence in the record. This in turn would have resulted in a penalty of $962 rather than the $29,822 as suggested in the Tentative Order.

E. Ability to Pay.

In applying the Policy regarding the assessment of penalties, one of the factors that must be properly analyzed is the ability to pay and the ability to continue in business.[40] The Tentative Order improperly evaluates San Altos' ability to pay and therefore must be revised before the SDRWQCB can adopt the order.

The first and most glaring error is that the Tentative Order attempts to conflate the financial status of BCA Development, Inc. ("BCA") the developer, and San Altos, the owner and the target of this Tentative Order.[41] Whatever the financial condition of BCA may be, it is completely irrelevant to the financial condition of San Altos.

Second, to the extent there is evidence in the record concerning San Altos' ability to pay, that evidence is contrary to the statements made in Attachment 1 Penalty Methodology Decisions ACL Order No. R9-2016-0064. On May 17, 2016, counsel for San Altos informed Ms. Laura Drabandt, counsel for the Prosecution Team, that San Altos lacked the ability to pay the proposed

[40] *See* Tentative Order Findings 64 and 65.

[41] Tentative Order Attachment 1 pages 4, 7, 9-10, 13, 16, 19, 22, 25, 28, 31, 34, 36-37, and 39.

penalty and "that absent a settlement, the ongoing litigation would likely exhaust San Altos' remaining resources." The correspondence went on to request that the parties meet to discuss a viable resolution of the matter."[42] The offer to discuss settlement was soundly rebuffed by the Prosecution Team.[43] At a minimum, prior to the adoption of the Tentative Order, the Prosecution Team must provide substantial evidence regarding San Altos' ability to pay.

V. CONCLUSION

The Tentative Order should be remanded for further consideration. The Tentative Order fails to consider many unique facts which should reduce the penalties for all of the alleged violations. The Tentative Order also incorrectly applies Permit standards and should recognize that there is a lack of substantial evidence of many of the alleged violations. The proposed penalties in the Tentative Order should be reduced by at least $250,000 based on lack of evidence and modification of the penalty calculator in light of the facts of this case. Furthermore, the Tentative Order should be remanded for additional reduction based on the lack of evidence of San Altos' ability to pay and significant due process violations that have occurred in this matter, especially the inability of San Altos to learn of the evidence against it, preventing San Altos from being able to be heard on these issues in violation of its due process rights.

Dated: August 1, 2016

OPPER & VARCO LLP

S. Wayne Rosenbaum
Attorney for San Altos – Lemon Grove, LLC

[42] Rosenbaum Dec., ¶ 3, Ex. B. (San Altos notes that it originally asserted a settlement privilege to this letter. However, San Altos now waives this privilege.)

[43] Rosenbaum Dec., ¶ 4, Ex. C.

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ATTORNEYS FOR SAN ALTOS – LEMON GROVE, LLC

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

SAN DIEGO REGION

IN THE MATTER OF: ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R9-2015-0110 AGAINST SAN ALTOS – LEMON GROVE, LLC	**DECLARATION OF S. WAYNE ROSENBAUM IN SUPPORT OF SAN ALTOS – LEMON GROVE, LLC'S COMMENTS ON TENTATIVE ORDER**

I, S. WAYNE ROSENBAUM, hereby declare as follows:

1. I am a partner in the law firm of Opper & Varco LLP and am counsel of record for San Altos-Lemon Grove, LLC in this above referenced matter. I know the following information based on my own personal knowledge and if called as a witness, I could and would competently testify to the matters discussed herein.

2. Attached as Exhibit A are true and correct copies of e-mails to Mr. Frank Melbourn identifying projects where stock piles were not protected or actively being used dated April 26, 2016, June 9, 2016 and July 27, 2016.

3. Attached as Exhibit B is a true and correct copy of San Altos' settlement offer letter to Laura Drabandt, counsel for the Prosecution Team dated May 17, 2016, advising of San Altos' inability to pay the proposed penalties.

4. Attached as Exhibit C is a true and correct copy of the e-mail response from Ms.

Laura Drabandt, counsel for the Prosecution Team, to San Altos' counsel dated May 18, 2016, rejecting the request to discuss settlement.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 1st day of August, 2016 at San Diego, California.

