

**REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION**

**ENFORCEMENT SUMMARY REPORT<sup>1</sup>  
NOVEMBER 9 & 10, 2021  
ITEM 6**

**SUBJECT**

Administrative Civil Liability Complaint (ACLC) Hearing: ACLC against Baldwin & Sons, Inc. et al. Portola Center South Construction Site, Complaint No. R9-2020-0006. (*Frank Melbourn*).

**STAFF RECOMMENDATION**

The San Diego Water Board's Prosecution Team (Prosecution Team or PT) recommends adoption of Tentative Order No. R9-2021-0119 (Supporting Document 1), as proposed by the Prosecution Team, imposing administrative civil liability in the amount of \$9,085,932 on Baldwin & Sons, Inc.; Sunranch Capital Partners, LLC; Sunrise Pacific Construction, Inc.; SRC-PH Investments, LLC; Baldwin & Sons, LLC; Shawn M. Baldwin; Randall G. Bone, and; Jose Capati (collectively, "Dischargers").

**KEY ISSUES**

This is a high-profile case due to four large sediment-laden stormwater runoff discharges from a grossly mismanaged large luxury home construction site by an experienced developer. The discharges left the Portola Center South Construction Site (Site) and entered Aliso Creek, which is an area of environmental significance for plants and wildlife. Issuance of this liability will send a deterrent message not only to the Dischargers but also to other developers within the Region and State. The key issues in this matter are the following:

1. Is the San Diego Water Board restricted to naming Sunranch Capital Partners, LLC (Sunranch) and SRC-PH Investments, LLC (SRC-PH) as dischargers?
2. Is it appropriate to assess a per gallon liability for the alleged discharges of stormwater runoff from the Site?
3. What volume was discharged from the Site?
4. Were the discharges to Waters of the United States (WOTUS)?
5. What is the appropriate level of due process and evidentiary support for this administrative hearing, and other adjudicative actions?
6. Does San Diego Water Board staff have the necessary qualifications to make recommendations to be considered by the Board in liability actions?
7. Is the Prosecution Team's discretion when applying the State Water Resources Control Board's (State Board's) Enforcement Policy liability calculation methodology acceptable in this instance and other cases?

While there are several key issues of disagreement, the evidence is clear regarding the following:

1. Multiple discharges of sediment-laden stormwater runoff from the Site occurred;
2. The ACLC reflects only a limited portion of the greater Portola Center Project and a limited violation period;

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<sup>1</sup> This document is prepared and submitted by the Prosecution Team.

3. The violations were caused by a multitude of failures and behaviors that fell woefully short of State Water Resources Control Board's Construction Storm Water General Permit (Order No. 2009-0009-DWQ, as amended, [Construction Storm Water Permit]) requirements and, therefore, cannot be explained away as a singular omission or ignorance in a discrete area.

Therefore, any potential Order should address the significant and repeated non-compliance that was observed during this Project.

The following is the position of the Prosecution Team on these issues:

Is the San Diego Water Board restricted to naming Sunranch and SRC-PH as dischargers? An analysis of applicable Water Code sections, the Enforcement Policy, and Construction Storm Water Permit language demonstrates that the San Diego Water Board has authority to bring enforcement against any entity or individual responsible for an illegal discharge, regardless of whether those persons are permittees, permittee contractors, or other third-party dischargers. The Dischargers named in the ACLC following the May 5, 2021, Stipulation are named because they either are permittees, operated at the Site to the extent that they are directly liable for the violations that occurred, or because they may be held liable pursuant to Responsible Corporate Officer Doctrine.<sup>2</sup> Water Code section 13323 provides the regional boards with authority to issue a complaint and adopt an order imposing liability on “. . . any person to whom administrative civil liability may be imposed . . .” (Water Code section 13323 (a) and (c).) Water Code section 13385 provides that the regional boards may impose civil liability on a “person who violates any of the following . . .” (Water Code section 13385(a).) Neither Water Code section limits the imposition of liability to a Legally Responsible Person (LRP) as the Dischargers state. (See Dischargers' Confidential Brief, p. 27.) The ability of the San Diego Water Board to impose liability on persons other than the LRP has been exercised many times. The San Diego Water Board's ability to identify dischargers and hold them liable for violations of the law extends to applying direct liability for those who operated at the Site or per the Responsible Corporate Officer doctrine. The application of these theories may be necessary for the Board to adequately identify a discharger.

