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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 EVIDENTIARY OBJECTIONS TO THE WRITTEN EVIDENCE AND EXHIBITS SUBMITTED BY THE REGIONAL WATER QUALITY CONTROL BOARD'S PROSECUTION TEAM IN SUPPORT OF ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R9-2015-0110 AND SUBMISSION OF REBUTTAL EVIDENCE**

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I. INTRODUCTION

On October 19, 2015 the San Diego Regional Water Quality Control Board ("RWQCB") served San Altos–Lemon Grove, LLC ("San Altos") with Administrative Civil Liability Complaint R9-2015-0110 ("ACLC")[1] alleging 136 violations of the Storm Water Construction General Permit (the "Permit")[2] at its work-force housing project on San Altos Place in Lemon Grove ("the Site"). On December 4, 2015, the RWQCB Prosecution Team ("Prosecution") submitted the evidence and policy statements on which it intended to rely for the prosecution of the ACLC. Relying on this disclosure, San Altos issued subpoenas, collected documents and took 9 depositions to prepare its own evidence, which it submitted on February 3, 2016.

On February 2, 2016, the day before San Altos' Legal and Technical Arguments were due, the Prosecution asked to introduce a significant amount of new evidence. Despite San Altos' request to have a reasonable opportunity to review and potentially object to this new evidence, the Advisory Team submitted the Prosecution's request to the RWQCB's Chair, who provisionally accepted much of the evidence. This was a violation of due process.

San Altos therefore submits these evidentiary objections in accordance with the timeline stated in the Advisory Team's letter of February 8, 2016. As detailed below, San Altos objects to the following evidence which the Prosecution seeks to introduce:

1. Evidence relying solely on inspections performed by the City of Lemon Grove and its contractor, D-Max Engineering, should be excluded as these inspections were not performed for the purpose of inspecting the Site for compliance with the Permit.

2. Evidence relying solely on inspections or enforcement actions performed by Gary Harper or Leon Firsht should be excluded as these individuals not qualified to inspect for compliance with the Permit.

3. Evidence and arguments that discharges from the Site allegedly transported pollutants such as metals, and arguments in support of penalties on that basis should be excluded.

4. Evidence and arguments of alleged violations for failure to implement erosion control BMPs in inactive areas (Violation No. 4) and failure to implement erosion control BMPs in active areas (Violation No. 6) at the Site must be excluded for lack of foundation.

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[1] RWQCB Compl. No. R9-2015-0110 for Administrative Civil Liability (October 19, 2015).

[2] State Water Resources Control Board Order No. 2009-2009-DWQ, amended by Orders Nos. 2010-0014-DWQ and 2012-0006-DWQ, National Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (2009).

5. Evidence of "unique facts" that support violations or penalties sought for this Site should be excluded as Ms. Clemente refused to state such facts on the basis of attorney-client privilege.

6. The additional evidence submitted by the Prosecution after its submittal on December 4, 2015, should be excluded as it violates San Altos' due process rights.

7. The 98 new photographs, the SWPPP, and six of the eight QSP reports should be excluded as surprise evidence that was improperly submitted and is not rebuttal evidence.

As further explained below, this evidence must be excluded from the record and the March 9 hearing. San Altos also submits rebuttal evidence identified at Section II.E. of this brief.

II. EVIDENTIARY OBJECTIONS & REBUTTAL EVIDENCE

A. Evidence relying solely on inspections performed by the City of Lemon Grove and D-Max Engineering should be excluded as irrelevant and prejudicial.

At the ACLC hearing, only relevant evidence is to be admitted. Evidence is "relevant" if it is, "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs . . . ." Cal. Govt. Code § 11513(c). For this case, all of the inspection reports, enforcement documents, and administrative citations issued by the City of Lemon Grove ("City") or its contractor, D-Max Engineering ("D-Max"), to San Altos should be excluded as they are not relevant to the issue of whether or not San Altos violated the Permit because neither the City nor D-Max was inspecting the Site for compliance with the Permit.

Between December 2, 2014 and January 14, 2015, the City, or its agents, inspected the Project roughly twenty times.[3] All of the City's representatives, including the City's Storm Water Manager, stated that these inspections were to assure compliance with the City's Jurisdictional Urban Runoff Management Plan ("JURMP") and Municipal Ordinances, not to evaluate compliance with the Permit.[4]

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[3] Technical Analysis for ACLC No. R9-2015-0110 (October 19, 2015), p. ii ("Technical Analysis").

[4] Deposition of Malik Tamimi (Dec. 28, 2015) ("Tamimi Depo."), p. 29:2-10 (excerpts provided at Exhibit J to the Declaration of Dee Dee Everett in support of San Altos' Legal and Technical Analysis ("Everett Dec.")); Deposition of Leon Firsht (Dec. 28, 2015) ("Firsht Depo."), p. 11:17-25, 12:1-6 (excerpts at Everett Dec., Ex. C); Deposition of Gary Harper (Dec. 28, 2015) ("Harper Depo."), p. 17:1-23, 35:18-25, 36:1-2 (excerpts at Everett Dec., Ex. D); and Deposition of Tad Nakatani (Dec. 29, 2015) ("Nakatani Depo."), p. 24:15-25, 25:1-7 (excerpts at Everett Dec., Ex. G).

