

1 **OPPER & VARCO, LLP**
S. WAYNE ROSENBAUM (Bar No. 182456)
2 LINDA C. BERESFORD (Bar No. 199145)
225 BROADWAY, SUITE 1900
SAN DIEGO, CALIFORNIA 92101
3 TELEPHONE: 619.231.5858
FACSIMILE: 619.231.5853

4 ATTORNEYS FOR SAN ALTOS – LEMON GROVE, LLC

5

6

7

8

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD

9

SAN DIEGO REGION

10

11 IN THE MATTER OF:) **SAN ALTOS – LEMON GROVE, LLC'S**
12 ADMINISTRATIVE CIVIL LIABILITY COMPLAINT) **LEGAL AND TECHNICAL**
No. R9-2015-0110) **ARGUMENTS AND ANALYSIS IN**
13 AGAINST SAN ALTOS – LEMON GROVE, LLC) **OPPOSITION TO ADMINISTRATIVE**
14) **CIVIL LIABILITY COMPLAINT NO.**
15) **R9-2015-0110**
16)

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I. INTRODUCTION1

II. FACTUAL BACKGROUND.....3

A. The Project.3

B. Enforcement History.4

III. LEGAL ISSUES8

A. The Prosecution does not have admissible evidence to support at least 65 of the 136 alleged violations in the ACLC.9

B. Lack of Due Process.10

C. The Allegations are based on Incorrect Interpretations of Key Provisions of the Permit.13

 1. The Prosecution wrongly redefines “Active Areas of Construction.”13

 2. The Prosecution improperly rewrites how to determine BCT for sediment.14

D. The ACLC Misapplies the Enforcement Policy in Calculating Penalties.15

 1. The ACLC fails to apply the provision for multiple violations resulting from the same or substantially similar incident.16

 2. The ACLC fails to properly apply the multiple day violation provisions of the Policy.17

 3. The ACLC improperly applies per day assessments and adjustment factors for non-discharge violations.20

 a. The ACLC applies an improper culpability multiplier......20

 b. The ACLC applies an improper cleanup and cooperation multiplier.22

IV. THE ALLEGED VIOLATIONS.23

A. Alleged Violation 1: Discharging sediment laden storm water from the Site into Encanto Channel on 6 separate days.24

 1. There is insufficient evidence to support this alleged penalty for two of the six alleged days.24

 2. There is no evidence of a discharge on December 17, 2014.24

1 3. There is no evidence a discharge occurred on December 31,
2 2014.25
3 4. The penalties applied do not meet the Enforcement Policy
4 guidelines.25
5 **B. Alleged Violation 2: Failing to implement material stockpile**
6 **BMPs on 10 days.**26
7 1. There is insufficient evidence to support four of the ten
8 alleged violations26
9 2. The penalties applied do not meet the Enforcement Policy
10 guidelines.27
11 **C. Alleged Violation 3: Failing to implement vehicle fluid leak BMPs**
12 **for 2 days.**27
13 **D. Alleged Violation 4: Failing to implement erosion control BMPs**
14 **in inactive areas on 22 separate days...**28
15 1. There is insufficient evidence to support 12 of the 22
16 alleged violations.28
17 2. The penalties applied do not meet the Enforcement Policy
18 guidelines.29
19 **E. Alleged Violation 5: Failing to implement perimeter sediment**
20 **control BMPs for 14 separate days.**30
21 1. There is insufficient evidence to support this alleged
22 violation for 7 of the 14 days.30
23 2. The penalties applied do not meet the Enforcement Policy
24 guidelines.30
25 **F. Alleged Violation 6: Failing to implement erosion control**
26 **BMPs in active areas on 22 separate days.**32
27 1. There is insufficient evidence to support this alleged
28 violation for 10 of the 22 days.32
2. The penalties applied do not meet the enforcement
policy guidelines.33

27 ///
28 ///

1 **G. Alleged Violation 7: Failing to apply linear sediment controls**
2 **on 9 separate days.34**

3 1. There is insufficient evidence to support this alleged violation
4 for 3 of the 9 days.34

5 2. The penalties applied do not meet the Enforcement Policy
6 guidelines.34

7 **H. Alleged Violation 8: Failing to effectively manage run-on**
8 **& runoff for 7 separate days.34**

9 1. There is insufficient evidence to support this alleged
10 violation for 3 of the 7 days.34

11 2. The penalties applied do not meet the Enforcement Policy
12 guidelines.35

13 **I. Alleged Violation 9: Failing to remove sediment from the road**
14 **on 10 separate days.35**

15 1. There is insufficient evidence to support this alleged
16 violation for 3 of the 10 days.35

17 2. The penalties applied do not meet the Enforcement Policy
18 guidelines.35

19 **J. Alleged Violation 10: Failing to protect storm drain inlets on 3**
20 **separate days.36**

21 1. There is insufficient evidence to support this alleged violation
22 for 1 of the 3 days.36

23 2. The penalties applied do not meet the Enforcement Policy
24 guidelines.37

25 **K. Alleged Violation 11: Failing to contain and securely protect**
26 **stockpiles waste material from wind and rain for 9 days.37**

27 1. The evidence does not support this alleged penalty for any of
28 the 9 days.37

 2. The penalties applied do not meet the Enforcement Policy
 guidelines.38

L. Alleged Violation 12: Failing to properly store chemicals on
 7 days.39

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

M. Alleged Violation 13: Failing to prevent the discharge of concrete waste to the ground for 15 days.39

1. The evidence does not support this alleged violation for 11 of the 15 days.39

2. The penalties applied do not meet the Enforcement Policy guidelines.40

V. CONCLUSION41

EXHIBITS

Exhibit A: Penalty Factor Comparison

Exhibit B: Alleged Violations

1 **I. INTRODUCTION**

2 On October 19, 2015 the San Diego Regional Water Quality Control Board (“RWQCB”)
3 served San Altos–Lemon Grove, LLC (“San Altos”) with Administrative Civil Liability
4 Complaint R9-2015-0110 (“ACLC”)¹ alleging one hundred thirty-six (136) violations of the
5 Storm Water Construction General Permit (the “Permit”) and in excess of \$800,000 in penalties.²
6 On December 9, 2015, San Altos and the RWQCB Prosecution Team (“Prosecution”) met to
7 discuss settlement. At the conclusion of San Altos’ presentation, the Prosecution declined to
8 pursue settlement discussion further notwithstanding a material disconnect between the penalties
9 sought in the ACLC and the requirements, adopted by the State Water Resources Control Board
10 (“State Board”) in its Water Quality Enforcement Policy (“Enforcement Policy”).³

11 The Enforcement Policy requires that the penalty sought bear a reasonable relationship to
12 the gravity of the violation and the harm to beneficial uses. The penalties of \$800,000 that are
13 sought here, however, bear no reasonable relationship to either the harm to beneficial uses or the
14 gravity of the violation.

15 The beneficial use at issue is Chollas Creek, a mostly dry tributary that borders the
16 project site (the “Site”). Prior to San Altos involvement with the property, the Site consisted of a
17 San Diego Gas & Electric Company (“SDG&E”) gas farm. Following SDG&E’s removal of
18 much of the gas storage equipment, the hillside site was heavily disturbed and in poor condition,
19 covered in poor condition, covered in trash and debris. The condition of the site together with
20 the dirt and heavily eroded asphalt roadways that encompassed the property was obviously the
21 source of pollution in the creek as evidence by the presence of shopping carts, trash and other
22 detritus in the areas of the creek directly below the site. The creek was essentially a trash
23 receptacle for the neighboring properties. Today, however, San Alto has improved the site with
24

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

26 ² State Water Resources Control Board Order No. 2009-2009-DWQ, amended by Orders Nos. 2010-
27 0014-DWQ and 2012-0006-DWQ, National Pollutant Discharge Elimination System General Permit for
28 Storm Water Discharges Associated with Construction and Land Disturbance Activities (2009).

³ California Environmental Protection Agency, State Water Resources Control Board Res. No. 2009-
0083, Water Quality Enforcement Policy (2009).

1 a state-of-the-art erosion control and storm water prevention systems which will protect the creek
2 for generations. These material benefits to Chollas Creek have come at a cost of over \$7.0
3 million in site improvements, including over \$500,000 in direct expenditures related to
4 temporary erosion control and storm water mitigation, and some immeasurable and substantially
5 inconsequential alleged discharges of sediment to the creek during construction alleged in the
6 ACLC. The \$800,000 penalty being sought by the Prosecution in the ACLC therefore bears no
7 reasonable relationship to the harm done to Chollas Creek, is in violation of the Enforcement
8 Policy and, if allowed to continue, would have the absurd result of punishing San Altos for
9 materially improving the watershed.

10 Similarly, there is no reasonable relationship between penalties sought and gravity of the
11 alleged violation. All of the evidence suggests that San Altos regularly worked with inspectors
12 and applicable government agencies in an effort to comply with the Permit in all material
13 respects. Significant resources were deployed to promptly address each and every violation
14 raised by RWQCB. There is no evidence of intentional disregard for the requirements of the
15 Permit or the recommendations of inspectors. The evidence is at best indicative of the
16 difficulty associated with balancing the practical requirements of construction and the
17 requirements of the Permit within the subjective opinions of inspectors. Thus the penalties
18 sought are grossly disproportionate to the gravity of the alleged violations.

19 Even if there were some material evidence of harm to Chollas Creek or particularly
20 egregious behavior associated with the alleged violations, the Enforcement Policy still requires
21 that the penalties be based on a preponderance of the evidence and must be calculated in a fair
22 and consistent manner. The record clearly reflects that the Prosecution lacks appropriate
23 evidence and has merely cobbled together bits and pieces of information from multiple
24 unreliable sources, including people not trained on the Permit, and who admittedly were not
25 inspecting the Site for compliance with the Permit. Moreover, the Prosecution has failed to
26 identify any basis for calculating penalties in the case in a manner inconsistent with other case,
27 which is unfair and in direct violation of the Enforcement Policy. The end result is that the
28 evidence is insufficient to support the Prosecution's request for more than \$800,000 in penalties.

1 Both the law and the facts of this case therefore require a material adjustment to the
2 penalties being sought.

3 **II. FACTUAL BACKGROUND**

4 **A. The Project.**

5 The subject of this ACLC is a project located on San Altos Place in Lemon Grove (“the
6 Site”). Prior to San Altos embarking on this project, the Site was a decommissioned San Diego
7 Gas & Electric Company gas farm, which had been considered uneconomical to develop by all
8 of its prior owners.⁴ Photographic evidence demonstrates that the already disturbed and
9 significantly sloped Site was polluted with trash and surrounded by heavily eroded asphalt and
10 dirt roads that were undoubtedly the source of continuous and unmitigated discharge into the
11 adjacent drainage canal and neighboring streets for many years.⁵ Thus, even assuming the
12 allegations in the ACLC are true (which San Altos does not concede), the San Altos project has
13 materially improved the quality of storm water runoff from the Site.⁶

14 San Altos’ Valencia Hills project is a single family home development that constructed
15 73 homes on an 18.26 acre site.⁷ The project provides much needed affordable housing to
16 middle income workers such as teachers, government employees and members of the military in
17 the urban core close to their places of employment.⁸ The project has been successful in this
18 regard as 41 homes have been sold to young families who fall into one of these categories and 30
19 have been sold to Veterans Affairs eligible buyers at an average sales price of \$470,000.⁹

20 Unfortunately, land development costs exceeded expectation, preventing the project from
21

22
23 ⁴ Declaration of Philip J. Dowley in support of San Altos’ Legal and Technical Arguments and Analysis
in Opposition to ACLC (“Dowley Decl.”), ¶ 4.

24 ⁵ Declaration of S. Wayne Rosenbaum in support of San Altos’ Legal and Technical Arguments and
25 Analysis in Opposition to ACLC (“Rosenbaum Decl.”), ¶ 18, Ex. P.

26 ⁶ Dowley Decl., ¶¶ 6-7

27 ⁷ Dowley Decl., ¶ 2.

28 ⁸ Dowley Decl., ¶ 3.

⁹ Dowley Decl., ¶ 3.

1 achieving its anticipated return on investment.¹⁰ San Altos originally acquired the land for
2 approximately \$5.8 million.¹¹ Land improvement costs, which include grading, underground
3 utilities, curb, gutter and sidewalks and streets (but excluding engineering and design, permits
4 and fees and other related costs) were budgeted at approximately \$4.5 million at the time the
5 property was acquired.¹² To date, San Alto has invested over \$8.0 million in these
6 improvements, including over \$500,000 in direct expenditures related to storm water
7 mitigation.¹³ After the total cost of land, entitlements, fees, interest, construction, and storm
8 water compliance, the expected net profit is \$29,000 per home, an average profit margin of 6.2%,
9 which is well below the industry standard of 12.0% to 15.0%.¹⁴ Imposing a penalty on the scale
10 suggested in the ACLC reduces the return on investment to below 3.7% and fails to recognize
11 how the Valencia Hills project has materially benefited the regional storm water system over the
12 pre-existing condition. The cost of storm water compliance will likely exceed \$700,000 by project
13 completion, or approximately \$10,000 per home, exclusive of the costs associated with this ACLC.¹⁵
14 Furthermore, low-income and work force housing projects already generate lower return on
15 investment than market rate housing.¹⁶ When the RWQCB issues such significant penalties,
16 other parties contemplating the construction of these kinds of projects will certainly reconsider
17 whether such efforts are worth the effort given that their return on investment can quickly
18 disappear based on allegations that rely on questionable inspections which make significant
19 assumptions about Site use, to days when nobody visited the Site at all.

20 **B. Enforcement History.**

21 Between December 2, 2014 and January 14, 2015, the City of Lemon Grove ("City"), or
22

23 ¹⁰ Dowley Decl., ¶¶ 5-9.

24 ¹¹ Dowley Decl., ¶ 5.

25 ¹² Dowley Decl., ¶ 6.

26 ¹³ Dowley Decl., ¶ 7.

27 ¹⁴ Dowley Decl., ¶ 9.

28 ¹⁵ Dowley Decl., ¶¶ 10-12

¹⁶ Dowley Decl., ¶¶ 8-9.

