

EDMUND G. BROWN JR.
GOVERNORMATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

San Diego Regional Water Quality Control Board

December 28, 2015

VIA E-MAIL ONLY

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Laura Drabandt, Senior Staff Counsel
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Subject: ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R9-2015-0110, SAN ALTOS-LEMON GROVE, LLC; CHAIR'S RULING ON REQUESTS FOR EXTENSION OF THE HEARING SCHEDULE AND FOR PROCEDURAL MODIFICATIONS

Mr. Rosenbaum and Ms. Drabandt:

The purpose of this letter is to transmit the Regional Water Quality Control Board, San Diego Region (San Diego Water Board) Chair's rulings on San Altos–Lemon Grove, LLC's (San Altos) requests for extension of the schedule and for procedural modifications set forth in correspondence dated December 15, 2015. On December 4, 2015, I distributed final hearing procedures and transmitted prehearing rulings by the Executive Officer, acting as the Chair's designee, on objections raised by San Altos concerning Administrative Civil Liability Complaint (ACLC) No. R9-2015-0110. By correspondence dated December 15, 2015, San Altos requested that the Chair reconsider the prehearing determinations and (1) extend the hearing date by at least 60 days, (2) allow each Designated Party four hours in which to present their cases at hearing, and (3) eliminate the requirement that witnesses submitting written testimony appear at the hearing to affirm their testimony.

The parties provided additional input in email correspondence dated December 22, 2015. The Prosecution Team objected to extension of the existing hearing schedule, but noted that an extension, if granted, should be limited to 30 days. San Altos indicated that it would be amenable to a 30 day extension of the hearing schedule but would have the Board either move its regularly scheduled board meeting to March 11 or

HENRY ABARBANEL, PH.D, CHAIR | DAVID GIBSON, EXECUTIVE OFFICER

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convene an additional meeting on March 11. San Altos also noted that it would not object to having its witnesses appear in person for Prosecution Team cross-examination on rebuttal if San Altos is allowed three hours for its case in chief (and assuming any cross-examination by the Prosecution Team be counted against the Prosecution Team's total allotted time)

The Chair rules as follows:

1. Extension of Hearing Deadlines

The deadline for San Altos to submit all information required under "Evidence and Policy Statements" is extended by thirty days to February 3.

The deadlines for Designated Parties to submit rebuttal evidence (if any) and evidentiary objections and to request a prehearing conference are extended by 33 days to February 17.¹

The deadline for Interested Parties to submit non-evidentiary policy statements, if any, is extended by 30 days to February 19.

The hearing date is extended by 28 days to March 9.²

2. Appearance of Witnesses at Hearing

The San Diego Water Board requires that witnesses submitting written testimony be available at the hearing to affirm their testimony and for the additional reason that they must be available to other Designated Parties to cross-examine and for Board Member or Advisory Team questions. If personal appearance becomes logistically challenging for one or more witnesses, either Designated Party may raise the matter for the Chair's further consideration based on the particular circumstances at issue. As provided in the Hearing Procedures, cross-examination by a Designated Party of another party's witness must be completed within the total amount of hearing time allotted to the cross-examining party.

¹ In their December 22, 2015, email exchange, the parties appear to agree that February 23 is an appropriate date for submittal of rebuttal testimony and evidence. However, submittal by February 23 does not provide sufficient time for the Advisory Team to prepare and distribute the agenda materials for timely San Diego Water Board consideration. Therefore, rebuttal evidence and testimony is due February 17. We note that as compared with the existing schedule, the February 17 deadline still allows three additional days from the Discharger's submittal of Evidence and Policy Statements (February 3 to February 17 as compared with January 4 to January 15) before rebuttal evidence and testimony is due.

² March 9 is the date of the regularly scheduled San Diego Water Board meeting. The Parties will have had 21 days from the last evidentiary submittal opportunity of February 17 before the March hearing. We note that in its December 22 correspondence, San Altos did not object to a rebuttal testimony and evidence deadline of February 23, which would have allowed only 17 days before its preferred hearing date of March 11.