This fact is significant because compliance with the JURMP and the City's Ordinances can be very different than compliance with the Permit. For example, the Permit defines "active" areas as those that have been disturbed and are scheduled to be redisturbed within 14 days.[5] But the City's definition of "active" is whether an area will be disturbed in 10 days.[6] Thus, on the 11th day, an area that has not been redisturbed would be "inactive" under the City's JURMP, but "active" under the Permit. Thus, it is clear that non-compliance with the City's JURMP does not necessarily mean non-compliance with the Permit. The two simply are not the same.

Since the City was not inspecting the Site for compliance with the Permit, no responsible person can rely solely on the City's inspections to determine whether or not the Site was in compliance with the Permit on any of those days. Therefore, pursuant to Government Code Section 11513(c), the following documents should be excluded from the hearing:

Exhibit No. 2 to Technical Analysis ("TA") (City Stop Work Notice December 2, 2014)
Exhibit No. 3 to TA (City Stop Work Notice December 4, 2014)
Exhibit No. 4 to TA (City Inspection Report December 8, 2014)
Exhibit No. 5 to TA (City Inspection Report December 9, 2014)
Exhibit No. 6 to TA (City Administrative Citation December 11, 2014)
Exhibit No. 7 to TA (City Administrative Citation December 15, 2014)
Exhibit No. 9 to TA (City Letter with Administrative Citation and Inspection Report December 16, 2014)
Exhibit No. 10 to TA (City Contractor Report December 17, 2014)
Exhibit No. 12 to TA (City Contractor Report December 31, 2014)
Exhibit No. 13 to TA (City Inspection Report March 18, 2015)
Exhibit No. 14 to TA (City Administrative Citation March 19, 2015)
Exhibit No. 15 to TA (City Correct Work Notice March 24, 2015)
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Exhibit No. 21 to TA (City Administrative Citation September 15, 2015)
Exhibit No. 22 to TA (City Inspection Report September 15, 2015)
Exhibit No. 23 to TA (City Administrative Citation October 5, 2015)

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[5] Permit, App. 5, p. 1, 4 (attached at Declaration of Wayne Rosenbaum in support of San Altos' Legal and Technical Analysis ("Rosenbaum Dec."), Ex. A).

[6] Harper Depo., p. 31:14-20 (excerpts at Everett Dec., Ex. D); Nakatani Depo., p. 26:6-24 (excerpts at Everett Dec., Ex. G).

Exhibit No. 24 to TA (City Contractor Report January 16, 2015)
Exhibit No. 25 to TA (City Inspection Report January 6, 2015)
Exhibit No. 26 to TA (City Inspection Report January 14, 2015)

Similarly, any arguments by the Prosecution that these documents, on their own, establish violations of the Permit should be excluded as no "responsible person" could rely on them for this purpose, and thus such arguments are not relevant under Government Code § 11513(c).

B. <u>All Inspection and Enforcement Documents relying on inspections by Mr. Harper or Mr. Firsht should be excluded as they are not qualified to inspect for the Permit.</u>

The two primary people at the City of Lemon Grove who inspected the Site and issued administrative citations were Gary Harper, a City inspector, and Leon Firsht, the former City Engineer for the City of Lemon Grove. Mr. Harper is an engineer by training; he has had no formal training in construction storm water management. Mr. Harper testified that he had two trainings on "stormwater" in approximately five years that lasted "maybe an hour or two."[7] Mr. Harper further testified that he was not familiar with the Permit.[8]

Mr. Firsht is also an engineer[9] and had no formal training on construction storm water issues. Mr. Firsht testified that he had two in-house trainings which were about half an hour.[10]

Mr. Harper is not familiar with the Permit and is therefore clearly not qualified to inspect the Site for compliance with the Permit. And Mr. Firsht, who testified that he had about one hour total of training on construction stormwater management, is clearly not qualified to issue citations that are evidence of violations of the Permit. Given their lack of qualifications, no "responsible persons" would "rely [on these reports] in the conduct of serious affairs." Therefore, neither Mr. Harper's reports nor Mr. Firsht's citations are relevant under Government Code § 11513(c) and the following documents should be excluded:

Exhibit No. 2 to TA (City Stop Work Notice December 2, 2014, issued by Harper)

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[7] Harper Depo., p. 12:3-25, 13:1-25, 14:1-25 (excerpts at Everett Dec., Ex. D).

[8] Harper Depo., p. 15:1-14 (excerpts at Everett Dec., Ex. G).

[9] Firsht Depo., p. 8:20-25, 9:1-25, 10:1-3, Ex. 2 (Deposition of Leon Firsht lodged on Feb. 3, 2016).