1 its agents, inspected the Project roughly twenty times.¹⁷ All of the City's representatives,
2 including the City's Storm Water Manager, stated that these inspections were for two purposes:
3 1) for the City to avoid receiving penalties from the RWQCB;¹⁸ and 2) to assure compliance with
4 the City's Jurisdictional Urban Runoff Management Plan ("JURMP") and Municipal Ordinances,
5 not to evaluate compliance with the Permit.¹⁹ Mr. Harper, the City's primary inspector, was not
6 qualified to determine compliance with the Permit, as he has had no formal training in
7 construction storm water management and was not even familiar with the Permit.²⁰ Mr.
8 Nakatani, an inspector contracted by the City, is a Qualified Stormwater Professional, but he also
9 testified that he was not inspecting the Site for compliance with the Permit.²¹

10 This fact is significant because compliance with the JURMP and the City's Ordinances
11 can be very different than compliance with the Permit. For example, the Permit defines "active"
12 areas as those that have been disturbed and are scheduled to be redisturbed within 14 days.²² But
13 the City's definition of "active" is whether an area will be disturbed in 10 days.²³ Thus, on the
14 11th day, an area that has not been redisturbed would be "inactive" under the City's JURMP, but
15 "active" under the Permit. As a result, reliance on the City's inspection reports, without
16 additional information, to determine compliance with the Permit is misplaced at best.

17 On December 15, 2014 RWQCB Inspector Wayne Chiu visited the Site.²⁴ As a result of
18

19 ¹⁷ Technical Analysis for ACLC No. R9-2015-0110 (October 19, 2015), p. ii ("Technical Analysis").

20 ¹⁸ Deposition of Malik Tamimi (Dec. 28, 2015) ("Tamimi Depo."), p. 41:7-15 (excerpts attached to
21 Declaration of Dee Dee Everett in support of San Altos' Arguments ("Everett Decl."), Ex. J); Deposition
of Leon Firsht (Dec. 28, 2015) ("Firsht Depo."), p. 42:15-25, 43:1-20 (excerpts at Everett Decl., Ex. C).

22 ¹⁹ Tamimi Depo., p. 29:2-10 (excerpts at Everett Decl., Ex. J); Firsht Depo., p. 11:17-25, 12:1-6 (excerpts
23 at Everett Decl., Ex. C); Deposition of Gary Harper (Dec. 28, 2015) ("Harper Depo."), p. 17:1-23, 35:18-
25, 36:1-2 (excerpts at Everett Decl., Ex. D); and Deposition of Tad Nakatani (Dec. 29, 2015) ("Nakatani
24 Depo."), p. 24:15-25, 25:1-7 (excerpts at Everett Decl., Ex. G).

25 ²⁰ Harper Depo., p. 12:3-25, 13:1-25, 14:1-25, 15:1-14 (excerpts at Everett Decl., Ex. D).

26 ²¹ Nakatani Depo., p. 24:15-25, 25:1-7 (excerpts at Everett Decl., Ex. G).

27 ²² Permit, App. 5, p. 1, 4 (attached at Rosenbaum Decl., Ex. A).

28 ²³ Harper Depo., p. 31:14-20 (Excerpts at Everett Decl., Ex. D); Nakatani Depo., p. 26:6-24 (excerpts at
Everett Decl., Ex. G).

²⁴ Technical Analysis, Ex. 8.

1 that visit, and RWQCB staff reliance on City inspections unrelated to the Permit, the RWQCB
2 issued a Notice of Violation (“NOV”) on December 19, 2014.²⁵ The NOV alleged discharges of
3 sediment from the Site and inadequate Best Management Practices (“BMPs”).²⁶ San Altos took
4 immediate action to address the NOV and filed a Corrective Action Report on January 1, 2015
5 with RWQCB staff.²⁷ On March 27, 2015 Wayne Chiu re-inspected the Site and confirmed that
6 San Altos had “implemented corrective actions that largely addressed the violations identified in
7 Notice of Violation no. R9-2015-0153.”²⁸

8 Between January 1, 2015 and April 1, 2015, the City issued three administrative citations
9 and one correct work order.²⁹ These citations noted violations of the City’s Ordinances, not
10 violations of the Permit. Accordingly, San Altos relied on Mr. Chiu’s representations that it was
11 in general compliance with the Permit during that time.³⁰

12 Notwithstanding the RWQCB’s general representations of compliance as of March 2015,
13 approximately ten months after RWQCB staff received San Altos’ Corrective Action Report and
14 seven months after the March inspection, the RWQCB served San Altos with the ACLC alleging
15 136 violations of the Permit. The ACLC came without an opportunity for San Altos to meet with
16 RWQCB staff, despite its request to discuss the RWQCB’s concerns.³¹ However, it quickly
17 became clear that the purpose of the ACLC (as stated to San Altos’ counsel by RWQCB counsel)
18 was to send a message to the development industry that El Niño storms were expected during the
19 2015-16 wet season and RWQCB staff decided to make an example of San Altos to help ensure
20 compliance by other developers.³² But despite the Prosecution’s desire to paint San Altos as a

21 _____
22 ²⁵ Technical Analysis, Ex. 11.

23 ²⁶ Technical Analysis, Ex. 11, p. 1-4.

24 ²⁷ San Altos Corrective Action Report, January 1, 2015, (Declaration of Ben Anderson in support of Legal
and Technical Arguments and Analysis in Opposition of ACLC (“Anderson Decl.”), ¶ 3, Ex. B).

25 ²⁸ Technical Analysis, Ex. 19, p. 3.

26 ²⁹ Technical Analysis, Ex. 14, 15, 16, 17.

27 ³⁰ Declaration of Scot Sandstrom in support of Legal and Technical Arguments and Analysis in
Opposition of ACLC (“Sandstrom Decl.”), ¶ 9.

28 ³¹ Deposition of Wayne Chiu (Jan. 14, 2016) (“Chiu Depo.”), Ex. 8 (excerpts at Everett Decl., Ex. A).

³² Rosenbaum Decl., ¶ 3.

1 bad actor, the allegations in the ACLC are not supported by the evidence.

2 Of the 136 alleged violations, six relate to alleged discharges of sediment to the Encanto
3 Channel and indirectly to Chollas Creek.³³ The remaining 130 alleged violations all relate to the
4 implementation of Best Management Practices (“BMPs”) designed to avoid future discharges.³⁴
5 Of these 130 alleged non-discharge violations, 53 are based on the same alleged deficiencies
6 cited in the December 2014 NOV.³⁵ But these alleged violations were addressed by the January
7 1, 2015 Corrective Action Report to the apparent satisfaction of the RWQCB. Furthermore, of
8 these 53 alleged violations, only 8 are supported by Mr. Chiu's observations; 18 of the alleged
9 violations are based on reports prepared by Mr. Harper (an unqualified City inspector who was
10 not inspecting for Permit compliance), and 2 were based on reports prepared by Mr. Nakatani (an
11 inspector who was not inspecting for the Permit). Twenty of the alleged violations are based on
12 no evidence at all.³⁶

13 Between January 2, 2015 and March 27, 2015 (when Mr. Chiu found the Site in
14 substantial compliance with the Permit), the ACLC alleges an additional 32 non-discharge
15 violations. Of these, 6 are based on the same unqualified City inspector who was not inspecting
16 for Permit compliance,³⁷ and 7 are based on inspections conducted by a contract inspector who,
17 while qualified to do so, also was not inspecting for compliance with the Permit.³⁸ The
18 remaining 9 allegations are supported by no evidence whatsoever.

19 Between March 28, 2015 and September 15, 2015, RWQCB staff Frank Melbourn visited
20 the Site three times on May 8, 13, and 15, 2015, and Mr. Chiu visited the Site on May 13,
21
22

23 ³³ Technical Analysis, p. 6-7.

24 ³⁴ Technical Analysis, p. 6-18.

25 ³⁵ Technical Analysis, p. 6-18, Ex. 11, p. 1-4; Rosenbaum Decl., ¶ 4.

26 ³⁶ Technical Analysis, p. 6-18; Rosenbaum Decl., ¶ 4; Deposition of Frank Melbourn (Jan. 14, 2016)
27 (“Melbourn Depo.”) Vol. II, p. 29:19-25, 30:1-2 (alleged violation based on inference without
28 corroborating evidence); (excerpts at Everett Decl., Ex. F).

³⁷ Technical Analysis, Ex., 15, Ex. 16; Harper Depo., p. 35:18-22 (excerpts at Everett Decl., Ex. D).

³⁸ Technical Analysis, Ex. 13; Nakatani Depo., p. 24:15-25, 25:1-7 (excerpts at Everett Decl., Ex. G).

1 2015.³⁹ They allege 15 violations of the Permit during these visits. However, the ACLC alleges
2 an additional seven violations based on a report prepared by a contract inspector who was not
3 inspecting for Permit compliance⁴⁰ and 22 alleged violations are based on no evidence.

4 In summary, of the 130 alleged non-discharge violations alleged in the ACLC, 22 are
5 based on the direct observations of RWQCB staff (some of which don't support Permit
6 violations), 23 are based on inspections by a City employee who was not qualified to do Permit
7 inspections and was not inspecting for Permit compliance, and 22 are based on a contract
8 inspector who was not inspecting for Permit compliance. The remaining 63 alleged violations
9 are based on no direct evidence, but on the assumption that if a possible violation was observed
10 on one day (regardless of the observer's qualifications), and another violation is observed days
11 later, the violation must have been continuous during that time. Such assumptions are not
12 evidence of a violation, especially when the Prosecution never discussed the facts with the
13 original observer.⁴¹

14 **III. LEGAL ISSUES**

15 In addition to the factual issues in this matter, this case presents several legal issues. The
16 State Board directs and coordinates water quality control in California, with local enforcement
17 performed by the Regional Boards.⁴² The Regional Boards must follow and be consistent with
18 the policies and protocols stated in the State Board's Enforcement Policy.⁴³ To achieve water
19 quality protection goals as well as consistency and fairness, the Enforcement Policy requires the
20 RWQCB to demonstrate: 1) admissible evidence of alleged violations; 2) consistent enforcement
21 for similar violations; and 3) appropriate application of the Policy's penalty calculation
22 methodology; and 4) other equitable factors.⁴⁴ This ACLC fails to satisfy these requirements.

23 _____
24 ³⁹ Melbourn Depo., Vol. II, p. 10:7-13, 27:15-21, 37:24-25, 38: 1-7 (excerpts at Everett Decl., Ex. F);
Chiu Depo., p. 66:19-25, 67: 1-8 (excerpts at Everett Decl., Ex. A).

25 ⁴⁰ Nakatani Depo., p. 24:15-25, 25:1-7 (excerpts at Everett Decl., Ex. G).

26 ⁴¹ Melbourn Depo., Vol. II, p. 18:17-25, 19:1-14 (excerpts at Everett Decl., Ex. F).

27 ⁴² Cal. Water Code §§ 13140, 13222.

28 ⁴³ Cal. Water Code § 13222.

⁴⁴ Enforcement Policy, p. 2, 7, 9-10.

1 **A. The Prosecution does not have admissible evidence to support at least 65 of the 136**
2 **alleged violations in the ACLC.**

3 The ACLC alleges 136 violations. The majority of these alleged violations are based on
4 reports prepared by individuals who either 1) are not trained on the Permit; or b) were not
5 inspecting the Site for Permit compliance. Many of the alleged violations are based on no
6 evidence at all. Specific discussions of each of the violations, and the lack of evidentiary
7 support, are provided in Section IV. However, since the Prosecution is attempting to rely on so
8 many reports prepared by other individuals (with whom the Prosecution never even spoke), the
9 result is that many of the alleged violations suffer from evidentiary infirmities including hearsay,
10 improper lay testimony, and lack of foundation.

11 For example, many of the alleged violations depend on whether a certain location at the
12 Site is “active” or “inactive” based on the definition of those terms in the Permit. In some cases,
13 the allegations in ACLC are based on notes taken by Tad Nakatani which speculate whether
14 portions of the Site were “active” or “inactive.”⁴⁵ Putting aside the issue that the definition of
15 “active” under the JURMP is different than under the Permit, these allegations are based on Mr.
16 Nakatani’s hearsay statements.⁴⁶ However, Mr. Nakatani is not an expert on construction sites
17 and could not recall talking to Site representatives.⁴⁷ Furthermore, Mr. Melbourn did not discuss
18 Mr. Nakatani’s findings with either Mr. Nakatani or Site representatives.⁴⁸ Therefore, any
19 alleged violations that a) are based on reports by non-RWQCB staff who are not qualified to
20 opine on certain matters; and b) are not supported by any other corroborating evidence, are based
21 on inadmissible hearsay, improper lay testimony, and lack foundation.

22 _____
23 ⁴⁵ Melbourn Depo., Vol. I, p. 113:6-25, 114:1-5, 119:17-25, 120:1-14 (excerpts at Everett Decl., Ex. E).

24 ⁴⁶ Hearsay evidence “is evidence of a statement that was made other than by a witness while testifying at
25 the hearing and that is offered to prove the truth of the matter stated.” Cal. Evid. Code § 1200(a). In an
26 adjudicative hearing such as this, “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).

27 ⁴⁷ Nakatani Depo., p. 26:19-25, 27:1-23; 28:6-13, 56:1-7 (excerpts at Everett Decl., Ex. G).

28 ⁴⁸ Melbourn Depo., Vol. I, p. 15:24-25, 16:1-7, 70:5-6, (excerpts at Everett Decl., Ex. E). Melbourn
Depo., Vol. II, p. 9:10-12, 15:9-25, 16:1-12 (excerpts at Everett Decl., Ex. F).