3. Total Hearing Time for Each Designated Party

The Chair declines to modify the total hearing time of 90 minutes per party. Consistent with the hearing procedures for this matter, 90 minutes per party is inclusive of presentation of evidence, cross-examination of other Designated Party witnesses, opening and closing statements and legal argument. Pursuant to this ruling, San Altos has an additional 30 days in which to prepare its evidentiary and other written submittals; rebuttal testimony and evidence is not due for seven weeks. The hearing procedures specify that the Advisory Team may modify the procedures to allow more hearing time in advance of the hearing and the San Diego Water Board may, at its discretion, allow more time upon request at the hearing.

Any future requests for reconsideration of the above rulings should be submitted in writing with any legal argument to me. Please copy all other parties. I will provide an opportunity for a response before making any recommendations to the Chair.

Enclosed are revised Final Hearing Procedures reflecting the above rulings and adding additional contact information for San Altos per its request.

Sincerely,



Catherine George Hagan
Senior Staff Counsel
Office of Chief Counsel
State Water Resources Control Board

Attachment: Revised Final Hearing Procedures for ACLC R9-2015-0110

cc: David W. Gibson, San Diego Water Board Executive Officer [Via E-mail Only] James G. Smith, San Diego Water Board Asst. Executive Officer [Via E-mail Only]

Adriana Nunez, Staff Counsel, Office of Chief Counsel, State Water Resources Control Board [Via E-mail Only] David De Vries, Principal Planner, City of Lemon Grove [Via E-mail Only]

Ben Carrier, Deputy City Attorney, City of San Diego [Via E-mail Only]

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

REVISED HEARING PROCEDURE FOR
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT
NO. R9-2015-0110
ISSUED TO

SAN ALTOS-LEMON GROVE, LLC
VALENCIA HILLS CONSTRUCTION SITE

SCHEDULED FOR MARCH 9, 2016

PLEASE READ THIS HEARING PROCEDURE CAREFULLY. FAILURE TO COMPLY WITH THE DEADLINES AND OTHER REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF YOUR DOCUMENTS AND/OR TESTIMONY.

Background

The Assistant Executive Officer of the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) has issued an Administrative Civil Liability (ACL) Complaint pursuant to California Water Code (Water Code) sections 13323 and 13385 against San Altos-Lemon Grove, LLC (Discharger) alleging it has violated California State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, as amended; Water Code section 13376; the Water Quality Control Plan for the San Diego Basin; and Clean Water Act section 301. The ACL Complaint proposes that administrative civil liability in the amount of **\$848,374** be imposed as authorized by Water Code section 13385. Unless the Discharger waives its right to a hearing and pays the proposed liability, a hearing will be held before the San Diego Water Board on **March 9, 2016**, in San Diego.

Purpose of Hearing

The purpose of the hearing is to receive relevant evidence and testimony regarding the proposed ACL Complaint. At the hearing, the San Diego Water Board will consider whether to adopt, modify, or reject the proposed assessment. The hearing will be held at the San Diego Water Board office at 2375 Northside Drive, Suite 100, in San Diego. An agenda for the hearing will be issued at least ten (10) days before the hearing and will be posted on the San Diego Water Board's web page at: www.waterboards.ca.gov/sandiego.

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Hearing Procedure

The hearing will be conducted in accordance with this hearing procedure. A copy of the procedures governing an adjudicatory hearing before the San Diego Water Board may be found at Title 23 of the California Code of Regulations, section 648 et seq., and is available at <http://www.waterboards.ca.gov> or upon request. In accordance with section 648(d), any procedure not provided by this Hearing Procedure is deemed waived. Except as provided in Title 23 of the California Code of Regulations (CCR), section 648(b), Chapter 5 of the Administrative Procedures Act (commencing with section 11500 of the Government Code) does not apply to adjudicatory hearings before the San Diego Water Board. This Notice provides additional requirements and deadlines related to the proceeding.

THE PROCEDURE AND DEADLINES HEREIN MAY BE AMENDED BY THE ADVISORY TEAM IN ITS DISCRETION. **ANY OBJECTIONS TO THE PROPOSED PROCEDURE MUST BE RECEIVED BY CATHERINE HAGAN, SENIOR STAFF COUNSEL, NO LATER THAN NOVEMBER 20,¹ 2015, OR THEY WILL BE WAIVED.** FAILURE TO COMPLY WITH THE DEADLINES AND REQUIREMENTS CONTAINED HEREIN MAY RESULT IN THE EXCLUSION OF DOCUMENTS AND/OR TESTIMONY.