[10] Firsht Depo., p. 10:7-20, Ex. B (excerpts at Everett Dec., Ex. C)

Exhibit No. 3 to TA (City Stop Work Notice December 4, 2014, issued by Harper)
Exhibit No. 4 to TA (City Inspection Report December 8, 2014, issued by Harper)
Exhibit No. 5 to TA (City Inspection Report December 9, 2014, issued by Harper)
Exhibit No. 6 to TA (City Administrative Citation December 11, 2014, issued by Firsht)
Exhibit No. 7 to TA (City Administrative Citation December 15, 2014, issued by Firsht)
Exhibit No. 9 to TA (City Letter with Administrative Citation and Inspection Report December 16, 2014, issued by Firsht)
Exhibit No. 14 to TA (City Administrative Citation March 19, 2015, issued by Firsht)
Exhibit No. 15 to TA (City Correct Work Notice March 24, 2015, issued by Harper)

Similarly, any arguments by the Prosecution that these documents, on their own, establish violations of the Permit should be excluded as no "responsible person" could rely on them for this purpose, and thus such arguments are not relevant under Government Code § 11513(c).

C. <u>All evidence and arguments that discharges from the Site allegedly transported other pollutants such as metals, and any arguments in support of penalties on that basis, should be excluded.</u>

When calculating the per day factor for penalties for alleged Violation No. 1, the Prosecution asserts that, "Storm water runoff containing sediment discharge from the Site likely transported other pollutants such as metals" which would allegedly further degrade Chollas Creek.[11] When asked what evidence there was of metals in the sediment, RWQCB staff member Frank Melbourn testified that he relied on studies that sediment from construction sites contains metals. But Mr. Melbourn could not identify the studies on which he relied for this assertion and admitted that he did not have samples from the Site.[12]

The Prosecution cannot now introduce testimony or exhibits to support this allegation. Any such evidence would require expert witness analysis, but since the Prosecution has not identified the studies on which it relied for this conclusion, San Altos cannot prepare a response and will not be able to identify an expert witness to opine on such studies. Therefore, any

[11] Technical Analysis, p. 36

[12] Deposition of Frank Melbourn (January 13-14, 2016) ("Melbourn Depo."), Vol. I, p. 33:23-25, 34:1-5, 47:25, 48:1-6, 52:23-25, 53:1-13 (excerpts at Everett Decl., Ex. E).

studies, documents, or testimony to support the assertion that the storm water runoff containing sediment discharge from the Site likely transported pollutants such as metals must be excluded.

D. <u>All evidence and arguments of alleged violations for failure to implement erosion control BMPs in inactive areas (Violation No. 4) and failure to implement erosion control BMPs in active areas (Violation No. 6) at the Site for December 5-9, 2014, January 6 & 14 and May 9-12 & 14, 2015 must be excluded for lack of foundation.</u>

Two of the violations alleged against San Altos are failure to implement erosion control BMPS in inactive areas at the Site (Violation No. 4) and failure to implement erosion control at "active" areas at the Site (Violation No. 6) for 22 specific days. The alleged "evidence" for 12 of these days must be excluded as it lacks foundation.

These alleged violations must necessarily be based on identifying which areas are "active" vs. "inactive." Presumably, to allege this violation, the Prosecution would have evidence of which areas at the Site were "active" or "inactive" but they do not. With respect to December 5-7 and May 9-12 and 14, nobody visited the Site on these days, and therefore there is no evidence of which areas were "active" vs. "inactive."

Indeed, RWQCB staff admitted that it had no knowledge of the Project's schedule until March 27, 2015 (at which time Mr. Melbourn admits that they mostly discussed the future schedule of the project).[13] Therefore, in December 2014 and January 2015, RWQCB staff did not know which areas were active or inactive. The Prosecution attempts to bridge this gap by having Mr. Melbourn review photographs almost one year later and opine on whether an area was "active" or "inactive" in December 2014 or January 2015 based on his opinion of what he learned about the Site in March 2015.[14] None of the allegations for December 5-7 and May 9-12 and 14 are based on anyone ever asking Site representatives which areas were active or inactive.

For December 8 and 9 and January 6 and 14, the Prosecution relies on reports prepared

[13] Melbourn Depo., Vol. II, p. 60:16-25, 61:1-12 (excerpts at Everett Dec., Ex. F).

[14] Melbourn Depo., Vol. I, p. 77:13-24, Vol. II, p. 60:16-25, 61:1-12 (excerpts at Everett Dec., Ex. E, F).

by Mr. Harper and Mr. Nakatani as evidence of insufficient BMPs in inactive areas.[15] But both Mr. Harper and Mr. Nakatani testified that they were inspecting for compliance with the City's ordinances (which defines inactive areas as those areas that are not scheduled to be disturbed for ten days, not 14 as provided by Permit)[16] and both admitted that they did not talk to anyone at the Site about what work was scheduled for the next two weeks.[17] Mr. Melbourn also admitted that he did not ask anyone at the Site which areas were being used to implement new BMPs during that time, or if they were performing any work (despite the Stop Work Notice).[18] Mr. Melbourn assumed he knew which areas were inactive based on information he learned about the Project's schedule in March 2015, but he never asked anyone about any specific areas[19] and he never discussed the pictures or reports of those days with those who prepared them.[20]