1 Similarly, many alleged violations are based on conclusions which lack foundation.⁴⁹ For
2 example, the Prosecution asserts it can discern whether an area of the project is active or inactive
3 simply by looking at a picture or a Site figure,⁵⁰ even though Mr. Melbourn admitted that he
4 never discussed the pictures or reports with those who prepared them.⁵¹ But for many areas,
5 neither Mr. Melbourn nor Mr. Chiu had any knowledge of when work was last performed, nor
6 when work was scheduled to be performed.⁵² Mr. Melbourn further admitted that he did not
7 know the project's schedule until March 2015, but he can now state whether an area was active
8 or inactive during December 2014 and January 2015.⁵³ The Prosecution's conclusion that an
9 inspector can look at a picture out of context, and based on information learned months after the
10 picture was taken, determine that an area was active or inactive, without actually discussing with
11 a Site representative whether the area was active or inactive,⁵⁴ is based on inadmissible hearsay
12 and lacks the necessary foundation to establish violations of the Permit.

13 **B. Lack of Due Process.**

14 “[D]ue process generally requires consideration of (1) the private interest that will be
15 affected by the official action, (2) the risk of an erroneous deprivation of such interest through
16 the procedures used, and the probable value, if any, of additional or substitute procedural
17 safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and
18

19 ⁴⁹ Cal. Gov. Code §11513(c) (“Proper foundation is established by relevant evidence that it is the sort of
20 evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless
of the existence of any common law or statutory rule which might make improper the admission of the
evidence over objection in civil actions.”).

21 ⁵⁰ Melbourn Depo., Vol. I, p. 166:18-25, 167:1-17 (excerpts at Everett Decl., Ex. E).

22 ⁵¹ 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
Decl., Ex. E).

23 ⁵² Melbourn Depo., Vol. I, p. 77:13-24, 86:3-5, 89:8-17, 90:1-18, 116:4-6, 163:16-23 (excerpts at Everett
Decl., Ex. E); Chiu Depo., p. 39:12-25 (excerpts at Everett Decl., Ex. A).

24 ⁵³ Melbourn Depo., Vol. II, p. 60:16-25, 61:1-12 (excerpts at Everett Decl., Ex. F).

25 ⁵⁴ Mssrs. Melbourn and Chiu visited the Site at least once when they did not talk to a Site representative
26 (Melbourn Depo., Vol. I, p. 77:13-25, 78:1-3 (excerpts at Everett Decl., Ex. E); Chiu Depo., p. 72:7-25,
73:1-8 (excerpts at Everett Decl., Ex. A)); and Mr. Melbourn did not talk to anyone at the Site about the
27 Harper and Nakatani reports. Melbourn Depo., Vol. I, p. 15:24-25, 16:1-7, 66:23-25, 70:5-6, 80:4-6,
157:5-7 (excerpts at Everett Decl., Ex. E), Melbourn Depo., Vol. II, p. 9:10-12, 15:9-25, 16:1-12, 33:5-7
28 (excerpts at Everett Decl., Ex. F),

1 consequences of the action and in enabling them to present their side of the story before a
2 responsible governmental official, and (4) the governmental interest, including the function
3 involved and the fiscal and administrative burdens that the additional or substitute procedural
4 requirement would entail.”⁵⁵ This hearing deprives San Altos of these due process goals by
5 providing it with less than 150 days to prepare its case for hearing and only 90 minutes to present
6 that case to the Board.⁵⁶

7 By contrast, the Encinitas ACLC was served on October 21, 2014 and the matter was
8 finally brought before the RWQCB board for the purposes of settlement on June 4, 2015; a
9 period of over 15 months.⁵⁷ Here, where there are a significantly greater number of issues of
10 both fact and law, the Prosecution initially proposed concluding these proceeding in a little less
11 than two months at a hearing in which San Altos would have 20 minutes to state its case and
12 cross examine witnesses.⁵⁸ The schedule has been slightly modified since that time to extend the
13 hearing date by 30 days and the time to state its case to 90 minutes. However, given that this
14 ACLC seeks four times the penalties than those sought in the Encinitas ACLC, there is a
15 significant inconsistency in the hearing procedures and the due process granted to these parties.
16 Moreover, such an expedited hearing process, and limited hearing time, does not comport with
17 the requirements of the Enforcement Policy and violates San Altos’ due process rights.

18 Violations of San Altos’ due process rights have continued up through the filing of this
19 brief. On February 2, 2016, 32 hours prior to the deadline for San Altos to submit its Legal and
20 Technical Arguments to the Technical Arguments and Analysis in Opposition to Administrative
21 Civil Liability Complaint NO. R9-2015-0110, Laura Drabrant, legal counsel to the Prosecution,
22 sent an E-mail to Catherine Hagan, legal counsel for the ACLC advisory team requesting that the
23

24 _____
25 ⁵⁵ *People v. Ramirez* (1979) 25 Cal.3d 260, 269 (citations omitted).

26 ⁵⁶ Rosenbaum Decl., ¶ 11, Ex. L.

27 ⁵⁷ San Diego Regional Water Quality Control Board, Compl. No. R9-2013-0152 for Administrative Civil
28 Liability (November 21, 2013) (hereinafter “Encinitas ACLC”); San Diego Regional Water Quality
Control Board, Order No. R9-2015-0047 (June 1, 2015) (Settlement Order), p. 14.

⁵⁸Rosenbaum Decl., ¶ 11, Ex. K.

1 Prosecution be permitted to submit new evidence, which had not previously been relied upon in
2 support of the ACLC.⁵⁹ On February 2, 2016, counsel for San Altos sent an e-mail objecting to
3 the introduction of new evidence without being granted sufficient time to review and address
4 these new materials.⁶⁰ On February 2, 2016, twenty-four hours prior to the prior to the deadline
5 for San Altos to submit its Legal and Technical Arguments to the Technical Arguments and
6 Analysis in Opposition to Administrative Civil Liability Complaint NO. R9-2015-0110, Ms.
7 Hagen responded to the Prosecution’s request by allowing the Prosecution Team “to submit to
8 the Advisory Team the proposed evidence (electronically and one hard copy) together with a
9 response to the Discharger’s objections.⁶¹

10 Title 23, California Code of Regulations, section 648.4, requires that the San Diego
11 Water Board must avoid surprise testimony or evidence.⁶² Absent a showing of good cause and
12 lack of prejudice to the parties, the San Diego Water Board must exclude evidence and testimony
13 that is not submitted in accordance with this hearing procedure. The admission of new evidence
14 at this late date in the ACAL process, does not comport with the requirements of the Policy and
15 violates San Altos’ due process rights.

16 As discussed in greater detail *infra*, The Prosecution does not provide any unique facts
17 that support the proposed penalties in this case or explain why the Prosecution team failed to
18 apply the Policy provisions regarding multiple violations resulting from the same incident or
19 multiple day violations. When asked at deposition to identify the unique facts that warrant the
20 proposed penalties, Ms. Chiara Clemente, Supervisor of the Compliance Assurance Unit, did not
21 answer, relying on attorney client privilege. Basic principles due process principles prohibit the
22 Prosecution from now attempting to support its case through the later disclosure of any “unique
23
24

25 _____
26 ⁵⁹ Rosenbaum Decl., ¶ 12, Ex. M.

27 ⁶⁰ Rosenbaum Decl., ¶ 13, Ex. N.

28 ⁶¹ Rosenbaum Decl., ¶ 14, Ex. O.

⁶² Rosenbaum Decl., ¶ 17, Ex. K, Ex. L.

1 facts” or why it refused to consider the Policy provisions it refused to discuss as part of the
2 discovery process.

3 **C. The Allegations are based on Incorrect Interpretations of Key Provisions of the Permit.**

4 1. The Prosecution wrongly redefines “Active Areas of Construction.”

5 The Permit defines Active Areas of Construction as “All areas subject to land surface
6 disturbance activities related to the project including, but not limited to, project staging areas,
7 immediate access areas and storage areas. **All previously active areas are still considered**
8 **active areas until final stabilization is complete.**”⁶³ The Permit defines Inactive areas as
9 “areas of construction activity that have been disturbed and are not scheduled to be re-disturbed
10 for at least 14 days.”⁶⁴ The difference between these two types of areas is significant because the
11 Permit imposes distinctly different BMP requirements for active versus inactive areas.⁶⁵ Risk
12 Level 2 dischargers must provide soil cover for inactive areas and all finished slopes, open space,
13 utility backfill, and completed lots.⁶⁶ In contrast, Risk Level 2 dischargers shall implement
14 **appropriate** erosion control BMPs (runoff control and soil stabilization) in conjunction with
15 sediment control BMPs for areas under active construction.⁶⁷ For example, if a construction road
16 is inactive, proper BMPs include application of soil cover such as Bonded Fiber Matrix. But soil
17 cover is not required for an active construction road because the vehicles using the road will
18 continuously damage the soil cover, making it an inappropriate BMP.⁶⁸

19 However, in order to avoid determining if an area is active or inactive, the Prosecution
20 now attempts to create a new category of land conditions: those that are “actively being used”
21 which they interpret as different from “active” areas as defined by the Permit.⁶⁹ Attachment D

22 _____
23 ⁶³ Permit, App. 5, p. 1 (bold added) (brackets in original) (attached as Ex. A to Rosenbaum Decl.).

24 ⁶⁴ Permit, Attach D, p. 5, fn. 1 (attached as Ex. B to Rosenbaum Decl.).

25 ⁶⁵ Permit, Attach D.

26 ⁶⁶ Permit, Attach D, p. 5 (underline added) (attached as Ex. B to Rosenbaum Decl.).

27 ⁶⁷ Permit, Attach D, p. 5 (bold added and underline added) (attached as Ex. B to Rosenbaum Decl.).

28 ⁶⁸ Sandstrom Decl., ¶ 5.

⁶⁹ Melbourn Depo., Vol. I, p. 72:17-25, 73:1-21 (excerpts at Everett Decl., Ex. E); Chiu Depo., p.36:15-25, 37:1-25 (excerpts at Everett Decl., Ex. A).

1 incorporates the term “actively being used” in reference to coverage of stock piles⁷⁰ and stock
2 piled waste materials.⁷¹ Under the Prosecution’s theory, “actively being used” means that the
3 inspector observed the active use of the stock pile or a construction road at the time of the
4 inspection.⁷² The Prosecution does not limit this new definition to just stock piles, but contends
5 that it is applicable to other portions of the Site such as construction roads and slopes.⁷³
6 However, nowhere does the Permit provide this definition of “actively being used” and nothing
7 in the Permit or the Permit Fact Sheet supports this interpretation.

8 Interpreting the Permit in this way would violate rules of statutory interpretation. Neither
9 a court nor a regulatory body may alter the words of a statute or regulation to insert provisions to
10 accomplish a purpose that does not appear in the language of the statute or regulation.⁷⁴
11 Additionally, statutes (and regulations) should be construed to avoid rendering any language
12 unnecessary or meaningless.⁷⁵ The Prosecution’s interpretation of “actively being used” would
13 swallow the meaning of the 14-day provision in the definition of inactive areas and conflicts with
14 the Permit Glossary definition of “active” areas. If the State Board wanted to create different
15 rules for stockpiles and construction roads, it could have done so. But the State Board didn’t
16 provide such a definition, and the Prosecution cannot rewrite the Permit in a way that it would
17 *like* the Permit to be, rather than what the Permit says.

18 2. The Prosecution improperly rewrites how to determine BCT for sediment.

19 The Prosecution also attempts to rewrite how the Permit determines Best Conventional
20

21 _____
22 ⁷⁰ Permit, Attach D, p. 1 (Cover and berm loose stockpiled construction materials that are not actively
23 being used (i.e. soil, spoils, aggregate . . .)) (attached as Ex. B to Rosenbaum Decl.).

24 ⁷¹ Permit, Attach D, p. 2 (Contain and securely protect stockpiled waste materials from wind and rain at
25 all times unless actively being used) (attached as Ex. B to Rosenbaum Decl.).

26 ⁷² Melbourn Depo., Vol. I, p. 55:6-25, 56:1-7 (excerpts at Everett Decl., Ex. E); Chiu Depo., p. 37:1-20
27 (excerpts at Everett Decl., Ex. A).

28 ⁷³ Melbourn Depo., Vol. I, p. 82:15-25, 83:1-12 (excerpts at Everett Decl., Ex. E).

⁷⁴ *In re Hoddinott* (1996) 12 Cal. 4th 992, 1002; Popkin, *Statutes in Court*, p. 201 (1999) (courts may not
interpret a statute in a way that will have particular consequences unless the statute makes unmistakably
clear its intent to achieve that result).

⁷⁵ *Astoria Federal Savings & Loan Ass’n v. Solimino* (1991) 501 U.S. 104, 112.

1 Pollutant Control Technology (“BCT”) for sediment in order to make any discharge of
2 stormwater a discharge of a pollutant. As defined by USEPA, BCT is a technology-based
3 standard for the discharge from existing industrial point sources of conventional pollutants
4 including, total suspended sediment (TSS).⁷⁶ The Permit uses turbidity as a proxy for TSS.⁷⁷
5 The Permit then establishes a Numeric Action Level for turbidity of 250 NTU.⁷⁸ If the storm
6 event daily average is exceeded then the discharger is required to review the BMPs deployed at
7 the site to determine if additional BMPs are required to achieve BCT. That is, the measure
8 whether a discharge violates the discharge prohibitions in Section V.5. of the Permit is whether
9 the storm event daily average is less than 250 NTU.⁷⁹

10 The Prosecution attempts to avoid any consideration of turbidity or how it is measured
11 (and whether it was measured properly) by standing the Permit on its head. The Prosecution
12 asserts that the measure of whether a project has violated Provision 5(a)(2) of the Permit for
13 sediment is not the quality of the discharge but rather the number of BMPs employed.⁸⁰ While
14 such an interpretation allows the Prosecution to avoid some troubling evidentiary deficiencies
15 such as whether and how turbidity was measured for discharges from the Site, it completely
16 ignores major portions of the Permit Fact sheet and Section V of the Permit.

17 **D. The ACLC Misapplies the Enforcement Policy in Calculating Penalties.**

18 The most serious issues raised by this ACLC are how the Prosecution alleged the
19 violations and largely misapplied the Enforcement Policy. The State Board’s Enforcement
20 Policy requires Regional Boards to be fair, firm, and consistent in prosecuting enforcement
21 actions while recognizing the unique facts of each case.⁸¹ When, as here, the penalty
22

23 _____
24 ⁷⁶ Permit, App. 5, p. 1-2 (attached as Ex. H to Rosenbaum Decl.).