Is it appropriate to assess a per gallon liability for the alleged discharges of stormwater runoff from the Site? Water Code section 13385 offers the Prosecution Team the discretion to charge a daily liability, a per gallon liability, or both for alleged discharges. Several regional boards have issued both daily and volume-based liabilities for unauthorized discharges under the Construction Storm Water Permit, including a multimillion-dollar liability in Region 1. While this is the first time that a contested Construction Storm Water Permit case has been presented to this Board in which both a daily and a per gallon liability is proposed, this Board has discretion to do so and should be based upon the severity and repetitive nature of the violations. Moreover, there have been several settled Construction Storm Water Permit cases that include a per gallon liability in this Region, as well as settled and contested cases for Sanitary

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<sup>2</sup> Responsible Corporate Officer doctrine operates to hold individuals in responsible positions of authority personally liable for violating strict liability statutes that are intended to protect the public welfare.

Sewer Overflows and Clean Water Act section 401 Water Quality Certification violations. While the Prosecution Team did not have sufficient information to recommend a per gallon liability in the San Altos case—the last contested Construction Storm Water Permit case brought before this Board, the Prosecution Team does here. A thorough analysis by both the Prosecution Team and the Dischargers has been done on the volume of stormwater runoff discharged from the Site. Furthermore, a per gallon liability is warranted here to set a sufficient deterrent given the seriousness and characteristics of the violations, which were repeated despite increasing warnings, orders to cease and desist, and in blatant disregard of any environmental regulation, reflected in either the City of Lake Forest municipal code or Water Code.

What volume was discharged from the Site? The parties disagree over which stormwater runoff model should be used to calculate the runoff volume as well as which precipitation data and other inputs should be used. In selecting the appropriate model, both the reliability and availability of information were considered by the Prosecution Team. Additionally, the parties disagree over how much onsite storage of stormwater runoff existed during the discharges, which impacts the calculation of stormwater that left the Site. Finally, the Dischargers have expressed that the Prosecution Team's expert witness (State Board staff Bryan Elder) is not qualified to provide expert testimony on this matter. The PT disagrees. Mr. Elder has testified in multiple ACL cases before regional boards on both volume estimation and economic benefit. Additionally, in his role as supervisor of the State Board's Special Investigations Unit, Mr. Elder provides training and support for regional board staff on these subjects.

Were the discharges to waters of the United States (WOTUS)? The Dischargers assert that Aliso Creek and its tributaries are WOTUS under the rule in place at the time of the violations. They argue, however, that the unnamed tributaries are not WOTUS under the current rule, which they argue is retroactive. The current rule is not retroactive. Additionally, the San Diego Water Board has jurisdiction to impose liability for the discharge violations regardless of whether the unnamed tributaries are WOTUS based upon discharge prohibitions in the Construction Storm Water Permit.

What is the appropriate level of due process and evidentiary support for this administrative hearing, and other adjudicative actions? The Dischargers provided extensive objections to both the evidence provided in support of the ACLC, and the hearing process to determine an appropriate liability. Many of these objections are more appropriately made in the context of civil litigation, but in the administrative law arena frustrate the public policy of administrative proceedings for environmental monetary liabilities. (See August 4, 2021 Evidentiary Ruling, p. 4). The applicable evidentiary standard for the upcoming hearing is based on Government Code section 11513, and not technical rules of evidence. (*Id.*, p. 2) Nonetheless, the Dischargers continue to assert technical objections to evidence that was prepared and submitted by them, their environmental consultants, or the City of Lake Forest, who had primary jurisdiction over the project and the issuance of grading permits.