Evidence is "relevant" if it is, "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs . . . ." Cal. Govt. Code § 11513(c). No responsible person could rely on pure assumptions to find violations warranting hundreds of thousands dollars of penalties. Therefore, all evidence and arguments of alleged violations of failure to implement erosion control BMPs in inactive areas (Violation No. 4) and failure to implement erosion control BMPs in active areas (Violation No. 6) at the Site for December 5-9, 2014, January 6 & 14, and May 9-12 & 14, 2015, must be excluded as not relevant. Furthermore, the following exhibits should be excluded for the purpose of establishing which areas were "active" vs. "inactive" as the persons who prepared these reports (Mr. Harper and Mr. Nakatani) stated that they did not ask anyone which areas were active or inactive and Mr. Melbourn did not ask anyone which areas were active or inactive on those dates.

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[15] Technical Analysis, Ex. 4, 5, 24, 25.

[16] Nakatani Depo., p. 26:6-25, 27:1-5; Harper Depo., p. 31:14-20 (excerpts at Everett Dec., Ex, G, Ex. D).

[17] Harper Depo., p. 76:14-20; Nakatani Depo., p. 76:14-20 (excerpts at Everett Dec., Ex., D, Ex. G).

[18] Melbourn Depo., Vol. I, p. 77:13-24, 86:3-5, 89:8-17, 90:1-18, 116:4-6, 163:12-23 (excerpts at Everett Dec., Ex. E); Chiu Depo., p. 39:12-25 (excerpts at Everett Dec., Ex. A).

[19] Melbourn Depo., Vol. I, p. 163:12-23, Vol. II, p. 60:16-25, 61:1-12 (excerpts at Everett Dec., Ex. E, F).

[20] Melbourn Depo., Vol. I, p. 16:2-15, 37:16-25, 38:1-5, 66:23-25, 67:1-4, 70:5-6 (excerpts at Everett Dec., Ex. E).

Exhibit No. 4 to TA (City Inspection Report December 8, 2014 – issued by Harper)
Exhibit No. 5 to TA (City Inspection Report December 9, 2014 – issued by Nakatani)
Exhibit No. 25 to TA (City Inspection Report January 6, 2015 – issued by Nakatani)
Exhibit No. 26 to TA (City Inspection Report January 14, 2015 – issued by Nakatani)

Since these exhibits do not demonstrate which areas were active or inactive (and indeed applied a different standard), no responsible person would rely on them for such purpose, and they must be excluded as not relevant under Government Code Section 11513(c).

E. <u>San Altos submits rebuttal evidence on identifying "active" versus "inactive" areas solely from photographs.</u>

Much of the Prosecution's evidence regarding the sufficiency of San Altos' BMPs in "active" or "inactive" areas, or whether stockpiles were "active," are based on Mr. Melbourn's testimony of reviewing photographs and determining and opining on whether the area was "active" or "inactive." To rebut this evidence, San Altos submits photographs, attached as Exhibit N to Wayne Rosenbaum's Declaration in support of San Altos' Evidentiary Objections and Rebuttal Evidence, which it will use during the March 9, 2016 hearing to address the ability of RWQCB staff to identify "active" vs. "inactive" areas based on photographs. [21]

F. <u>Any evidence of "unique facts" not identified in the ACLC and Technical Analysis to support the violations or penalties sought for this Site should be excluded as Ms. Clemente refused to state such facts on the basis of attorney-client privilege.</u>

The State Water Resource Control Board's Enforcement Policy requires Regional Boards to be fair, firm, and consistent in prosecuting enforcement actions while recognizing the unique facts of each case.[22] When asked at deposition to identify the unique facts that warrant the proposed penalties in this case, Ms. Chiara Clemente, Supervisor of the Compliance Assurance Unit, would not answer, relying on attorney client privilege.[23]

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[21] In addition to this rebuttal evidence, San Altos will use a Powerpoint and other visual presentations at the hearing. This information will be submitted to the Advisory Team at or before the hearing.

[22] Enforcement Policy, p. 2 (attached as Ex. F to Rosenbaum Dec.).

[23] Deposition of Chiara Clemente (Jan. 22, 2016) ("Clemente Depo."), p. 42:4-16 (excerpts at Everett Dec., Ex. B).

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 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.*

Since the Prosecution refused to reveal what (if any) "unique facts" it relied on alleging the violations and penalties sought for this matter (beyond facts stated in the ACLC, Technical Analysis, or attachments), San Altos was not apprised of such facts and will not have an opportunity to respond. And any suggestion that San Altos can respond to such facts at the hearing does not meet due process standards because a) due process requires a "*reasonable* opportunity to know the claims of the adverse party" and b) is in direct violation of 23 Cal. Code Reg. § 648.4(a) which states, "It is the policy of the State and Regional Boards to discourage the introduction of surprise testimony and exhibits."

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 Prosecution seeks more than $800,000 in penalties. Such new facts therefore cannot be relevant under Government Code § 11513(c) and cannot be admitted.