25 ⁷⁷ Permit, Fact Sheet, p. 15 (attached as Ex. I to Rosenbaum Decl.).

26 ⁷⁸ Permit, p. 31 (attached as Ex. J to Rosenbaum Decl.).

27 ⁷⁹ Permit, p. 31 (attached as Ex. J to Rosenbaum Decl.).

28 ⁸⁰ Melbourn Depo., Vol. I, p. 27:17-25, 28:1-25, 29:1-13 (excerpts at Everett Decl., Ex. E); Chiu Depo., p. 47:5-25 (excerpts at Everett Decl., Ex. A).

⁸¹ Enforcement Policy, p. 2 (attached as Ex. F to Rosenbaum Decl.).

1 calculations are not supported by the evidence, the Board should not adopt the suggested
2 penalties. The Prosecution does not provide any unique facts that support the proposed penalties
3 in this case. When asked at deposition to identify the unique facts that warrant the proposed
4 penalties, Ms. Chiara Clemente, Supervisor of the Compliance Assurance Unit, did not answer,
5 relying on attorney client privilege.⁸² Absent presentation of unique facts and the opportunity for
6 San Altos to dispute such facts, there is no basis for the Board to conclude that the calculation of
7 penalties was fair and consistent. Because the Prosecution has failed to provide evidence of
8 unique circumstances, the Board must therefore calculate penalties consistently with similar
9 cases.

10 1. The ACLC fails to apply the provision for multiple violations resulting from the
11 same or substantially similar incident.

12 The Enforcement Policy specifically provides that the Prosecution can assess a single
13 base liability for multiple violations under the following circumstances:

- 14 a. The facility has violated the same requirement at one or more locations within the
15 facility;
- 16 b. A single operational upset where violations occur on multiple days;
- 17 c. The violation continues for more than one day;
- 18 d. When violations are not independent of one another or are not substantially
19 distinguishable. For such violations, the Water Boards may consider the extent of
20 the violation in terms of the most egregious violation;
- 21 e. A single act may violate multiple requirements, and therefore constitute multiple
22 violations. . . . [In such situations, a single] act [that] would constitute [multiple]
23 distinct violations . . . may be addressed with a single base liability amount.⁸³

24 Assuming the Prosecution had admissible evidence of a violation, sections (d) and (e)
25 provide that a single base liability amount should be imposed where violations are not
26 independent of one another or are not substantially distinguishable. Here, in at least 6 instances,
27 the Prosecution relies on exactly the same evidence to support as many as 5 different violations,
28

27 ⁸² Deposition of Chiara Clemente (Jan. 22, 2016) (“Clemente Depo.”), p. 42:4-16 (excerpts at Everett
Decl., Ex. B).

28 ⁸³ Enforcement Policy, p. 17-18.

1 thereby overcharging at least 20 violations from what should have been charged as one.⁸⁴

2 The Prosecution also entirely ignores section (c) of the Enforcement Policy. Section (c)
3 requires the Prosecution to consider charging a single base liability amount for a single violation
4 that continues for more than one day, the application of which could have reduced the number of
5 alleged non-discharge violations by 95. When asked why this provision was not applied, Ms.
6 Clemente responded that she really did not understand section (c) and had never applied it.⁸⁵
7 When asked to identify the “unique facts” in this case that supported the Prosecution’s decision
8 not to apply *any* of the Enforcement Policy provisions that allowed for penalty consolidation
9 from the same or similar acts, Ms. Clemente stated that she could not disclose such facts based
10 on attorney client privilege.⁸⁶ It is arbitrary and capricious to impose the penalties sought by the
11 Prosecution without identify the facts that support such action.

12 2. The ACLC fails to properly apply the multiple day violation provisions of the Policy.

13 The Policy also provides the following guidance for multiple day violations:

14 For violations that assess a civil liability on a per day basis, the initial liability
15 amount should be assessed for each day up to thirty days. For violations that last
16 more than thirty days, the daily assessment can be less than the calculated daily
17 assessment, provided that it is no less than the per day economic benefit, if any,
resulting from the violation. For these cases, the Water Board must make express
findings that the violation:

- 18 a. Is not causing daily detrimental impacts to the environment or the
regulatory program;
- 19 b. Results in no economic benefit from the illegal conduct that can be
measured on a daily basis; or,
- 20 c. Occurred without the knowledge or control of the violator, who therefore
21 did not take action to mitigate or eliminate the violation.

22 If one of the above findings is made, an alternate approach to penalty calculation
for multiple day violations may be used.⁸⁷

23 Regional Board enforcement actions must be fair and consistent for similar violations.

24
25 ⁸⁴ Clemente Depo., p. 60:6-25, 61:1-25, 62:1-25, 63:1-25, 64:1-25, 65:1-25, 66:1-25, 67:1-25, 68:1-25,
69:1-25, 70:1-22 (excerpts at Everett Decl., Ex. B).

26 ⁸⁵ Clemente Depo., p. 71:7-25; 72:1-25, 73:1-4 (excerpts at Everett Decl., Ex. B).

27 ⁸⁶ Clemente Depo., p 78:6-25; 79:1-11 (excerpts at Everett Decl., Ex. B).

28 ⁸⁷ Enforcement Policy, p. 18 (attached as Ex. G to Rosenbaum Decl.); Rosenbaum Decl., ¶ 9.

1 The prosecution and settlement of the Encinitas ACLC when contrasted with this ACLC for San
2 Altos demonstrates a startling inconsistency in enforcement for similar violations, especially
3 given that the Prosecution could not articulate any unique facts to differentiate these two cases.
4 The likely reason for this is that there are no “unique facts” that so significantly differentiates
5 this case from other enforcement actions to warrant the level of penalties sought here.

6 The Encinitas site was 43 acres.⁸⁸ The San Altos site is 18.26 acres.⁸⁹ The proposed
7 penalty for Encinitas was \$194,480 for non-discharge violations⁹⁰ or approximately \$4,500 per
8 acre. The proposed penalty for San Altos is \$843,374 of which approximately \$829,498 is for
9 non-discharge violations⁹¹ or approximately \$45,000 per acre. This is both inconsistent and
10 unfair given that the alleged violations appear to be identical. For example, the Encinitas ACLC
11 alleged 141 days of “failure to implement adequate controls, structures, and manages practices at
12 the Project.”⁹² This was based on conduct such as failure to implement adequate linear sediment
13 controls, failure to remove sediments from streets, failure to protect storm drain inlets, and
14 failure to prevent run-on and runoff.⁹³ These are the exact same violations as those alleged in
15 San Altos, except here, each violation is alleged separately (such as failure to implement linear
16 sediment controls, failure to prevent runoff, etc.).⁹⁴

17 What makes these discrepancies even more concerning are the water bodies into which
18 the two projects discharge. The Encinitas site discharges into San Elijo Lagoon which is
19 identified as impaired for silt and sediment.⁹⁵ The San Altos project discharges into the north
20

21
22 ⁸⁸ Encinitas ACLC, p. 4.

23 ⁸⁹ ACLC, p. 1.

24 ⁹⁰ Encinitas ACLC, Technical Analysis, p. 36.

25 ⁹¹ Technical Analysis (for San Altos), p. 67.

26 ⁹² Encinitas ACLC, p. 3, ¶ 14.

27 ⁹³ Encinitas ACLC, Technical Analysis, pp. 6-10; Clemente Depo., p. 39:6-25, 40:1-25, 41:1-4 (excerpts
at Everett Decl., Ex. B).

28 ⁹⁴ ACLC (for San Altos), pp. 3-5.

⁹⁵ Encinitas ACLC, Technical Analysis, p. 24.

1 branch of Chollas Creek, a water segment that is not impaired for silt or sediment.⁹⁶ Thus, the
2 ACLC against San Altos asserts a penalty on a per acre basis that is ten times greater than the
3 Encinitas project, which discharged sediment laden water into a water body impaired because of
4 sediment (whereas Chollas Creek is not). This is not fair or consistent enforcement.

5 Even though the facts and the alleged conduct for these two cases were essentially
6 identical, the two complaints take two significantly different approaches in how the violations
7 were alleged and how the penalties were calculated. The Encinitas complaint alleges 81 days of
8 continuous violation between October 8 and December 27, 2012, and 60 days of continuous
9 violations between January 8 and March 8, 2013, for a total of 141 days of failure to implement
10 adequate BMPs.⁹⁷ The complaint then applies the Multiple Day Violation Policy that reduced
11 the number of days of violation to 16.⁹⁸ In contrast, the San Altos complaint alleges 130 non-
12 discharge violations arising out of inadequate BMPs over 167 days.⁹⁹ But instead of alleging one
13 all-encompassing violation of inadequate BMPs for 167 days, the Prosecution alleged 8 virtually
14 identical violations (violations 2 and 4 – 10) over 22 separate days, resulting in 97 separate
15 violations.¹⁰⁰ Thus, while the conduct involved in the two complaints is the same, the difference
16 in allegations allows the application of the multiple day violation policy in the Encinitas case,
17 while choosing 22 separate days to allege 97 violations in the San Altos case does not. If the San
18 Altos case adopted the methodology in the Encinitas case, the number of non-discharge
19 violations would be 13 instead of 130.¹⁰¹

20 If the Prosecution applied the same per day penalty, culpability, and cooperation factors
21 to this case as were applied in the Encinitas ACLC, the per day penalty for non-discharge
22

23 ⁹⁶ Chollas Creek is not identified as impaired due to silt or sediment. San Diego Regional Water Quality
24 Control Board, Clean Water Act Sections 305(b) and 303(d) Integrated report for the San Diego Region
(December 16, 2009), App. B, p. 5.

25 ⁹⁷ Encinitas ACLC, p. 3; Encinitas ACLC, Technical Analysis, p. 36.

26 ⁹⁸ Encinitas ACLC, Technical Analysis, p. 32.

27 ⁹⁹ ACLC, pp. 3-5 (December 1, 2014 – May 15, 2015 (166 days) and September 15, 2015).

28 ¹⁰⁰ ACLC, pp. 3-5; Technical Analysis, Ex. 27.

¹⁰¹ Enforcement Policy, p. 18 (attached as Ex. G to Rosenbaum Decl.); Rosenbaum Decl., ¶¶ 8-9.

1 violations would be \$12,155 per day for 13 days for total penalties of \$158,015.¹⁰² The result of
2 the inconsistent enforcement approach increases San Altos' alleged liability by \$655,720 for
3 non-discharge violations. But the Prosecution could not articulate any "unique facts" to
4 differentiate the ACLC from the Encinitas ACLC.¹⁰³ To the contrary, San Altos has pointed out
5 that the body of water affected by the alleged discharges is far less sensitive than what was
6 involved in the Encinitas ACLC, which suggests that penalties should be less, not more. The
7 penalties being sought are not therefore a fair and consistent application of the Enforcement
8 Policy.

9 3. The ACLC improperly applies per day assessments and adjustment factors for
10 non-discharge violations.

11 Liabilities imposed by Water Boards are an important part of the Water Boards'
12 enforcement authority.¹⁰⁴ Accordingly, any assessment of administrative civil liability, whether a
13 negotiated settlement or imposed after an administrative adjudication, should, "be assessed in a
14 fair and consistent manner . . . and bear a reasonable relationship to the gravity of the violation
15 and the harm to beneficial uses."¹⁰⁵ In an effort to send a message to the construction industry,
16 the Prosecution calculated incorrect Per Day, Culpability, and Cleanup and Cooperation
17 Assessments on multiple violations. The Per Day multiplier will be addressed in the sections
18 below discussing each of the separate violations. However, the Culpability multiplier and
19 Cleanup and Cooperation multiplier were incorrectly calculated across the board. The
20 discrepancies on those factors are discussed immediately below.

21 a. The ACLC applies an improper culpability multiplier.

22 The culpability multiplier reflects the discharger's degree of culpability for the violation.
23 The test of culpability is "what a reasonable and prudent person would have done or not done
24

25 ¹⁰² Encinitas ACLC, Technical Analysis, p. 23-35; Rosenbaum Decl., ¶¶ 8-9.

26 ¹⁰³ Clemente Depo., p. 79:5-11 (excerpts at Everett Decl., Ex. B).

27 ¹⁰⁴ Enforcement Policy, p. 10.

28 ¹⁰⁵ Enforcement Policy, p. 10.

1 under similar circumstances” based on prevailing industry practices.¹⁰⁶ The Prosecution here
2 consistently applies a multiplier of 1.3 without any consideration of prevailing industry practices.
3 But in at least three distinct areas, the Prosecution applies its own unique standard of what the
4 Prosecution would *like* the prevailing industry practice to be, rather than what a reasonable and
5 prudent person would have done. After appropriate consideration of what a reasonable person
6 would have done, the Policy provides that the culpability multiplier can range from 0.5 to 1.5.

7 By reinterpreting the definition of “active” as it applies to stockpiles and roads, the
8 Prosecution asserts that San Altos should have taken more action, rather than what a reasonable
9 person in the construction industry would do for active stockpiles and roads. In deposition,
10 neither Mr. Chiu nor Mr. Melbourn could identify any written policy that interpreted “actively
11 being used” as being used at the time of the inspection.¹⁰⁷ On the other hand, the prevailing
12 industry standard is to cover stockpiles either a) when rain is imminent; or b) when they are not
13 scheduled to be disturbed within the next 14 days.¹⁰⁸ Thus the “prudent person” standard as used
14 in the Enforcement Policy should reduce the culpability factor to 0.50 for alleged violations 2
15 (failure to protect material stock piles) and 11 (failure to protect waste stockpiles).

16 The Prosecution also misapplies the culpability factor for alleged failure to adequately
17 protect active areas when there is less than a 50% chance of rain in the next 48 hours. The
18 Prosecution asserts that roads that are actively being used to gain access to various areas of the
19 construction site should be fully protected even when there is less than a 50% chance of rain in
20 the next 48 hours.¹⁰⁹ Even if such a standard of care were feasible, which it is not, it does not
21 represent industry practice nor is it the standard of care that a reasonable and prudent person
22 would apply when there is less than a 50% chance of rain in the next 48 hours.¹¹⁰ The culpability
23

24 ¹⁰⁶ Enforcement Policy, p. 17.