S. Wayne Rosenbaum
Attorney for San Altos – Lemon Grove, LLC

EXHIBIT A

[redacted]

From: Wayne Rosenbaum
Sent: Tuesday, April 26, 2016 11:25 AM
To: Melbourn, Frank@Waterboards
Cc: Clemente, Chiara@Waterboards; Walsh, Laurie@Waterboards
Subject: Pre Rain Inspection San Altos

Frank,

Hope the picture below addresses any concern you might have. PS. You may want to check out the construction project on Camino Real in Carlsbad. Stockpiles routinely uncovered and equipment without drip pans.

Thanks

Wayne

I will be out of the country between May 25, 2016 and June 7, 2016 with limited access to phones or e-mail. In my absence, please contact my assistant, Odette Diaz, at ODiaz@envirolawyer.com or 619-231-5858 or you may contact my law clerk, Josh Rosenbaum, at jtrosenb@gmail.com or 619-920-1535. Thank you.

S. Wayne Rosenbaum
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From: [redacted]
Sent: Tuesday, April 26, 2016 11:19 AM
To: Wayne Rosenbaum <swr@envirolawyer.com>

From:	Wayne Rosenbaum
To:	Melbourn, Frank@Waterboards
Subject:	Weekly Report
Date:	Thursday, June 09, 2016 5:39:43 AM
Attachments:	DSCN9796.jpg DSCN9793.jpg DSCN9795.jpg DSCN9794.jpg 6-6-16 Weekly Inspection.pdf

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Frank,

Attached please find San Altos weekly report along with photo documentation that the corrective action (residue from saw cutting in street) has been addressed. Let me know if you have any questions.

Meanwhile, you may want to take a look at the new construction at Carlsbad Mile of Cars. I went by there the other day and there was a very large uncovered stock pile that did not appear to be "actively being used".

Thanks

Wayne

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From: Wayne Rosenbaum
To: Melbourn, Frank@Waterboards
Subject: Weekly Report
Date: Wednesday, July 27, 2016 6:42:06 AM
Attachments: 7-25-2016 Weekly Inspection.pdf

Frank,

Attached please find July 25th weekly report. You may also want to give Laurie the heads up about large stock piles over by Lego Land in Carlsbad (visible from Cannon Road) and near the intersection of I5 and Garnet (visible from I5) that are obviously not being actively used and are not covered and bermed.

Thanks

Wayne

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EXHIBIT B

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OPPER & VARCO LLP
THE ENVIRONMENTAL LAW GROUP

May 17, 2016

VIA EMAIL AND U.S. MAIL

Laura Drabandt, Esq.
State Water Resources Control Board
Office of Enforcement
P.O. Box 100
Sacramento, CA 95812
Laura.Drabandt@waterboards.ca.gov

Re: ACL Complaint No. R9-2015-0110; San Altos – Lemon Grove, LLC
Request for Settlement Discussions
Privileged Communication pursuant to Evidence Code § 1152

Dear Ms. Drabandt:

As you know, ACL Complaint No. R9-2015-0110 seeks penalties, fees and costs from San Altos-Lemon Grove, LLC ("San Altos") in the amount of $848,374.00. San Altos' attempts to obtain insurance coverage and indemnity for the claim have been denied and the amount sought otherwise exceeds San Altos' ability to pay. Given the economic reality, we respectfully request that the Board reconsider settlement before San Altos spends its remaining available proceeds from the Project on incoming invoices, including defense costs.

State Water Resources Control Board Resolution No. 2009-0083, the Water Quality Enforcement Policy, provides guidance on a variety of issues, including calculation of penalties. One of the items that the Board should consider in assessing penalties is the alleged discharger's ability to pay. The Policy states:

> The ability of a discharger to pay an ACL is determined by its revenues and assets. In most cases, it is in the public interest for the discharger to continue in business and brings its operations into compliance. If there is strong evidence that an ACL would result in widespread hardship to the service population or undue hardship to the discharger, the amount of the assessment may be reduced on the grounds of ability to pay. . . . [T]he adjustment for ability to pay and ability to continue in business cannot reduce the liability to less than the economic benefit amount.