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G. The additional evidence submitted by the Prosecution should be excluded as it violates San Altos' due process rights.

1. The submission and provisional acceptance of the Prosecution's new and supplemental evidence violates San Altos' due process rights.

As required by the Hearing Procedure for the ACLC in effect at the time, the Prosecution submitted its Evidence and Policy statements on December 4, 2015, which stated that its "Legal and Technical Arguments or Analysis" "was provided with the ACL Complaint package."[24] The Prosecution submitted four documents as its evidence: 1) the ACL Complaint (including the Technical Analysis and attachments); 2) evidence of delivery of the ACLC to San Altos; 3) the California Stormwater Quality Association Construction Storm Water Best Management Practice EC-1 Scheduling; and 4) the Permit.

In reliance on this evidentiary submission, San Altos issued subpoenas, collected hundreds (perhaps thousands) of documents, and conducted depositions of nine witnesses.[25] The purpose of this discovery was to determine the basis of the Prosecution's claims against San Altos so that San Altos would "have an opportunity to refute, test, and explain" these facts as it is entitled to do. And this is exactly what San Altos did: it invested hundreds of hours and tens of thousands of dollars to conduct discovery and prepare its Legal and Technical Arguments and Analysis and supporting evidence, which it was required to submit on February 3, 2016.[26]

On February 2, 2016, *one day* before San Altos was to submit its Legal and Technical Arguments and Analysis, the Prosecution submitted an e-mail seeking to submit additional evidence.[27] While completing its Legal and Technical Arguments (due the next day), San Altos sent an e-mail objecting to the submission of new evidence at such a late date.[28] San Altos

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[24] Declaration of Wayne Rosenbaum in support of San Altos' Evidentiary Objections and Rebuttal Evidence ("Rosenbaum Dec. re Evid. Obj."), ¶ 2, Ex. A.

[25] Rosenbaum Dec. re Evid. Obj., ¶ 3.

[26] Rosenbaum Dec. re Evid. Obj., ¶ 3.

[27] Rosenbaum Dec. re Evid. Obj., ¶ 4, Ex. B.

[28] Rosenbaum Dec. re Evid. Obj., ¶ 5, Ex. C.

requested an opportunity to review the proposed evidence (which was not provided on February 2), and a reasonable opportunity to provide objections to the evidence.

Despite this request, the Advisory Team responded at 4:32 p.m. on February 2 by e-mail, directing the Prosecution to submit its proposed evidence on February 4, and that the Advisory Team would rule on the request as soon as practicable after receiving the submission.[29] The Advisory Team did not provide San Altos with an opportunity to respond to the request.

In the February 2 e-mail, issued at 4:32 p.m., the Advisory Team stated that San Altos could have one additional week (until February 10) to submit its Legal and Technical Arguments to address the new evidence. San Altos responded on February 3 (the day its Legal and Technical Arguments had been due) raising procedural concerns and stating that an extension of one week was insufficient to address new evidence for many reasons, including the fact that San Altos hadn't seen the proposed evidence yet and San Altos would not have a ruling from the Advisory Team about whether the evidence would be accepted until one or two business days before the submission date of February 10, making it impossible to address the evidence in its submission.[30] Given that a significant amount of its Legal and Technical Argument was already in copying and production, San Altos submitted its Legal and Technical Arguments on February 3, but asked that it be given an opportunity to respond to the Prosecution's submission of additional evidence.

The Prosecution submitted the additional evidence on February 4, 2016.[31] In its February 2 e-mail allowing the submission of the additional evidence by the Prosecution, the Advisory Team directed the Prosecution to explain: a) why San Altos would not be prejudiced by the submittal; b) why the evidence was not submitted earlier; and c) confirm that the evidence is not submitted to support changes to the complaint.[32] The brief submitted by the Prosecution on February 4, 2016 failed to adequately address these issues.

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[29] Rosenbaum Dec. re Evid. Obj., ¶ 6, Ex. D.

[30] Rosenbaum Dec. re Evid. Obj., ¶ 7, Ex. E.

[31] Rosenbaum Dec. re Evid. Obj., ¶ 7, Ex. F.

[32] Rosenbaum Dec. re Evid. Obj., ¶ 6, Ex. D.

To address the issue of why San Altos would not be prejudiced by the submittal, the Prosecution stated, "The Discharger has not asserted whether or not it will be prejudiced by these specific items."[33] Well, of course San Altos hadn't asserted whether or not it would be prejudiced – it hadn't been given the opportunity to see the evidence yet. The Prosecution then implied there would be no prejudice because San Altos had seen much of the evidence because it was produced in response to San Altos' subpoenas. This misses the point of due process and why Hearing Procedures provide a specific schedule of when evidence must be submitted.