25 ¹⁰⁷ Melbourn Depo., Vol. I, p. 55:6-11 (excerpts at Everett Decl., Ex. 5); Chiu Depo., p. 37:10-20
26 (excerpts at Everett Decl., Ex. 1).

27 ¹⁰⁸ Sandstrom Decl., ¶ 3.

28 ¹⁰⁹ Melbourn Depo., Vol. I, p. 75:5-25, 76:1-25, 77:1-4 (excerpts at Everett Decl., Ex. E).

¹¹⁰ Sandstrom Decl., ¶ 4.

1 for alleged violation 6 (failure to implement erosion control BMPs in active areas) should be 0.5.

2 The culpability multiplier for alleged violation 13 (failure to prevent the discharge of
3 concrete waste to the ground) also fails to recognize the standard of care for stucco application.
4 The gravamen of these alleged violations is that in the process of applying stucco to the outer
5 surfaces of the homes, some of the stucco fell to the ground.¹¹¹ But since the stucco was not
6 applied during the rain or when rain is imminent, the stucco was cleaned up when it dried, a
7 standard the industry has deemed reasonable and prudent.¹¹² But Prosecution suggested a new
8 standard of care that plastic be put down under the scaffolding used by the stucco installers even
9 though this could result in a violation of OSHA.¹¹³ Based on what a “reasonable and prudent”
10 person would do, the culpability factor for this alleged violation should be reduced to 0.50.

11 Finally, as will be discussed for the individual violations below, the Prosecution’s
12 culpability factor does not reflect what a reasonable and prudent person would do in many
13 instances, especially on days where rain was not imminent. But in many cases, San Altos’
14 conduct met the standard of care and the Prosecution’s culpability factor should be reduced.

15 b. The ACLC applies an improper cleanup and cooperation multiplier.

16 The cleanup and cooperation multiplier (“cleanup multiplier”) reflects the extent to which
17 the discharger voluntarily cooperated in returning to compliance.¹¹⁴ Adjustments should result in
18 a multiplier between 0.75 and 1.1. Here, the Prosecution constantly assigned a value of 1.1 on
19 the theory that “the Discharger repeatedly failed to comply with the requirement over several
20 months” or “failed to correct the violation with[in] 72 hours of being notified.”¹¹⁵

21 These assertions misstate the facts. After the RWQCB’s December 15, 2014 Site
22 inspection December 19, 2014 Notice of Violation, San Altos took immediate actions to correct
23

24 ¹¹¹ Technical Analysis, p. 64.

25 ¹¹² Rosenbaum Decl., ¶ 6, Ex. D; Sandstrom Decl., ¶ 6.

26 ¹¹³ Melbourn Depo., Vol. I, p. 122:15-25, 123:1-12 (excerpts at Everett Decl., Ex. E); Sandstrom Decl., ¶
27 7

27 ¹¹⁴ Enforcement Policy, p. 17.

28 ¹¹⁵ Technical Analysis, p. 28, p. 65.

1 the alleged deficiencies and submitted a Corrective Action Report to Wayne Chiu on January 1,
2 2015 to demonstrate its efforts to come into compliance.¹¹⁶ Mr. Chiu stated that these efforts
3 generally addressed the Notice of Violation.¹¹⁷ The City of Lemon Grove and its contractor
4 agreed that the Corrective Action Report demonstrated compliance.¹¹⁸ While Mr. Chiu and Mr.
5 Melbourn testified that they believed additional work could be done at the Site after they visited
6 the Site in March 2015, they provided no written notification of the additional tasks that they
7 believed were required at the Site.¹¹⁹ The Prosecution's proposed Cooperation Multiplier of 1.1
8 is not supported by the facts; a factor of 0.8 is appropriate.

9 In summary, the Prosecution's application of the Enforcement Policy is not fair and
10 consistent. In an effort to "send a message" the Prosecution has redefined terms, constructed an
11 entirely new approach to enforcement that essentially eliminates the use of the multiple day
12 violation policy, seeks multiple violations for the same conduct on the same day, and does not
13 accurately incorporate what a reasonable person would do to implement the Permit. The next
14 section details the results of this failure to appropriate implement the Policy.

15 **IV. THE ALLEGED VIOLATIONS.**

16 The following section provides a concise summary for each alleged violation, why the
17 evidence does not support the violation, and why the penalties are incorrect. Attached as Exhibit
18 A to the end of this brief is a chart comparing the Prosecution's suggested dates, multipliers, and
19 proposed penalties, with San Altos' suggested dates, multipliers and proposed penalties.

20 ///

21 ///

22 ///

24 ¹¹⁶ Dowley Decl., Ex. B.

25 ¹¹⁷ Technical Analysis, Ex. 19, p. 3.

26 ¹¹⁸ Nakatani Depo., p. 58:20-25, 59:1-9, Ex. 12 (excerpts at Everett Decl., Ex. G); Firsh Depo., Ex. 13
27 (cover letter to RWQCB advising that Lemon Grove as going to lift its stop work notice because San
28 Altos had come into compliance) (excerpts at Everett Decl., Ex. C)

¹¹⁹ Melbourn Depo., Vol. I, p. 168:24-25, 169:1-15 (excerpts at Everett Decl., Ex. E); Chiu Depo., p.
65:8-13 (excerpts at Everett Decl., Ex. A).

1 **A. Alleged Violation 1: Discharging sediment laden storm water from the Site into**
2 **Encanto Channel on 6 separate days.**

- 3 1. There is insufficient evidence to support this alleged penalty for two of the six
4 alleged days.

5 The Prosecution alleges that San Altos discharged sediment laden storm water from the
6 Site into Encanto Channel on December 4, 12, 17, and 31, 2014, and on May 8 and September
7 15, 2015. San Altos does not dispute these allegations for December 4 and 12, 2014, or May 8
8 and September 15, 2015 (although San Altos disputes the penalty calculation for each of these
9 dates). There is also insufficient evidence to support the allegations for December 17 and 31.

- 10 2. There is no evidence of a discharge on December 17, 2014.

11 The Prosecution relies on a memo prepared by Brian Nemerow of D-Max Engineering, a
12 contractor hired by the City, for the alleged violation on December 17.¹²⁰ In this memo, Mr.
13 Nemerow states that “evidence of sediment discharge was observed at the [construction]
14 entrance” but the memo clearly states that, “no runoff was observed flowing out from the
15 construction site” and he clearly did not observe a discharge of sediment to the storm drain.¹²¹

16 Instead, the memo details that a crew was power washing the street to prevent a discharge
17 to the storm drain and the water sample taken at the storm drain indicates low levels of
18 sediment.¹²² Mr. Nemerow assumed that the power washing effort “indicates that there likely had
19 been a noticeable sediment discharge earlier in the day,” but when asked if the construction team
20 could have been power washing to prevent a discharge, Mr. Nemerow said, “I don’t know.”¹²³
21 When asked if the sediment in the street could have been from unvegetated soil on adjacent
22 properties, Mr. Nemerow said, “I’m not sure.”¹²⁴

23 No witnesses saw a discharge of sediment to the storm drain on December 17 and nobody

24 ¹²⁰ Melbourn Depo., Vol. I, p. 42:4-11 (excerpts at Everett Decl., Ex. E).

25 ¹²¹ Technical Analysis, Ex. 10, p. 1.

26 ¹²² Technical Analysis, Ex. 10, p. 1.

27 ¹²³ Deposition of Brian Nemerow (December 29, 2015) (“Nemerow Depo.”), p. 15:4-25, 16:1-4 (Excerpts
at Everett Decl., Ex. H).

28 ¹²⁴ Nemerow Depo., p. 14:21-25, 15:1-3 (Excerpts at Everett Decl., Ex. H).

1 told either Mr. Nemerow or Mr. Melbourn of such a discharge. Penalties cannot be assessed
2 because a witness assumed a discharge occurred just because someone was cleaning up.

3 3. There is no evidence a discharge occurred on December 31, 2014.

4 The Prosecution again relies on a memo prepared by D-Max Engineering for the alleged
5 December 31 violation.¹²⁵ But again there was no evidence of a discharge to the storm drain on
6 this date. Mr. Quezner of D-Max took distant pictures of the storm drain inlet, but did not take a
7 picture of the inlet itself. The water sample taken at gravel bags upstream from the storm drain
8 indicated 235 NTU.¹²⁶ As discussed in Section III.C.2, turbidity levels below 250 NTU
9 constitute BCT for sediment and are not a basis for a violation. While Mr. Quezner stated that,
10 “turbidity results . . . are likely lower than the turbidity of the discharge that had occurred earlier,”
11 his judgment is unreliable because: a) he could not produce a calibration log or QA/QC logs (as
12 required by EPA Method 180), and 2) he took a sample by “disturbing” the puddle and then
13 taking the sample.¹²⁷ Even Mr. Quezner admitted that this is not a proper sampling protocol.¹²⁸

14 Mr. Quezner did not see a discharge of storm water laden with sediment on December 31.
15 There are no photos showing the storm drain, and to the extent the sampling can be considered,
16 the sample closest to the storm drain had turbidity levels at less than 250 NTU. There is no
17 evidence the gravel bags around the storm drain did not adequately prevent sediment from
18 entering the storm drain. This evidence is insufficient to support this alleged violation.

19 4. The penalties applied do not meet the Enforcement Policy guidelines.

20 The Prosecution proposes penalties of \$3,146/day for six days for a total of \$18,876. As
21 noted above, two days should be removed. With respect the remaining days, the Prosecution
22 asserts a per day factor of .22, a culpability multiplier of 1.3 and a cleanup multiplier of 1.1.
23 These factors are not supported by the Enforcement Policy guidelines.

24
25 ¹²⁵ Technical Analysis, Ex. 12.

26 ¹²⁶ Technical Analysis, Ex. 12, p. 1.

27 ¹²⁷ Deposition of John Quenzer (December 29, 2015) (“Quenzer Depo.”), p. 21:8-12, 34:21-25, 35:1-25,
36:1-7 (excerpts at Everett Decl., Ex. I); Technical Analysis, Ex. 12, p. 1.

28 ¹²⁸ Quenzer Depo., p. 34:21-25, 35:1-25, 36:1-7 (excerpts at Everett Decl., Ex. I).

1 In calculating the per day factor, the Prosecution asserts that, “Storm water runoff
2 containing sediment discharge from the Site likely transported other pollutants such as metals”
3 which would allegedly further degrade Chollas Creek.¹²⁹ When asked what evidence there was
4 of metals in the sediment, Mr. Melbourn said that he relied on studies that sediment from
5 construction sites contains metals. But Mr. Melbourn could not identify the studies on which he
6 relied for this assertion and admitted that he did not have samples from the Site.¹³⁰ San Altos
7 should not be charged with discharging metals without actual evidence that the sediment
8 contained metals. The per day factor should be .15.

9 Second, as discussed above in Section III.D.3.b., the cleanup multiplier of 1.1 ignores the
10 detailed Corrective Action Report that San Altos submitted on January 1, 2015 and the
11 comprehensive response from all parties that they had addressed the issues at the Site.

12 Considering the lack of evidence and inconsistencies in applying the Enforcement Policy,
13 San Altos should be charged with 4 days of a discharge with a per day factor of .15, a culpability
14 multiplier of 1.3, and a cleanup multiplier of 0.8. This results in total penalties of \$6,240.

15 **B. Alleged Violation 2: Failing to implement material stockpile BMPs on 10 days.**

16 1. There is insufficient evidence to support four of the ten alleged violations

17 The Prosecution alleges that San Altos failed to protect material stockpiles on December
18 2-8, and 15, 2014, and on May 13 and September 15, 2015. There is no evidence, however, to
19 support these allegations for December 5 – 8.

20 First, there is no evidence for December 5 - 7 because nobody inspected the Site on those
21 days. Even if stockpiles were uncovered on those days, there is no evidence that the stockpiles
22 weren't active (such as being used to implement BMPs). For December 8, the Prosecution relies
23 on a report prepared by Mr. Harper (from the City) that there was an uncovered inactive stock
24 pile.¹³¹ But Mr. Harper testified that he did not talk to anyone at the Site about whether the stock

25
26 ¹²⁹ Technical Analysis, p. 36

27 ¹³⁰ 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. A).

28 ¹³¹ Technical Analysis, pp. 7 – 8.

1 pile was active or inactive.¹³² Mr. Melbourn also stated that he did not talk to anyone about
2 whether stockpiles were being used during December 5 – 8 to implement BMPs.¹³³ Finally, rain
3 was not expected in the 48 hours following these four days.¹³⁴ Therefore, since there is no
4 evidence that the stockpiles weren't being used, and rain was not imminent, there is no evidence
5 of a violation on these 4 days.

6 2. The penalties applied do not meet the Enforcement Policy guidelines.

7 The Prosecution proposes penalties of \$5,005/day for ten days for a total of \$50,050.
8 Four days should be removed for lack of evidence. The Prosecution also asserts a per day factor
9 of .35, a culpability multiplier of 1.3 and a cleanup multiplier of 1.1.

10 As discussed above in Section III.D.3.a, the culpability multiplier should be .5, as there is
11 no evidence that a reasonable and prudent person would not have active stock piles uncovered
12 when rain is not imminent. And as described in Section III.D.3.b, the cleanup multiplier should
13 be 0.8 given the Corrective Action Report submitted by San Altos.

14 After considering the lack of evidence and the inconsistencies in applying the
15 Enforcement Policy, at most San Altos can properly be charged with 6 violations with a per day
16 factor of .35, a culpability multiplier of 1.3, and a cleanup multiplier of 0.8; or penalties of
17 \$8,400, without taking into consideration other mitigating factors.