For example, one of the Dischargers' main points of contention is the use of photographs taken by City of Lake Forest inspectors throughout the violation period. These

photographs were taken in the course of Lake Forest employees' official duty and contemporaneously with the construction activities occurring at the time. Lake Forest is required to document violations at construction sites in its jurisdiction pursuant to its municipal code, as well as the MS4 Permit. Thousands of photographs were taken and provided to the San Diego Water Board. The Dischargers allege such photographs do not have adequate foundation because they cannot be attributed to one of the three City inspectors. The Dischargers ignore the appropriate threshold for evidence in an administrative hearing and instead challenge the photographs when they, in limited instances, fail to contain correct metadata related to their location. The Prosecution Team has independently visited the Site and verified the photographs prior to submitting them into evidence. These photographs are the type of evidence typically relied upon in these types of administrative hearings. Additionally, the City staff responsible for the photographs and documents will be available during the hearing to testify, if called upon to do so. Finally, an overwhelming majority of violations are supported by multiple photographs.

Furthermore, due process requires notice and an opportunity to be heard. In this matter, Dischargers have continually objected to hearing times and other procedural directives that are within the discretion of the Advisory Team. For example, despite multiple hearing procedures and rulings providing each side with four hours, exclusive of board member questioning, the Dischargers continued to seek additional time or referral of the matter to another forum. (See August 19, 2021 Ruling after Pre-hearing Conference; Dischargers' correspondence dated September 2, 2021, p.5). The Dischargers have also objected to a virtual hearing, notwithstanding the fact that multiple depositions proceeded in this matter virtually with no issues, as well as government orders that allowed civil and criminal matters to proceed virtually to reduce COVID-19 risks. The current hearing procedures provide for a multiple-day hearing, to highlight key points of the written record, which was unlimited. Barring additional time, the Dischargers requested referral to another forum. The Advisory Team denied referral (August 19, 2021 Ruling, p.5), but did provide additional time via a phased hearing (September 29, 2021 Advisory Team Response).

Regional board staff, led by the Assistant Executive Officer and guided by publicly-determined regional goals, is responsible for providing due process for all regulated entities and individuals, and utilizes a number of enforcement tools, including more informal notices of violation, cooperative agreements, settlement discussions, and compliance efforts to protect its region's waters. The processes provided in this matter – multiple written notices of violation, cease and desist orders, inspection reports which identified violations, settlement discussions covering both legal and technical topics – failed to quickly return the Site to compliance or resolve this matter. It is only after exhaustion of such tools that the Prosecution Team commenced an adversarial hearing. The hearing comes after extensive discovery by the Dischargers, and the objection to the board's authority, rather than the presentation of credible exculpatory evidence. The nature of this matter, and the protections afforded to the Dischargers, are appropriate pursuant to the Administrative Procedures Act and further direction developed in the Enforcement Policy. The Dischargers' demands for increased burdens of proof, lengthy delays, and additional procedural safeguards are not appropriate for liability actions of this type.

Is the Prosecution Team's discretion when applying the State Board's Enforcement Policy liability calculation methodology acceptable in this instance and other cases? Does San Diego Water Board staff have the necessary qualifications to make recommendations in liability actions to be considered by the San Diego Water Board? The Prosecution Team evaluated the Enforcement Policy factors consistent with the San Diego Water Board's rulings on the San Altos matter and directives from the Office of Enforcement, in consultation with its counsel. Further, consistent with recent stormwater cases statewide, the Prosecution Team also developed a volume calculation with the assistance of staff from the Special Investigations Unit at the State Water Board. The Dischargers argue that both San Diego Water Board and State Board staff are not qualified to make Enforcement Policy recommendations. The Dischargers have also argued that the San Diego Water Board does not have the jurisdiction to resolve this matter.