Due process requires a party to be "apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it . . . ." *Clark v. City of Hermosa Beach*, 48 Cal.App.4th at 1172. Here, the Prosecution seeks to introduce 98 new photographs and multiple documents with no discussion regarding which of the alleged 13 violations the photographs and documents are intended to support. Due process includes "the right to present legal and factual issues in a deliberate and orderly manner." *White v. Board of Medical Quality Assurance*, 128 Cal.App.3d at 705. But it is impossible for San Altos "to present legal and factual issues in a deliberate and orderly manner" in response to this new evidence, or to "refute, test, [or] explain it" without any information regarding which violations the new evidence allegedly supports.

San Altos should not have to guess the purpose of the evidence, but without such information (which was the entire purpose of the depositions – for each violation San Altos asked RWQCB staff to identify all evidence on which it relied for each violation),[34] it is impossible for San Altos to submit rebuttal evidence. The first time that San Altos will learn the purpose of this evidence will be at the hearing. This means it will be surprise testimony, which is in direct violation of the Board's policy discouraging the introduction of surprise testimony and exhibits.

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[33] Rosenbaum Dec. re Evid. Obj., Ex. F, p. 4:12-13.

[34] *See generally* Melbourn Depo., Vol. I and II (e.g., Vol. I, p. 39:4-6; 42:4-14; 46:1-6; 49:4-7; 56:8-24; 61:4-12; 103:16-25; 104:1-2; 119:11-16; 138:22-25; 139:1-6; 143:15-21) (lodged Feb. 3, 2016).

The Prosecution's explanation regarding why it had not submitted the evidence previously was equally devoid of information. For example, the 70 new photographs from the City of Lemon Grove that the Prosecution seeks to admit were allegedly discovered through subpoenas issued by San Altos.[35] But San Altos has discovered that the RWQCB was in possession of at least three of these photographs in September 2015[36] (more than two months before it submitted its evidence on December 4, 2015), and suspects that the RWQCB had more of these photographs in the fall of 2015. Furthermore, the Prosecution had equal ability to obtain these documents before December 4, 2015; it simply chose not to do so. Indeed, RWQCB staff was communicating with City Officials to obtain photographs;[37] staff could have (and did) obtain any information it wanted. According to Exhibit 29 to the ACLC Technical Analysis, RWQCB staff spent more than 200 hours preparing the ACLC, and it had almost two months after it issued the ACLC (October 19, 2015) to prepare its evidence (submitted on December 4, 2015). San Altos should not be penalized because staff didn't review and submit all of the photographs on which it might want to rely.

With respect to the documents that the Prosecution now seeks to admit (the December 2014 City inspector notes and letter, January 2015 BMP walk notes and photos, the May 15, 2015 D-Max Engineering Memo, additional Regional Board photographs, weather data, and San Altos' SWPPP), the Prosecution entirely failed to state why these documents were not submitted earlier; it simply said, "over the course of defending numerous depositions and reviewing documents produced by the City and D-Max Engineering in response to [San Altos'] subpoenas, the Prosecution Team has discovered additional evidence . . . ."[38] This does not address whether or not the Prosecution had these documents before December 4, 2015 and does not state why the

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[35] Rosenbaum Dec. re Evid. Obj., Ex. F, p.2:23-25.

[36] Rosenbaum Dec. re Evid. Obj., ¶ 9, Ex. G. San Altos should not be required to scour months of e-mails and compare all 70 photographs to determine which photographs the RWQCB had in its possession before its December 4, 2015 evidentiary submission. San Altos requests that the Advisory Team ask the Prosecution to identify which of these documents it had before December 4, 2015.

[37] Rosenbaum Dec. re Evid. Obj., ¶ 10, Ex. H.

[38] Rosenbaum Dec. re Evid. Obj., ¶ F, p.3:18-21.

Prosecution did not submit the documents it had before December 2015 (and it had many of these documents) with its December 4, 2015 submission. San Altos' discovery efforts forced the Prosecution to look harder at its case, but the Prosecution's failure to submit all of the evidence it *now* wants to rely on is an insufficient reason to give the Prosecution a second bite at the apple *after* San Altos has completed its discovery.

Finally, the Prosecution was required to confirm that the evidence was not submitted to support changes to the complaint. Again however, this misses the point of due process. The Prosecution states numerous times that the evidence is to "supplement" existing evidence[39] but it provides no information regarding which alleged violations the evidence is intended to "supplement." Without such information, San Altos has been denied "a reasonable opportunity to know the claims of the adverse party and to present their objections." *Ryan v. CIF – San Diego Section*, 94 Cal.App.4th at 1072. A party must be "apprised of the evidence against him so that he may have an opportunity to refute, test, and explain it . . . ." *Clark v. City of Hermosa Beach*, 48 Cal.App.4th at 1172. In the absence of any information regarding which of the violations these more than 100 new pieces of evidence are intended to support, submitting this evidence is a violation of San Altos' due process rights.