18 **C. Alleged Violation 3: Failing to implement vehicle fluid leak BMPs for 2 days.**

19 The Prosecution alleges that San Altos failed to implement vehicle fluid leak BMPs at the
20 Site on December 15, 2014 and May 13, 2015. San Altos does not dispute that it did not have a
21 pan under the identified equipment on these two days. However, San Altos disputes the
22 Prosecution's request for \$15,730 in penalties (which seeks \$7,865 per day; the maximum
23 penalty is \$10,000 per day) for this violation.

24 ///

25 _____
26 ¹³² Harper Depo., p. 46:15-25, 47:1-6 (excerpts at Everett Decl., Ex. D).

27 ¹³³ Melbourn Depo., Vol. I, p. 63:21-25, 64:1-25, 65:1-25, 66:1-25, 67:1-24 (excerpts at Everett Decl., Ex.
E).

28 ¹³⁴ Rosenbaum Decl., ¶ 6, Ex. D.

1 When calculating the per day factor for this violation, the Prosecution identified the
2 potential for harm as “moderate.” However, Mr. Melbourn admitted there was no evidence of a
3 spill from the equipment on either day and further admitted there was no harm from this
4 violation.¹³⁵ The per day factor should be .25. And as discussed above, the cleanup multiplier
5 should be 0.8, resulting in penalties of \$5,200.

6 **D. Alleged Violation 4: Failing to implement erosion control BMPs in inactive areas on**
7 **22 separate days.**

8 1. There is insufficient evidence to support 12 of the 22 alleged violations.

9 The Prosecution alleges violations on December 1-9, 2014, December 15-16, 2014,
10 January 6, January 14, May 8-15, and September 15, 2015.

11 With respect to December 5-7 and May 9-12 and 14, there is no evidence to support the
12 allegations on these days and nobody inspected the Site on these days. Therefore, there is no
13 evidence of which areas were “active” vs. “inactive.”

14 For December 8 and 9 and January 6 and 14, the Prosecution relies on reports prepared
15 by Mr. Harper and Mr. Nakatani as evidence of insufficient BMPs in inactive areas.¹³⁶ But both
16 Mr. Harper and Mr. Nakatani testified that they were inspecting for compliance with the City’s
17 ordinances (which defines inactive areas as those areas that are not scheduled to be disturbed for
18 ten days, not 14 as provided by Permit)¹³⁷ and both admitted that they did not talk to anyone at
19 the Site about what work was scheduled for the next two weeks.¹³⁸ Mr. Melbourn also admitted
20 that he did not ask anyone at the Site which areas were being used to implement new BMPs, or if
21 they were performing any work (despite the Stop Work Notice); he assumed he knew which
22 areas were inactive based on information he learned about the Project’s schedule in March 2015,
23

24 _____
25 ¹³⁵ Melbourn Depo., Vol. II, p. 51:8-15, 53:1-25; 54:2-3 (excerpts at Everett Decl., Ex. F).

26 ¹³⁶ Technical Analysis, Ex. 4, 5, 24, 25.

27 ¹³⁷ Nakatani Depo., p. 26:6-25, 27:1-5 (Excerpts at Everett Decl., Ex. 6); Harper Depo., p. 31:14-20
28 (Excerpts at Everett Decl., Ex. 4).

¹³⁸ Harper Depo., p. 76:14-20 (excerpts at Everett Decl., Ex. D); Nakatani Depo., p. 76:14-20 (excerpts at
Everett Decl., Ex. G).

1 but he never asked anyone about any specific areas.¹³⁹ There is no evidence of insufficient
2 BMPs in inactive areas on December 5 – 9, January 6 and 14, or May 9 – 12 and 14.

3 For many of these dates, Mr. Melbourn asserts that the “inactive” areas were construction
4 roads that “could have been inactive” even though people were driving on them. Mr. Melbourn
5 asserts that a construction road is “active” only if it is actively being graded.¹⁴⁰ However, the
6 Permit defines “active” as “All areas subject to land surface disturbance activities related to the
7 project including, but not limited to, **project staging areas, immediate access areas and**
8 **storage areas.**”¹⁴¹ And as noted above, Mr. Melbourn retroactively determined which roads
9 were inactive in December and January based on limited information he learned in March. This
10 is insufficient to establish this violation on these dates.

11 2. The penalties applied do not meet the Enforcement Policy guidelines.

12 The Prosecution proposes penalties of \$6,229/day for 22 days for a total of \$173,030,
13 based on a per day factor of .55, a culpability multiplier of 1.3 and a cleanup multiplier of 1.1.

14 First, 12 days should be removed for lack of evidence. Second, given that many of the
15 alleged violations were based on alleged failure to have insufficient BMPs on construction roads,
16 an interpretation that is not consistent with industry practice or what a reasonable or prudent
17 person would do, the culpability factor should be 1.0. Third, as the cleanup multiplier should be
18 adjusted to 0.8. After considering the evidence and the appropriate application of the
19 Enforcement Policy, San Altos cant at most be charged with 10 violations with a per day factor
20 of .55, a culpability multiplier of 1.0, and a cleanup multiplier of 0.8, for total penalties of
21 \$44,000, without taking further mitigating factors into consideration.

22 ///

23 ///

24 ///

25 _____
26 ¹³⁹ Melbourn Depo., Vol. I, p. 163:12-23 (Excerpts at Everett Decl., Ex. E); Melbourn Depo., Vol. II, p.
60:16-25, 61:1-12 (Excerpts at Everett Decl., Ex. F).

27 ¹⁴⁰ Melbourn Depo., p. Vol. I, P. 76:14-20 (excerpts at Everett Decl., Ex. E).

28 ¹⁴¹ Permit, App. 5, p. 1 (bold added) (attached as Ex. A to Rosenbaum Decl.)

1 **E. Alleged Violation 5: Failing to implement perimeter sediment control BMPs for 14**
2 **separate days.**

3 1. There is insufficient evidence to support this alleged violation for 7 of the 14 days.

4 The Prosecution alleges violations on December 4 – 8, December 15 and 16, 2014, May 8
5 - 15, and September 15, 2015.

6 There is no evidence to support the allegations on December 5-7 and May 9–12 as there
7 were no inspections on these days. The Prosecution cannot assume ongoing lack of perimeter
8 control based on no direct evidence, especially since there was no rain on December 5, 6, and 7
9 or May 10, 11, and 12.¹⁴²

10 2. The penalties applied do not meet the Enforcement Policy guidelines.

11 As discussed above in Section III.C.1, the imposition of penalties for alleged violations
12 4–9 violate the “fair and consistent” requirement of the Enforcement Policy as well as the
13 directive that the Board should not impose duplicative penalties for multiple violations that are
14 not substantially different, or are based on the same facts on the same days.¹⁴³

15 For example, “failing to implement perimeter sediment control” is not substantially
16 distinguishable from “failing to manage run-on and runoff at a site” or “failing to remove
17 sediment from a road.” Of the 14 days that San Altos allegedly failed to implement perimeter
18 sediment control (Dec. 4 – 8; Dec. 15 – 16; May 8 – 13; and Sept. 15), it also allegedly failed to
19 manage run-on and runoff for 7 of those same days (Dec. 15 and May 8-13), and allegedly failed
20 to remove sediment from the road for the other 7 days (Dec. 4 – 8, Dec. 16 and Sept. 15). The
21 Prosecution also alleged that San Altos failed to have linear sediment control on 8 of those same
22 days (Dec. 15, 16, and May 8-13). Finally, the Prosecution alleged lack of erosion control BMPs
23 in active areas on all of these days and alleged lack of erosion control BMPs in inactive areas on
24 all of these days. This is an improper imposition of penalties for substantially similar violations.
25 (A chart showing all of the days where substantially similar violations are alleged is attached to
26

27 ¹⁴²Rosenbaum Decl., ¶ 6, Ex. D, Ex. E.

28 ¹⁴³ Enforcement Policy, p. 17-18 (subsections c, d, and e) (attached as Ex. G to Rosenbaum Decl.)

1 this brief at Exhibit B.)

2 Indeed, the RWQCB recognized this in the Encinitas ACLC, when it alleged only “lack
3 of effective BMPs” for multiple days, based on these exact types of alleged violations (lack of
4 perimeter control, ineffective soil cover for inactive areas, lack of appropriate erosion and
5 sediment controls, failure to manage run-on and runoff, and failure to protect storm drain
6 inlets).¹⁴⁴ Instead of alleging six different penalties for the same conduct (lack of sufficient
7 BMPs to retain sediment on the site) on the same day, the Board should impose only one of these
8 penalties on those days where there is evidence of a violation by applying the same methodology
9 it adopted in the Encinitas ACLC.

10 Furthermore, many of these violations are based on the same facts. For example, on
11 December 15, Photos 4 – 7 are used to allege lack of adequate erosion control BMPs in inactive
12 areas and lack of linear sediment controls; Photo 4 was relied on for failure to have adequate
13 erosion control BMPs in inactive areas and also lack of effective run-on and run-off controls; and
14 Photo 14 was relied on for lack of adequate run off controls and lack of perimeter sediment
15 control.¹⁴⁵ On May 8, the Prosecution appears to rely on the same facts for lack of erosion
16 control BMPs in inactive areas, lack of linear sediment control and failure to control run-on and
17 runoff.¹⁴⁶ And on May 13, the Prosecution appears to rely on the same facts for lack of erosion
18 control BMPs in inactive areas, lack of linear sediment controls, failure to manage run-on and
19 runoff, and lack of perimeter sediment controls.¹⁴⁷

20 The Prosecution proposes penalties of \$5,005/day for 14 days for a total of \$70,070 based
21 on a per day factor of .35, a culpability multiplier of 1.3 and a cleanup multiplier of 1.1.

22 There is no evidence for seven days of the alleged violations. For the remaining seven
23

24 _____
¹⁴⁴ Encinitas ACLC, p. 3, ¶ 14; Encinitas ACLC, Technical Analysis, pp. 6-12.

25 ¹⁴⁵ Technical Analysis, Ex. 8, pp. 3, 4, 7; Clemente Depo, p. 60:13-25, 61:1-25, 62:1-25, 63:1-25, 64:1-17
26 (excerpts at Everett Decl., Ex. B).

27 ¹⁴⁶ Technical Analysis, Ex. 18, p. 6.

28 ¹⁴⁷ Technical Analysis, Ex. 19, pp. 3, 4, 7; Clemente Depo, p. 68:8-25, 69:1-25, 70:1-22 (excerpts at
Everett Decl., Ex. B).

1 days, the most that San Altos can be liable for is violations for these days for these days (on the
2 basis that no penalties for other substantially similar or violations based on the same evidence
3 should be imposed) with a per day factor of .35, a culpability multiplier of 1.3, and a cleanup
4 multiplier of 0.8, for total penalties of \$25,480, without taking further mitigating factors into
5 consideration.

6 **F. Alleged Violation 6: Failing to implement erosion control BMPs in active areas on**
7 **22 separate days.**

8 1. There is insufficient evidence to support this alleged violation for 10 of the 22 days.

9 The Prosecution alleges violations on December 1-8, December 15 and 16, 2014, January
10 6, March 23 and 24, May 8 - 15 and September 15.

11 With respect to December 5-7 and May 10-12, there is no evidence to support these
12 allegations. Nobody inspected the Site on those days and there is no evidence regarding which
13 areas were active versus inactive.

14 On December 8 and January 6, the Prosecution relies on reports prepared by Mr. Harper
15 and Mr. Nakatani for evidence that “active” areas lacked proper erosion controls.¹⁴⁸ However,
16 both Mr. Harper and Mr. Nakatani testified that they were inspecting for compliance with the
17 City’s ordinances and not for compliance with the Permit¹⁴⁹ both testified that they did not
18 discuss with anyone which areas at the Site were active (being used to implement BMPs).¹⁵⁰

19 The Prosecution also relies on Mr. Harper’s reports for the alleged violations on March
20 23 and 24. Again however, Mr. Harper was not inspecting for the Permit and he did not discuss
21 with anyone at the Site which areas were active or inactive.¹⁵¹ Mr. Melbourn assumed that he
22 knew which areas were active based on information that he learned after the fact, not based on
23

24 _____
¹⁴⁸ Technical Analysis, Exs. 4, 24, 25.

25 ¹⁴⁹ Nakatani Depo., p. 24:15-25, 25:1-7 (Excerpts at Everett Decl., Ex. G); Harper Depo., p. 17:1-23
26 (Excerpts at Everett Decl., Ex. D).

27 ¹⁵⁰ Nakatani Depo., p. 38:16-22 (Excerpts at Everett Decl., Ex. G); Harper Depo., p. 47:3-6 (Excerpts at
Everett Decl., Ex. D).

28 ¹⁵¹ Harper Depo., p. 71:18-25, 72:1-25, 73:1-25, 74:1-25, 75:1-22 (Excerpts at Everett Decl., Ex. D).

1 specific discussions with anyone regarding what was occurring at the Site on those two dates.
2 Furthermore, only three days later, Mr. Chiu stated that he thought the Site was in general
3 compliance with the Permit.¹⁵²

4 Moreover neither the Permit nor the CASQA BMP construction manual require that
5 active areas be fully protected unless there is greater than a 50% chance of rain in the next 48
6 hours. The Permit provides that "Risk Level 2 dischargers shall implement **appropriate** erosion
7 control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs
8 for areas under active construction."¹⁵³ The CASQA BMP manual states that all inactive soil
9 disturbed areas on the project site, and **most** active areas prior to the onset of rain, must be
10 protected from erosion.¹⁵⁴ Rain was not expected in the next 48 hours following December 5-8,
11 January 6, March 23 and 24, or May 10-11.¹⁵⁵ There is no evidence of a failure to have
12 sufficient BMPs in these active areas on these dates.

13 2. The penalties applied do not meet the enforcement policy guidelines.

14 The Prosecution proposes penalties of \$7,865/day for 22 days for a total of \$173,030,
15 based on a per day factor of .35, a culpability multiplier of 1.3 and a cleanup multiplier of 1.1.