First, it should be noted that the economic benefit amount identified in the ACL was $29,923 (approximately 28 times less than the penalty sought). Second, the Board should remember that this Project was designed to provide badly needed affordable housing to first time homebuyers. Imposing a penalty on San Altos that

makes San Altos insolvent will discourage future development of such Projects. A penalty close to $1 million relative to the size of this Project will certainly "result in widespread hardship to the service population" in that developers who are already wary of the narrow margins associated with the development of affordable housing will likely be even further deterred. As it is, Valencia Hills was the first entry level housing development of significance to be built in Lemon Grove in more than 20 years.

Finally, the ability of a discharger to pay an ACL is determined by its revenues and assets while allowing the discharger to remain in business. As of this writing San Altos has one remaining house, which will likely close escrow in less than ten days, at which point there will be no further revenue from the Project. After payment of costs and expenses associated with the Project, including the cost associated with defending the ACL and the setting aside of reserves for warranty claims by homeowners, San Altos' before-tax profits from the Project are anticipated to be less than $1 million.

In light of this financial reality, San Altos requests that the Prosecution Team reconsider its past settlement position and pursue additional settlement discussions. Absent settlement, ongoing litigation will likely exhaust San Altos' remaining resources (San Altos will provide additional information regarding the financial status of the company in connection with confidential settlement discussions).

Please let us know if and when the parties can meet to discuss a viable resolution of this matter.

Sincerely,

OPPER & VARCO LLP

Linda C. Beresford

cc: Catherine George Hagen *(chagan@waterboards.ca.gov)*

EXHIBIT C

From: Drabandt, Laura@Waterboards
To: Linda Beresford
Cc: Hagan, Catherine@Waterboards; Nunez, Adriana@Waterboards; Wayne Rosenbaum; Boyers, David@Waterboards; Clemente, Chiara@Waterboards; Melbourn, Frank@Waterboards
Subject: ACLC R9-2015-0110 San Altos-Lemon Grove
Date: Wednesday, May 18, 2016 1:51:24 PM

Good afternoon, Linda,

This message is in response to your May 17, 2016 letter to me, and cc'd to Catherine Hagan. In summary, the Prosecution Team is not amenable to meeting with San Altos to discuss a resolution, and would ask the Advisory Team to not let this request delay the Board's deliberations in any manner.

On a housekeeping note, contrary to the subject line in your letter, I don't believe these communications are confidential pursuant to Evidence Code section 1152 since you have cc'd Catherine from the Advisory Team. If you prefer to return to confidential settlement negotiations with the Prosecution, please contact me separately.

The purpose of your letter was to request entering settlement negotiations in light of San Altos' inability to attain insurance coverage and indemnity, which is essentially an argument that San Altos is not able to pay the proposed penalty. A discharger's ability to pay the liability is a factor the Board must consider pursuant to Water Code section 13385(e), which is why the Fact Sheet that was sent with the Complaint package explained in detail what documents a discharger must provide when asserting inability to pay. San Altos failed to provide any of those documents for the Board to consider by any of the evidence deadlines, and certainly did not bring them to the hearing itself where we would have been afforded an opportunity to evaluate and object to their admission. In fact, the evidence San Altos did timely submit of its ability to pay was the statement by Philip Dowley that "the expected net profit is $29,000 per home, an average profit margin of 6.2%" (see Dowley declaration, p. 2, lines 20-22).

San Altos has had the benefit of knowing about its insurance coverage and indemnity agreements the entire extent of this enforcement proceeding, and was able to factor any litigation risks into its decision-making process, including having its claims denied. Similarly, San Altos was in control of deciding how much to spend on litigation. These facts do not weigh into the Board's determining whether a party has an ability to pay a penalty, especially how much attorneys' fees ended up costing the discharger.

It is imperative in enforcement cases to fully eliminate any economic advantage and unfair competitive advantage a discharger has benefited from by its violating the law, and to deter future violations. The Prosecution Team at hearing explained how very conservative its economic benefit analysis was, and that it was not an accurate "cost of doing business" calculation. The fact that San Altos continues to profit from its project indicates that the recommended penalty does not over-step any economic guidelines for the Board to consider. The proposed penalty correlates to the Prosecution Team's interest in discouraging future development of any projects that build into their plans the cost of non-compliance with state laws, including the Construction General Permit.

Sincerely,
Laura

Attorney for the Prosecution

Laura Drabandt, Attorney III
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