Despite these issues, and despite San Altos' repeated request on February 8 to have until February 11 to review the additional evidence and respond to the Prosecution's brief,[40] the Advisory Team submitted the evidence to the Chair of the Board, who ruled on the requests.[41] The following section provides arguments regarding why specific pieces of the additional evidence should be excluded. However, for the reasons stated above, San Altos requests that all of the additional evidence submitted on February 4 be excluded and further states that it cannot submit rebuttal evidence, nor will it likely be able to respond to this evidence at the hearing because it has no information regarding the purpose for which this evidence will be used. This is

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[39] Rosenbaum Dec. re Evid. Obj., ¶ F, p. 3:1, 3:21, 4:2, 4:10-11 (evidence offered to provide a more complete picture), 4:18.

[40] Rosenbaum Dec. re Evid. Obj., ¶ 11, Ex. I.

[41] Rosenbaum Dec. re Evid. Obj., ¶ 12, Ex. J.

the epitome of surprise exhibits and testimony and violates 23 Cal. Code Reg. § 648.4(a). This evidence also should be excluded under 23 Cal. Code Reg. § 648.4(e) because the Prosecution submitted this evidence two months after its deadline. Allowing this evidence, without any ability of San Altos to respond in advance is prejudicial to San Altos and a violation of its rights.

2. The 23 new photographs from Water Board files not already in the record (Exhibit 33), the 5 pictures previously submitted to the Water Board by San Altos but not included in the record (Exhibit 38), and the 70 new photographs from the City of Lemon Grove (Exhibit 40) should be excluded.

The 70 new photographs from the City of Lemon Grove (Exhibit 40), the 23 new photographs from the RWQCB's files not already in the record (Exhibit 33), and the 5 photographs that were submitted to the Water board by San Altos in December 2014[42] but also not included in the record (Exhibit 38), should be excluded because they constitute surprise testimony and exhibits. Furthermore, the argument and provisional ruling that the City's photographs could be admitted as "rebuttal" evidence is misplaced.

Rebuttal evidence addresses the evidence produced by the opposing party, and does not include mere cumulative evidence of the plaintiff's case in chief. *Edgar v. Workman's Comp. Appeals Bd.* (1966) 246 Cal.App.2d 660, 665 (underline added). But this is exactly how the Prosecution characterized these photographs: "The photos are only offered to support violations already alleged in the Complaint and to supplement existing evidence in the record."[43] And the purpose of rebuttal evidence is to specifically respond to evidence from the opposing party. *See People ex rel. Department of Public Works v. Donovan* (1962) 57 Cal.2d 346, 357 (citation omitted). But San Altos had not even submitted its evidence before the Prosecution sought to admit these photographs. Furthermore, the Prosecution did not identify which evidence these photographs are intended to rebut, information which is required for "rebuttal evidence."

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[42] Rosenbaum Dec. re Evid. Obj., ¶ 13, Ex. K. San Altos requests that the Advisory Team ask the Prosecution to identify which the documents it had in its possession before December 4, 2015 that it sought to submit on February 4, 2016.

[43] Rosenbaum Dec. re Evid. Obj., Ex. F, p. 2:28, 3:1-2.

These photographs are not rebuttal evidence; they are cumulative evidence designed to improve the Prosecution's case after the Prosecution either: a) had the photographs in its files but failed to include them as part of its evidentiary submission on December 4, 2015; or b) failed to obtain this evidence before its December 4, 2015 submission, even though it had every opportunity to do so. It is improper to characterize these supplemental photographs as "rebuttal evidence" and allowing such evidence after San Altos completed its discovery, especially with no information regarding how the evidence is to be used, is prejudicial and violates 23 Cal. Code Reg. § 648.4(a) prohibiting surprise evidence. These 98 new photographs should be excluded.

3. San Altos' SWPPP (Exhibit 35) should be excluded for any reason other than to provide background figures for the Site.

In addition to the reasons stated above, San Altos' SWPPP should be excluded for any reason other than to provide background about the Site. The entire purpose of the depositions was to find out what information the Prosecution relied on in alleging the violations. The Prosecution had months to prepare its case and submit its evidence; it cannot now change the facts on which it relies – especially not without disclosing such information (which it has failed to do). Furthermore, the SWPPP was clearly in the RWQCB's files well before December 4, 2015, but the Prosecution did not identify this document as part of its evidence.[44] The Prosecution should not be able to rely on the SWPPP for any purpose other than to provide background information; all other evidence and argument should be excluded.

4. Six of the Eight San Altos' QSP Reports (Exhibit 37) should be excluded.

In addition to the reasons stated above, six of the eight San Altos' QSP Reports should be excluded as surprise testimony and exhibits.[45] The entire purpose of the depositions was to find out what information the Prosecution relied on in alleging the violations. The Prosecution had

[44] Despite the Prosecution's argument that it is providing hard copies of the SWPPP that is available in the public record (Rosenbaum Dec. re Evid. Obj., Ex. F, p. 5:1-2), the Prosecution did not identify the SWPPP or its location in its December 4 evidentiary submission. (Rosenbaum Dec. re Evid. Obj., Ex. A.)

[45] San Altos does not object to including those two QSP reports (identified by the Advisory Team as Exhibit No. 37G and Exhibit No. 37H) that were submitted as part of San Altos' submission of evidence.

months to prepare its case and submit its evidence; it cannot now change the facts on which it relies – especially not without disclosing such information (which it has failed to do).