16 As stated above, 10 days should be removed. For the remaining 12 days, as discussed
17 above, the culpability factor should be reduced to 0.5 as many of the alleged violations are based
18 on assumptions regarding the use of roads, stock piles, and not what appropriate BMPs for active
19 areas are. The cleanup and cooperation multiplier should be adjusted to 0.8 based on the
20 comprehensive Corrective Action Report submitted on January 1 and Mr. Chiu's comments that
21 the Site was in general compliance in March 2015. Therefore the most that San Altos can be
22 charged with is 12 days of violations with a per day factor of .55, a culpability multiplier of 0.5,
23 and a cleanup multiplier of 0.8 results in total penalties of \$26,400, without taking further
24

25 _____
26 ¹⁵² Technical Analysis, Ex. 19, p. 3.

27 ¹⁵³ Permit, Attachment D, p. 5 (bold added) (attached as Ex. B to Rosenbaum Decl.)

28 ¹⁵⁴ CASQA BMP Construction Manual at 3-1 (attached as Ex. C to Rosenbaum Decl.)

¹⁵⁵ Rosenbaum Decl., ¶ 6, Ex. D, Ex. E.

1 mitigating factors into consideration.

2 **G. Alleged Violation 7: Failing to apply linear sediment controls on 9 separate days.**

3 1. There is insufficient evidence to support this alleged violation for 3 of the 9 days.

4 The Prosecution alleges violations on December 15 and 16, 2014, May 8, 9, and 13,
5 2015, and September 15, 2015. There is insufficient evidence, however, for these allegations on
6 May 10- 12 because nobody inspected the Site on these days.

7 2. The penalties applied do not meet the Enforcement Policy guidelines.

8 Additionally, as discussed in detail above in Section IV.E.2, the Prosecution alleges
9 failure to have sufficient perimeter sediment controls on all of these same days, as well as
10 insufficient erosions controls for both active and inactive areas on all of these same days.
11 Imposing penalties for all of these violations is inconsistent with the Enforcement Policy. First,
12 these allegations are not substantially different. Second, the same facts are relied upon for at
13 least three of these allegations, while also being relied upon for other allegations. Finally,
14 alleging these multiple violations is contrary to the mandate that the Prosecution be “fair” and
15 “consistent” as the Encinitas ACLC only alleged one violation per day for the same conduct.

16 The Prosecution proposes total penalties of \$70,785: \$7,865/day (out of a maximum of
17 \$10,000/day) for 9 days, based on a per day factor of .55, culpability multiplier of 1.3, and a
18 cleanup multiplier of 1.1.

19 As noted above, at least three days (if not all nine days) should be removed. In the event
20 that the Board could properly impose penalties for the remaining six days (despite the fact that
21 San Altos is already being charged at least two other times for the same conduct), with a per day
22 factor of .55, a culpability multiplier of 1.3, and a cleanup multiplier of 0.8 (based on San Altos’
23 Corrective Action Report), the total maximum penalties should be no more than \$34,320,
24 without taking further mitigating factors into account.

25 **H. Alleged Violation 8: Failing to effectively manage run-on & runoff for 7 separate days.**

26 1. There is insufficient evidence to support this alleged violation for 3 of the 7 days.

27 The Prosecution alleges violations on December 15, 2014, and May 8 – 13, 2015.
28 However, there is insufficient evidence for these allegations on May 10 - 12 because nobody

1 inspected the Site on these days and there is no evidence of rain on these dates.

2 2. The penalties applied do not meet the Enforcement Policy guidelines.

3 Additionally, as discussed above in detail in Section IV.E.2, the Prosecution alleges
4 failure to have sufficient perimeter sediment controls on all of these same days, as well as
5 insufficient erosions controls for both active and inactive areas on all of these same days.
6 Imposing penalties for all of these violations is inconsistent with the Enforcement Policy for the
7 following reasons. First, these allegations are not substantially different. Second, the same facts
8 are relied upon for at least three of these allegations, while also being relied upon for other
9 allegations. Finally, alleging these multiple violations is contrary to the mandate that the
10 Prosecution be “fair” and “consistent” as the Encinitas ACLC only alleged one violation per day
11 for the same conduct.

12 The Prosecution proposes penalties of \$5,005/day for 7 days for a total of \$35,035 based
13 on a per day factor of .55, a culpability multiplier of 1.3 and a cleanup multiplier of 1.1.

14 As noted above, at least three days (if not all seven days) should be removed. In the
15 event that the Board could properly impose penalties for the remaining four days (despite the fact
16 that San Altos is already being charged at least two other times for the same conduct), with a per
17 day factor of .55, a culpability multiplier of 1.3, and a cleanup multiplier of 0.8 (based on San
18 Altos’ Corrective Action Report), the maximum total penalties are no more than \$22,880, before
19 taking other appropriate mitigating factors into account.

20 **I. Alleged Violation 9: Failing to remove sediment from the road on 10 separate days.**

21 1. There is insufficient evidence to support this alleged violation for 3 of the 10 days.

22 The Prosecution alleges violations on December 2-9 and 16, 2014 and September 15,
23 2015. However, there is insufficient evidence for these allegations on December 5 – 7 because
24 nobody inspected the Site on these days and there is no evidence of rain on these dates.

25 2. The penalties applied do not meet the Enforcement Policy guidelines.

26 However, as discussed above in detail in Section IV.E.2, the Prosecution alleges failure
27 to have sufficient perimeter sediment controls on December 4-8 and 16, and September 15, 2015,
28 as well as insufficient erosions controls for both active and inactive areas on all of these same

1 days. Imposing penalties for all of these violations is inconsistent with the Enforcement Policy:
2 1) these allegations are not substantially different; 2) the same facts are relied upon for at least
3 three of these allegations, while also being relied upon for other allegations; and 3) alleging these
4 multiple violations is contrary to the mandate that the Prosecution be “fair” and “consistent” as
5 the Encinitas ACLC only alleged one violation per day for the same conduct.

6 The Prosecution proposes penalties of \$5,005/day for ten days for a total of \$50,050,
7 based on a per day factor of .35, a culpability multiplier of 1.3 and a cleanup multiplier of 1.1.

8 As noted above, at least three days (if not all ten days) should be removed. In the event
9 that the Board can properly impose penalties for the remaining seven days (despite the fact that
10 San Altos is already being charged at least two other times for the same conduct), with a per day
11 factor of .35, a culpability multiplier of 1.3, and a cleanup multiplier of 0.8 (based on San Altos’
12 Corrective Action Report), the maximum total penalties should be no more than \$25,480 before
13 taking other mitigating factors into account.

14 **J. Alleged Violation 10: Failing to protect storm drain inlets on 3 separate days.**

15 1. There is insufficient evidence to support this alleged violation for 1 of the 3 days.

16 The Prosecution alleges that San Altos failed to protect storm drain inlets on December 8,
17 2014, May 13, 2015, and September 15, 2015.

18 Exhibit 19 to the ACLC is Mr. Melbourn’s inspection report for May 13, 2015.
19 Importantly however, nowhere in this report does Mr. Melbourn identify this issue, and the
20 photograph that allegedly supports this allegation on page 16 of the ACLC does not appear in the
21 inspection report.¹⁵⁶ The Prosecution should not be able to allege a violation that was not noted
22 the day of the inspection. However, even if the Prosecution could assert this allegation, the
23 storm drain identified in the photograph was not an active storm; this “storm drain” was not yet
24 connected to the MS4, but instead drained into a sediment basin.¹⁵⁷

25 ///

26
27 ¹⁵⁶ Technical Analysis, p. 16, Ex.19.

28 ¹⁵⁷ Sandstrom Decl. ¶ 10.

1 When presented with this fact, Mr. Melbourn asserted that it was still a violation because,
2 in his experience, contractors didn't clean these areas out before they connected them to storm
3 drains.¹⁵⁸ But a party cannot be penalized based on Mr. Melbourn's assumptions of what they
4 may or may not do based on what other contractors have done – especially when Mr. Melbourn
5 didn't even point it out during his inspection. Furthermore, the fact is that, even using Mr.
6 Melbourn's definition, this is not a storm drain.¹⁵⁹ There is no violation on May 13.

7 2. The penalties applied do not meet the Enforcement Policy guidelines.

8 The Prosecution proposes penalties of \$4,550/day for three days for a total of \$13,650
9 based on a per day factor of .35, a culpability multiplier of 1.3 and a cleanup multiplier of 1.1.

10 Based on the lack of evidence for at least one day, however, at most San Altos can be
11 charged with 2 violations with a per day factor of .35, a culpability multiplier of 1.3, and a
12 cleanup multiplier of 0.8 (considering San Altos' Corrective Action Report); or This results in
13 \$7,280 before taking other mitigating factors into account.

14 **K. Alleged Violation 11: Failing to contain and securely protect stockpiles waste**
15 **material from wind and rain for 9 days.**

16 1. The evidence does not support this alleged penalty for any of the 9 days.

17 The Prosecution alleges that San Altos failed to protect stockpiles waste material from
18 wind and rain from January 6 through 14, 2015. The evidence does not support the allegations.

19 The Prosecution relies on two investigations (January 6 and January 14) conducted by
20 Mr. Nakatani of D-Max Engineering for this alleged violation.¹⁶⁰ There are no inspections of
21 the Site from January 7 through January 13. When asked to identify the stockpiles that were the
22 subject of this alleged violation, Mr. Melbourn admitted that he could not.¹⁶¹ The January 6
23 inspection report by Mr. Nakatani identified uncovered stockpiles, but these are reported as
24

25 _____
¹⁵⁸ Technical Analysis, p. 16.

26 ¹⁵⁹ Melbourn Depo., Vol. II, p. 145:5-25, 146:1-25, 147:1-18 (excerpts at Everett Decl., Ex. F).

27 ¹⁶⁰ Technical Analysis, Ex. 24, 25.

28 ¹⁶¹ Melbourn Depo., Vol. I, p. 142:5-25, 143:1-2 (excerpts at Everett Decl., Ex. E).

1 being active and therefore are not required to be covered. There is also no evidence active
2 stockpiles remained uncovered during the rain event occurring during this time period, and Mr.
3 Melbourn could not produce any wind data.¹⁶²

4 The January 14 report says, "wood/scrap pile should be removed or protected."¹⁶³
5 However, there is no evidence of whether San Altos was actively using this pile. Furthermore,
6 Mr. Nakatani is clear that this wood pile is different from the stockpile he noticed on January
7 6.¹⁶⁴ Finally, in a memo dated January 16, Mr. Nakatani states the "stockpiles had been covered"
8 and admits that he did not know when that occurred (i.e., the coverage could have occurred on
9 January 7).¹⁶⁵ This evidence does not support any violations, much less 9 days of violations.

10 2. The penalties applied do not meet the Enforcement Policy guidelines.

11 The Prosecution proposes penalties of \$3,575/day for 9 days for a total of \$32,175 based
12 on a per day factor of .25, culpability multiplier of 1.3, cleanup and cooperation multiplier of 1.1.

13 As stated above, there should be no penalties at all. However, to the extent that a
14 violation could potentially be identified for one day, all of the multipliers should be adjusted. In
15 calculating the per day factor, the Prosecution asserts that the "deviation from requirement" is
16 "moderate."¹⁶⁶ This is not appropriate for a wood stockpile (which was possibly active) that was
17 uncovered for one day when there was no wind or rain. Second, the culpability multiplier
18 provides no basis for this penalty; it discusses failure to protect storm drain inlets¹⁶⁷ which has no
19 relationship to this alleged violation. It also does not reflect the industry standard or what a
20 "reasonable and prudent" person would do with an active stockpile with no wind or rain. The
21 cleanup multiplier assigns a value of 1.1 "because the Discharger failed to correct the violation
22

23 ¹⁶² Rosenbaum Decl., ¶ 6, Ex. D; Melbourn Depo., Vol. I, p. 45:4-14, 68:9-25, 69:1-6 (excerpts at Everett
24 Decl., Ex. E); Melbourn Depo., Vol. II, p. 12:15-25, 13:1-4, 42:14-25, 43:1-25, 44:1-25, 45:1-4, Ex. 6,
25 Ex. 7 (excerpts at Everett Decl., Ex. F).

26 ¹⁶³ Technical Analysis, Ex. 25.

27 ¹⁶⁴ Nakatani Depo., p. 60:23-25, 61:1-19 (excerpts at Everett Decl., Ex. G).

28 ¹⁶⁵ Nakatani Depo., p. 59:13-25, 60:1-11, Ex. 12 (excerpts at Everett Decl., Ex. G).

¹⁶⁶ Technical Analysis, p. 57.

¹⁶⁷ Technical Analysis, p. 57.

1 with[sic] 72 hours of being notified.” However, the Discharger was not notified of a violation on
2 January 6 because the stockpiles were active, and there is no evidence that the Discharger failed
3 to cover the wood stockpile within 72 hours of the January 14 inspection.

4 After considering the lack of evidence and the inconsistencies in applying the
5 Enforcement Policy guidelines, San Altos can at most be charged with 0 days of a discharge; if
6 charged at all, the violation should be for one day, the per day factor should be .25, the
7 culpability multiplier should be 0.5, and the cleanup multiplier should be 0.8, resulting in
8 penalties or no more than \$1,000 as there is no evidence a violation even occurred.

9 **L. Alleged Violation 12: Failing to properly store chemicals on 7 days.**

10 San Altos disputes the penalties for these alleged violations. The Enforcement Policy
11 provides that a single liability amount can be assessed for multiple violations where a single
12 violation continues for more than one day. The Prosecution failed to identify any unique facts to
13 warrant why San Altos should not be charged with a single violation.

14 The Prosecution asserts a per day factor of .55, which in part relies on the finding that the
15 potential harm is “moderate” which means that there is a substantial threat to beneficial uses.¹⁶⁸
16 This is contrary to the facts. Mr. Melbourn admitted that he didn’t know what was in the
17 drums¹⁶⁹ and there was no rain imminent for any of the days alleged.¹⁷⁰ The location and
18 composition of the materials present a minor harm and the per day factor should be .35. With a
19 culpability multiplier of 1.3 and a cleanup multiplier of 0.8, the alleged liability should be
20 \$25,480 (as opposed to the Prosecution’s request for \$55,055).

