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BEFORE THE CALIFORNIA WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

IN THE MATTER OF:)	PROSECUTION'S RESPONSE TO
)	DISCHARGER'S OBJECTIONS TO
LOS ALTOS-LEMON GROVE, LLC)	ADMIT SUPPLEMENTAL EVIDENCE
)	
)	Administrative Complaint
)	No. R9-2015-0110

I. Introduction

The Prosecution Team submitted its evidence, equivalent to its case-in-chief, on December 4, 2015, consistent with the Hearing Procedures issued on the same day. At the Los Altos-Lemon Grove, LLC's (Discharger's) request, the February 10, 2016 hearing was subsequently moved to March 9, 2016, and the Discharger's evidence, arguments or analysis due date was moved from January 4 to February 3, 2016. After the Discharger's attorneys deposed nine potential witnesses, new information arose leading the Prosecution Team to request an opportunity to submit additional evidence on February 2. After the Discharger objected, the Advisory Team requested the Prosecution Team to submit the proposed evidence for its review along with a response to the objections. This brief responds to the Discharger's objections, describes the timing of the request and why the evidence should be included in the record, confirms that there are no changes to the Complaint issued October 19, 2015, and confirms the Prosecution is ready to proceed with having this administrative liability hearing on March 9, 2016.

1 **II. The Advisory Team should admit the City of Lemon Grove photos and Regional**
2 **Board staff photos that are already in the record but are of a better quality,**
3 **more accurately depicting site conditions.**

4 The Discharger subpoenaed City of Lemon Grove (City) staff and D-Max
5 Engineering, Inc., employees for depositions, and to produce all documents,
6 communications, etc. related to inspections at the Valencia Hills construction site (Site)
7 the last week in December 2015. Contained in the documents produced by the City were
8 better copies of the photos that accompanied the City and D-Max Engineering site
9 inspection reports. Prior to the depositions, Regional Board staff had pdf copies of the
10 reports with the photos already imbedded, which were blurry and small. With the original
11 photos in their jpeg form from the City's document production, one can best view the
12 images, providing the Board Members with more and better information.

13 The Prosecution Team seeks to provide these five photos in an electronic and 8 ½" x
14 11" hard copy format for the ease of all parties to use at hearing, and to make it easier for
15 the Board Members and members of the public to view. The Prosecution Team is also
16 offering 40 better quality photographs that accompanied its own site inspections after
17 recognizing that the higher resolution photos would benefit the Board's consideration of
18 the violations alleged in this matter.

19 The Discharger has failed to state how better quality pictures could possibly
20 prejudice its case. It is unfathomable to suggest better quality pictures are sufficient
21 reason for a three month delay in the Board hearing this administrative civil liability.

22 **III. The Advisory Team should admit the new City of Lemon Grove photos because**
23 **they supplement existing evidence and the Discharger has had sufficient time**
24 **to consider these additional photos.**

25 The Prosecution Team is seeking to admit 70 photos from the City that are not
26 presently in the record. These photos were produced in accordance with the Discharger's
27 subpoenas to City staff and D-Max employees on December 28, 2015. Not allowing the
28 Prosecution to submit them now, over four weeks before the hearing date, would
prejudice the Prosecution because the Prosecution did not possess these photos before
its December 4, 2015 evidence submission due date. The photos are only offered to

1 support violations already alleged in the Complaint and to supplement existing evidence in
2 the record. City staff and D-Max Engineering employees can verify the accuracy of the
3 photos relaying site conditions, and the photos would assist in providing the Board
4 Members with a broader context of the site conditions. There should be no surprise to the
5 Discharger as the photos were taken at the site to document site conditions known to the
6 Discharge at the time the photos were taken.

7 The Discharger has had a sufficient amount of time to consider this set of photos in
8 building its evidence, legal and technical argument or analysis. The Discharger also has
9 the opportunity to respond to these photos by submitting any rebuttal evidence it may
10 have on February 17, 2016. There is no detriment in admitting them into the record at this
11 point in time.