Furthermore, these documents are not "rebuttal" evidence because a) San Altos had not submitted its evidence before the Prosecution identified them as evidence; and b) the Prosecution does not identify which evidence these documents are intended to rebut. In fact, nowhere in the Prosecution's brief of February 4, 2016 does the Prosecution discuss these documents.[46] Last, the six QSP reports dated December 2, 3, 4, 5, 10 and 15, 2014 were in the RWQCB's possession since December 2014,[47] but the Prosecution a) did not identify them in its December 4, 2015 evidentiary submission, and b) did not explain in its February 4, 2016 supplemental briefing why these reports were not produced previously. Admitting these documents without any basis or discussion of their purpose violates the prohibition on surprise evidence (23 Cal. Code Reg. § 648.4(a)) and is prejudicial to San Altos. They should be excluded from the record.

H. <u>San Altos reserves the right to object to evidence based on hearsay, lack of authentication, or other insufficient evidentiary support at the hearing.</u>

"Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration." Cal. Govt. Code § 11513(d). Evidence submitted at an administrative hearing must be sufficiently authenticated; "hearsay evidence standing alone can have no weight . . . . ." *Voices of Wetlands v. Cal. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 1268, 69 Cal.Rptr.3d 487, 532 (citations omitted) (overruled on other grounds). Furthermore, "common sense and fair play dictate certain basic requirements for the conduct of any hearing at which facts are to be determined." *Id.* Therefore, evidence that lacks sufficient expert witness support or sufficient documentary support for technical data should also potentially be excluded based on timely objection.

[46] Rosenbaum Dec. re Evid. Obj., Ex. F.

[47] Rosenbaum Dec. re Evid. Obj., ¶ 14, Ex. L.

San Altos cannot anticipate whether or not the Prosecution will properly authenticate all of its evidence, especially the new "supplemental" evidence at the hearing. However, Government Code Section 11513 states that objections are timely 'if made before submission of the case" which San Altos understands to mean before the hearing is complete and the matter submitted to the Board. That is, objections made at the hearing are timely. San Altos therefore reserves its right to object to the Prosecution's evidence presented at the hearing on the basis of hearsay, lack of authentication, or other insufficient evidentiary support which would not meet common sense or standard of care guidelines.

I. The Prosecution's Submission regarding a Pre-Hearing Conference should be excluded as failing to meet the February 17, 2016 deadline.

The Advisory Team's letter dated February 8, 2016 setting forth new deadlines for the Hearing Procedures provided that all requests for pre-hearing conferences, which were to also identify the issues to be discussed at such a pre-hearing conference, were to be submitted by February 17, 2016.[48] San Altos submitted its request regarding a pre-hearing conference on February 17, 2016 in accordance with this timeline.[49]

The Prosecution did not submit a letter on February 17, 2016, but instead sent an e-mail on February 22, 2016 identifying the issues it wants to discuss during a pre-hearing conference.[50] This information was due to the Advisory Team by February 17, 2016. This late submission is another example of the Prosecution Team not following the timelines and procedures required for this hearing. This e-mail should be excluded from the record as the information was not submitted in a timely fashion. 23 Cal. Code Reg. § 648.4(e).

III. CONCLUSION

After spending more than 200 hours preparing evidence, the San Diego Regional Water Quality Control Board issued an ACL Complaint to San Altos alleging 136 violations of the

[48] Rosenbaum Dec. re Evid. Obj., ¶ 12, Ex. J.

[49] Rosenbaum Dec. re Evid. Obj., ¶ 12.

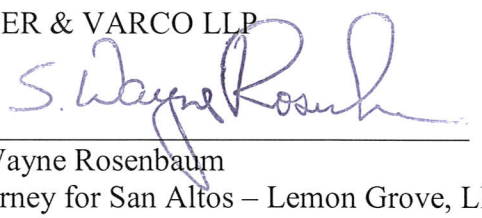
[50] Rosenbaum Dec. re Evid. Obj., ¶ 16, Ex. M.

Permit. Of the 136 alleged violations, 130 violations are alleged non-discharge violations. Of these, only 22 are based on direct observations of RWQCB staff (some of which do not support Permit violations). The remaining 114 alleged violations are not based on reliable evidence, including evidence that must be excluded because the alleged violations are not noted violations of the Permit at all, but are based on site inspections performed for reasons totally separate from the Permit. Furthermore, the reports on which the Prosecution relies are prepared by people who are not familiar with the Permit and have only a couple of hours of training.

Additionally, after San Altos completed its discovery, the Prosecution sought to submit more than 100 pieces of new evidence, even though it already had much of this evidence in its files, or it had the ability to obtain it before it submitted its evidence on December 4, 2015. Allowing the introduction of this evidence violates San Altos' due process rights and results in surprise evidence, the introduction of which violates Water Board policy and the California Code of Regulations. Therefore, the evidence identified in this brief should be excluded from the record and hearing in this matter.

Dated: February 23, 2016

OPPER & VARCO LLP



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