21 **M. Alleged Violation 13: Failing to prevent the discharge of concrete waste to the**
22 **ground for 15 days.**

23 1. **The evidence does not support this alleged violation for 11 of the 15 days.**

24 The Prosecution alleges that San Altos failed to prevent the discharge of concrete waste
25

26 ¹⁶⁸ Technical Analysis, p. 60.

27 ¹⁶⁹ Melbourn Depo., Vol. I, p. 131:10-25, 132:1-14 (excerpts at Everett Decl., Ex. E).

28 ¹⁷⁰ Rosenbaum Decl., ¶ 6, Ex. D.

1 to the ground from March 18 – April 1, 2015, but the evidence does not support the allegations.

2 First, the ACLC misapplies the Permit's requirements. The Permit requires dischargers
3 to "ensure the containment of concrete washout areas and other washout areas that may contain
4 additional pollutants so there is no discharge into the underlying soil and onto the surrounding
5 areas."¹⁷¹ The Permit does not regulate small amounts of stucco that fall on the ground during
6 the application process during days when there is no rain and is cleaned up before a rain event.

7 Second, there is no evidence on eleven of the fifteen days cited as nobody inspected the
8 Site on those dates. Additionally, the evidence shows that the spills were different on the three
9 days noted.¹⁷² This infers that the spills noted on each of the three days were cleaned up,
10 indicating that the violation was not continuing on each day.

11 2. The penalties applied do not meet the Enforcement Policy guidelines.

12 The Prosecution proposes penalties of \$5,005/day for 15 days for a total of \$75,075 based
13 on a per day factor of .55, culpability multiplier of 1.3, and cleanup multiplier of 1.1. But in
14 calculating the per day factor, the Prosecution asserts that the "deviation from requirement" is
15 "major."¹⁷³ This is not appropriate for minor drops of stucco where the applicator is following
16 the industry standard of care (see discussion in Section III.C.a above) when there was no rain.¹⁷⁴

17 Additionally, the basis for the Prosecution's culpability factor discusses failure to protect
18 concrete washouts, which is not what occurred in this alleged violation.¹⁷⁵ Furthermore, the
19 approach to cleanup was within the standard of care. The culpability should be reduced to 0.50
20 to reflect was a "reasonable and prudent" person would do on such a construction site.

21 Last, the cleanup multiplier assigns a value of 1.1 "because the Discharger failed to
22 correct the violation with[sic] 72 hours of being notified." However, there is no evidence to
23

24 ¹⁷¹ Permit, Att. D., p. 3 (provided at Ex. B to Rosenbaum Decl.).

25 ¹⁷² Harper Depo., p. 75:23-25, 76:1-25, 77:1-13 (excerpts at Everett Decl., Ex. D); Melbourn Depo., Vol.
26 I, p. 127:25, 128:1-12 (excerpts at Everett Decl., Ex. E).

27 ¹⁷³ Technical Analysis, p. 63.

28 ¹⁷⁴ Sandstrom Decl. ¶ 6, Rosenbaum Decl., ¶ 6, Ex. D.

¹⁷⁵ Technical Analysis, p. 64.

1 support the fact that the stucco wasn't cleaned up with 72 hours. In fact, all of the spills noted in
2 the three exhibits are different spills, inferring they were likely cleaned up within 72 hours.¹⁷⁶

3 After considering the lack of evidence and the inconsistencies in applying the
4 Enforcement Policy guidelines, at most San Altos can be charged with 4 days of a discharge (if
5 charged at all), the per day factor should be .25, the culpability multiplier should be 0.5, and the
6 cleanup multiplier should be 0.8 for total penalties or no more than \$4,000 before taking further
7 mitigating factors into account.

8 **V. CONCLUSION**

9 The Enforcement Policy requires that the penalty fit the crime and that the RWQCB be
10 "fair and consistent" in imposing penalties while recognizing the "unique facts of each case."
11 The Prosecution here is neither. There is no evidence of harm to Chollas Creek and no evidence
12 that the alleged violations were particularly egregious such that extraordinary penalties are
13 warranted. In order to remind the construction industry that El Nino was coming, the Prosecution
14 decided to make San Altos an example. These penalties are simply not supported by the law or
15 the facts of the case.

16 The Prosecution proposes a penalty of \$832,611 (\$848,374 when adding staff time). To
17 achieve this massive amount, the Prosecution has relied on questionable evidence, reinterpreted
18 provisions of the Permit, and misapplied the Enforcement Policy and penalty guidelines. The
19 resulting penalty is more three times greater than the evidence supports and five times greater
20 than what it would be if the Prosecution approached this case in a "fair" and "consistent" way.

21 (See Chart at Exhibit A to this Brief.)

22 ///

23 ///

24 ///

25 ///

26

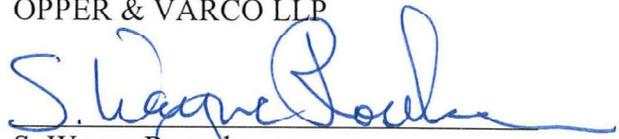
27

28 ¹⁷⁶ Technical Analysis, Exs. 14, 16, 17; Harper Depo., p. 75:23-25, 76:1-25, 77:1-13 (excerpts at Everett
Decl., Ex. D); Melbourn Depo., Vol. I, p. 127:25, 128:1-12 (excerpts at Everett Decl., Ex. E).

1 The Prosecution asserts that the penalties are justified by the “unique facts” of this case,
2 but they have not identified any facts that distinguish this case from others where penalties are
3 25% of what are sought here. In fact, the Prosecution refused to disclose these “unique facts”
4 making the imposition of these penalties unsupported by both the facts and law. The Board must
5 take it upon itself to be fair and consistent and reject the Prosecution’s claims.

6 Dated: February 3, 2016

OPPER & VARCO LLP

7 
8 S. Wayne Rosenbaum
9 Attorney for San Altos – Lemon Grove, LLC

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

Penalty Factor Comparison

Violation 1: Unauthorized Discharge of Sediment

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	6	.22	\$10,000	1.3	1.1	1.0	\$18,876
San Altos	4	.15	\$10,000	1.3	0.8	1.0	\$6,240
Difference	2	.07	0	0	0.3	0	\$12,636

Violation 2: Failure to Implement Material Stockpile BMPs

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	10	.35	\$10,000	1.3	1.1	1.0	\$50,050
San Altos	6	.35	\$10,000	0.5	0.8	1.0	\$8,400
Difference	4	0	0	0	0.3	0	\$46,650

Violation 3: Failure to Implement Fluid Leak BMPs.

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	2	.55	\$10,000	1.3	1.0	1.0	\$15,730
San Altos	2	.25	\$10,000	1.3	0.8	1.0	\$5,200
Difference	0	.30	0	0.0	0.3	0	\$11,330

Violation 4: Failure to Implement Erosion Control BMPs in Inactive Areas

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	22	.55	\$10,000	1.3	1.1	1.0	\$173,030
San Altos	10	.55	\$10,000	1.0	0.8	1.0	\$44,000
Difference	12	.20	0	0	0.3	0	\$129,230

Violation 5: Failure to Implement Perimeter Sediment Control BMPs

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	14	.35	\$10,000	1.3	1.1	1.0	\$70,070
San Altos	7	.35	\$10,000	1.3	0.8	1.0	\$25,480
Difference	7	0	0	0	0.3	0	\$44,590

Violation 6: Failure to Implement Erosion Control BMPs in Active Areas

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	22	.55	\$10,000	1.3	1.1	1.0	\$173,030
San Altos	12	.55	\$10,000	0.5	0.8	1.0	\$26,400
Difference	10	0	0	0.8	0.3	0	\$14,630

Violation 7: Failure to Apply Linear Sediment Controls

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	9	.55	\$10,000	1.3	1.1	1.0	\$70,785
San Altos	6	.55	\$10,000	1.3	0.8	1.0	\$34,320
Difference	3	0	0	0	0.3	0	\$36,465

Violation 8: Failure to Manage Run-on and Runoff

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	7	.55	\$10,000	1.3	1.1	1.0	\$35,035
San Altos	4	.55	\$10,000	1.3	0.8	1.0	\$22,880
Difference	3	0	0	0	0.3	0	\$12,155

Violation 9: Failure to Remove Sediment or Other Construction Materials

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	10	.35	\$10,000	1.3	1.1	1.0	\$50,050
San Altos	7	.35	\$10,000	1.3	0.8	1.0	\$25,480
Difference	3	0	0	0	0.3	0	\$24,570

Violation 10: Failure to Protect Storm Drain Inlets

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	3	.35	\$10,000	1.3	1.1	1.0	\$13,650
San Altos	2	.35	\$10,000	1.3	0.8	1.0	\$7,280
Difference	1	0	0	0	0.3	0	\$6,370

Violation 11: Failure to Contain and Securely Protect Stockpiled Waste Material from Wind and Rain

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	9	.25	\$10,000	1.3	1.1	1.0	\$32,175
San Altos	0	.25	\$10,000	0.5	0.8	1.0	\$1,000
Difference	9	0	0	0.8	0.3	0	\$31,175

Violation 12: Failure to Properly Store Chemicals

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	7	.55	\$10,000	1.3	1.1	1.0	\$50,055
San Altos	7	.35	\$10,000	1.3	0.8	1.0	\$25,480
Difference	0	.22	0	0	0.3	0	\$25,575

Violation 13: Failure to Prevent Discharge of Concrete Waste to the Ground

Total Base Liability	Day of Violation	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	15	.55	\$10,000	1.3	1.1	1.0	\$75,075
San Altos	4	.25	\$10,000	0.5	0.8	1.0	\$4,000
Difference	11	.30	0	0.8	0.3	0	\$71,075

Totals

Liability Methodology	Violations	Per Day Factor	Statutory Maximum Liability/Day	Culpability Multiplier	Cleanup & Cooperation Multiplier	History of Violations	Total
RWQCB	136	.43*	\$10,000	1.30	1.1	1.0	\$832,611
San Altos ¹	71	.42**	\$10,000	1.01**	0.8**	1.0	\$240,945
Reduction for Multiple Violations from same incident. ²	67	.41**	\$10,000	0.99**	0.8**	1.0	\$217,562
Reduction for Multiple Violations from consolidated incidents ³	42	.43**	\$10,000	1.02**	0.8**	1.0	\$147,370
Reduction pursuant to the methodology used in the Encinitas ACLC ⁴	17	.85***	\$10,000	1.3***	1.1***	1.0***	\$182,325

*Weighted Average based on RWQCB factors

** Weighted Average based on San Altos calculations

*** Applies the Encinitas per day factor, culpability multiplier and clean up and cooperation multiplier.

¹ The "San Altos" number of violations or alleged violations in this row is derived from the tables in the Penalty Factor Comparison above.

² The number of violations or alleged violations for this row is derived by applying subsections d and e of the "Multiple Violations Resulting From the Same Incident" found on pages 17 and 18 of the Water Quality Enforcement Policy to the number of violations or alleged violations from the preceding row.

³ The number of violations or alleged violations for this row is derived by applying subsection c of the "Multiple Violations Resulting From the Same Incident" found on pages 17 and 18 of the Water Quality Enforcement Policy to the number of violations under the "San Altos" liability methodology and consolidating alleged violations that occur daily for a period of time after the initial occurrence of an alleged violation.

⁴ The number of violations or alleged violations for this row is derived by counting the total number of days from December 1, 2014 to May 15, 2015 and adding September 15, 2015 for a total of 167 days. Applying the "Multiple Day Violations" policy found on page 18 of the Water Quality Enforcement Policy, this results in a total of 13 non-discharge violations provided all non-discharge violations are treated consistently with how they were treated in the Encinitas ACLC and consolidated to form a single type of violation (Encinitas ACLC, p. 3.). Adding these 13 non-discharge violations to the 4 discharge violations San Altos concedes results in 17 violations under this method.

EXHIBIT B

ALLEGED VIOLATIONS

DATE	1	2	3	4	5	6	7	8	9	10	11	12	13
12/1/2014													
12/2/2014													
12/3/2014													
12/4/2014													
12/5/2014													
12/6/2014													
12/7/2014													
12/8/2014													
12/9/2014													
12/10/2014													
12/11/2014													
12/12/2014													
12/13/2014													
12/14/2014													
12/15/2014													
12/16/2014													
12/17/2014													
12/18/2014													
12/19/2014													
12/29/2014													
12/30/2014													
12/31/2014													
1/1/2015													
1/2/2015													
1/3/2015													
1/4/2015													
1/5/2015													
1/6/2015													
1/7/2015													
1/8/2015													
1/9/2015													
1/10/2015													
1/11/2015													
1/12/2015													
1/13/2015													
1/14/2015													
1/15/2015													
1/16/2015													
3/16/2015													
3/17/2015													
3/18/2015													
3/19/2015													
3/20/2015													
3/21/2015													
3/22/2015													
3/23/2015													
3/24/2015													
3/25/2015													
3/26/2015													
3/27/2015													
3/28/2015													
3/29/2015													
3/30/2015													
3/31/2015													
4/1/2015													
4/2/2015													
4/3/2015													
5/6/2015													
5/7/2015													
5/8/2015													
5/9/2015													
5/10/2015													
5/11/2015													
5/12/2015													
5/13/2015													
5/14/2015													
5/15/2015													
5/16/2015													
5/17/2015													
9/13/2015													
9/14/2015													
9/15/2015													
9/16/2015													
9/17/2015													
9/18/2015													

ALLEGED VIOLATIONS KEY

1. Unauthorized Discharge of Sediment-laden water from Site into Encanto Channel
2. Failure to Implement Material Stockpiling BMPs
3. Failure to Implement Fluid Leak BMPs
4. Failure to Implement Erosion Control BMPs in Inactive Areas
5. Failure to Implement Perimeter Sediment Control BMPs
6. Failure to Implement Erosion Control BMPs in Active Areas
7. Failure to Apply Linear Sediment Controls
8. Failure to Manage Run-On and Runoff
9. Failure to Remove Sediment or Other Construction Materials
10. Failure to Protect Storm Drain Inlets
11. Failure to Contain and Securely Protect Stockpiled Waste Material from Wind and Rain
12. Failure to Properly Store Chemicals
13. Failure to Prevent Discharge of Concrete Waste to Ground