12 **IV. The Advisory Team should admit the December 2014 City inspector notes and**
13 **letter, January 2015 BMP walk notes and photos, the May 15, 2015 D-Max**
14 **Engineering Memo, additional Regional Board staff photos, weather data, and**
15 **the Stormwater Pollution Prevention Plan (SWPPP) because they provide a**
more comprehensive understanding of the site conditions and permit¹
violations for the Board Members

16 The evidence package the Prosecution Team submitted on December 4, 2015,
17 combined with testimony at hearing, sufficiently supports the violations for the Regional
18 Board to find the allegations in the Complaint true. However, over the course of
19 defending numerous depositions and reviewing documents produced by the City and D-
20 Max Engineering in response to the Discharger's subpoenas, the Prosecution Team has
21 discovered additional evidence that supplements and supports the evidence already in the
22 record related to certain alleged violations. The evidence is offered now to give the Board
23 a complete and accurate picture of the site conditions that resulted in the Complaint being
24 issued. The Discharger, as the owner of the site, should be well aware of the site

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27 ¹ State Water Resources Control Board Order No. 2009-0009-DWQ, as amended by Order Nos. 2010-0014-
28 DWQ and 2012-0006-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for
Storm Water Discharges Associated with Construction and Land Disturbance Activities.*

1 conditions throughout the history of the project. The additional evidence is not being
2 offered to support any new violations. The supplemental evidence offered by the
3 Prosecution Team includes: the City's December 16, 2014 letter and December 24, 2014
4 inspection report; the Discharger's January 1, 2015 Response to Notice of Violation
5 (NOV); the Discharger's January 19, 2015 BMP walk notes and photos; the D-Max
6 Engineering May 15, 2015 memo; additional Regional Board staff photos, and the
7 SWPPP. These items will assist in explaining the specific nuances to each violation, such
8 as which portions of the site were considered active or inactive pursuant to the
9 Construction General Permit's language, and when it was raining. None of these items
10 were solely relied upon in issuing the Complaint, but are offered now to provide a more
11 complete picture to the Regional Board.

12 The Discharger has not asserted whether or how it will be prejudiced by these
13 specific items. Procedurally, the Discharger will have an opportunity to rebut them on
14 February 17, removing any due process concerns. In fact, much of this information would
15 likely be included in the Prosecution's rebuttal; admitting it now provides the Discharger
16 with additional time to review and respond to it.

17 **V. The Prosecution is Ready to Proceed with the Hearing on March 9, 2016**

18 None of the supplemental proffered evidence changes the violations alleged in the
19 Complaint issued October 19, 2015. The Prosecution will not seek to add violations for
20 liability to the Complaint or for the Board to find true at the Hearing. The better quality
21 photos that are already in the record that the Prosecution seeks to add now do not
22 change anything substantial but are offered to the Discharger and the Board for easier
23 viewing at hearing. The additional photos not already in the record will provide better
24 visual understanding of the site conditions during the time periods alleged in the
25 Complaint, including weather conditions and views of the same BMPs from different
26 angles. The Prosecution will not seek to add additional violations for liability based upon
27 these photos.

1 The SWPPP is essentially a reference item. Instead of merely providing a location
2 of where one could find it in the public file (23.CCR 648.3), the Prosecution is offering to
3 have copies available at the hearing for the ease of the Board Members to review.
4 Having the SWPPP present at hearing does not change the nature or the Complaint in
5 any manner.

6 The Prosecution intends on using the remaining items for additional support for the
7 alleged violations already contained in the Complaint. It does not intend to add violations
8 for liability at the hearing or to amend the violations alleged in the Complaint.

9 The proposed supplemental evidence support and add to the evidence for the
10 Complaint that is already in the record. It is not intended to modify the Complaint or
11 alleged violations. Therefore, the Prosecution is ready to proceed to hearing on March 9,
12 2016, and does not intend on requesting a continuance or to withdraw the Complaint
13 based on the Advisory Team's ruling on the supplemental evidence.

14 The Prosecution does, however, reserve the right to submit a portion, all, or more
15 evidence as responsive to the Discharger's evidence upon rebuttal.

16 **VI. Conclusions**

17 The San Diego Water Board endeavors to avoid surprise testimony or evidence.
18 None of the proposed supplemental evidence is a surprise since it supports what is
19 already in the record pertaining to site conditions, and the Discharger knows the site
20 conditions better than anyone else as it is the property owner. The Prosecution is not
21 expanding on any of the alleged violations. The Discharger is not prejudiced by the
22 proposed supplemental evidence, and has an opportunity to respond to it when rebuttal
23 evidence is due February 17, 2016. The Prosecution Team respectfully requests to admit
24 the proposed supplemental evidence for hearing on March 9, 2016.

25 DATED: February 4, 2016

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28 Laura J. Drabandt, Senior Staff Counsel
Office of Enforcement
State Water Resources Control Board