Notwithstanding prosecution staff's familiarity with the Enforcement Policy, which was examined in deposition and can be summarized again at hearing, the Dischargers' position deviates from the Enforcement Policy significantly. The Dischargers' expert, Rincon Consultants, Inc. (Rincon), developed its own approach to evaluate "Deviation from Requirements" and "Culpability," rather than implementing the definitions and guidance provided by the Enforcement Policy. As a result of this fabricated process, Rincon troublingly combines two liability factors into one analysis. This shows a clear misunderstanding by Rincon of the Enforcement Policy's liability calculation methodology and underscores the need to analyze each factor independently. Pursuant to the Enforcement Policy, "Deviation from Requirement" is an analysis regarding the effectiveness of a permit requirement in light of the extent to which a violation deviated from that requirement. (PT Ex. 175 PDF p. 19 of 63.) The "Culpability" analysis focuses, instead, on the reasonableness of a discharger's actions or inactions leading up to the violation. Although the evidence used to make these analyses (i.e. photographs, reports, etc.) can apply to both factors, the analyses themselves differ. In contrast to the Rincon approach, the Prosecution Team looked at all of the evidence (photographs, videos, inspection reports, etc.) for all of the alleged days of violation for a particular violation type in assessing the "Deviation from Requirement" and "Culpability" scores; it was not on a day-by-day or photo-by-photo analysis, but based instead on the totality of the evidence for each violation type.

Additionally, Rincon incorporated a four-element "Fate and Transport" model (Contaminant Source, Release Mechanism, Transport Pathway, and Receptor Analysis) in lieu of the Enforcement Policy's intended analysis of "Potential for Harm to Beneficial Uses." This substitution is unacceptable and would lead to absurd results, and consistently eliminate the Water Code and Enforcement Policy's goal of preventing harm. Following Rincon's logic would altogether eliminate liabilities for non-discharge violations, such as the failure to implement BMPs, because per Rincon's analysis, if there is no discharge, "there can be no potential for harm" to beneficial uses.

### **PRACTICAL VISION**

The San Diego Water Board's regional enforcement priorities align with the [Practical Vision](#) by focusing on violations that affect one or more key beneficial use categories in a key area for that use. This enforcement action is a response to unauthorized discharges of construction stormwater runoff from a large construction site into a key

area for healthy ecosystems. The area affected includes the Whiting Ranch Wilderness Park and the wetland habitat surrounding Aliso Creek. Additionally, the Site is in the middle of the regional wildlife movement corridor for the Cleveland National Forest, O'Neill Regional Park and Whiting Ranch Wilderness Park. (See PT Exhibit 334, Portola Center Project 401 Application, at page 226; and Exhibit 339, HMMP, at page 8.)

### **DISCUSSION**

The San Diego Water Board will receive evidence and testimony related to ACLC No. R9-2020-0006. The hearing will be conducted in accordance with the Revised Final Hearing Procedure issued October 25, 2021 (Supporting Document 4) and applicable laws and regulations. Upon the conclusion of the hearing, the San Diego Water Board may meet in closed session to consider the evidence and to deliberate on a decision to be reached based upon that evidence [Authorized under Government Code section 11126(c)(3)].

### **LEGAL CONCERNS**

Is issuance of an order to parties other than the permittee or entity that provided the Notice of Intent to comply with the Construction Storm Water Permit requirements (NOI) pursuant to the Construction Storm Water Permit permissible? Is such an order appropriate here?

To what extent does the Regional Board have discretion to impose liability for unauthorized discharges given the WOTUS rule, the language of the CGP, and Water Code?

### **PUBLIC NOTICE (Revised by Advisory Team)**

The Advisory Team will issue an updated Tentative Order at a later date.

The agenda notice for today's meeting was posted on the San Diego Water Board's website and sent to subscribers to the email list for San Diego Water Board meetings. This satisfies the Bagley-Keene Open Meeting Act requirements to publish the meeting notice and agenda.

### **SUPPORTING DOCUMENTS (Document list revised by Advisory Team. Additional supporting materials are available. Members of the public should contact Frank Melbourn for exhibit lists or to request copies.)**

1. Prosecution Team Proposed Order No. R9-2021-0119
2. Prosecution Team Proposed Order No. R9-2021-0119 Attachment A, Administrative Liability Methodology Summary
- 3a. Dischargers' Proposed Order
- 3b. Dischargers' Proposed Order, Table 2
4. Revised Final Hearing Procedure (October 2021)
5. Administrative Civil Liability Complaint No. R9-2020-0006
6. Interested Person Comment, Orange County Coastkeeper
7. Interested Person Comment, Tom Bistline Construction, Inc.