Hearing Participation

Participants in this proceeding are either "designated parties" or "interested persons." Designated parties to the hearing may present evidence and cross-examine witnesses and are subject to cross-examination. Interested persons may present non-evidentiary policy statements, but may not cross-examine witnesses and are not subject to cross-examination. Interested persons generally may not present evidence (e.g., photographs, eye-witness testimony, monitoring data). Both designated parties and interested persons may be asked to respond to clarifying questions from the San Diego Water Board, staff, or others, at the discretion of the San Diego Water Board.

The following participants are hereby designated parties in this proceeding:

1. San Diego Water Board Prosecution Team; and
2. San Altos-Lemon Grove, LLC.

¹ By email dated November 23, 2015, this deadline was extended to November 25.

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Requesting Designated Party Status

Persons who wish to participate in the hearing as a designated party, and are not already listed above, shall request party status by submitting a request in writing (with copies to the existing designated parties) no later than 5:00 p.m. on **November 20, 2015**,² to Catherine Hagan, Senior Staff Counsel, at the address set forth below. The request shall include an explanation of the basis for status as a designated party (e.g., how the issues to be addressed in the hearing and the potential actions by the San Diego Water Board affect the person), the information required of designated parties as provided below, and a statement explaining why the party or parties designated above do not adequately represent the person's interest. Any opposition to the request must be submitted by 5:00 p.m. on **November 23, 2015**. The parties will be notified by 5:00 p.m. on **December 4, 2015**, as to whether the request has been granted or denied.

Contacts

Advisory Team:³

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Deborah Jayne, Senior Environmental Scientist

² By email dated November 23, 2015, this deadline and the deadline for opposition to requests were extended to November 25 and November 30 respectively.

³ Additional staff may be designated as advisory staff with the Final Hearing Procedures or at a later date.

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Separation of Functions

To help ensure the fairness and impartiality of this proceeding, the functions of those who will act in a prosecutorial role by presenting evidence for consideration by the San Diego Water Board (Prosecution Team) have been separated from those who will provide advice to the San Diego Water Board (Advisory Team). Members of the Advisory Team¹ include Catherine George Hagan and Adriana Nunez, Staff Counsel, Deborah Jayne, Senior Environmental Scientist and Beatrice Griffey, Engineering Geologist. Members of the Prosecution Team are: Laura Drabandt, Senior Staff Counsel; James Smith, Assistant Executive Officer; Jeremy Haas, Environmental Program Manager; Chiara Clemente, Senior Environmental Scientist; Laurie Walsh, Senior Water Resource Control Engineer; Wayne Chiu, Water Resource Control Engineer; and Frank Melbourn, Water Resource Control Engineer.

Ex Parte Communications

The designated parties and interested persons are forbidden from engaging in *ex parte* communications regarding this matter with members of the Advisory Team or members of the San Diego Water Board. An *ex parte* contact is any written or verbal communication pertaining to the investigation, preparation, or prosecution of the ACL Complaint between a member of a designated party or interested party on the one hand, and a San Diego Water Board member or an Advisory Team member on the other hand, unless the communication is copied to all other designated and interested parties (if written) or made at a proceeding open to all other parties and interested persons (if verbal). Communications regarding non-controversial procedural matters are not *ex parte* contacts and are not restricted. Communications among the designated and interested parties themselves are not *ex parte* contacts.

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Hearing Time Limits To ensure that all participants have an opportunity to participate in the hearing, the following time limits shall apply: each designated party shall have a combined ninety (90) minutes to present evidence, cross-examine witnesses (if warranted), and provide a closing statement; and each interested person shall have three (3) minutes to present a non-evidentiary policy statement. Participants with similar interests or comments are requested to make joint presentations, and participants are requested to avoid redundant comments. Participants who would like additional time must submit their request to the Advisory Team no later than **February 19, 2016**. Additional time may be provided at the discretion of the Advisory Team (prior to the hearing) or the San Diego Water Board (at the hearing) upon a showing that additional time is necessary.

Submission of Evidence and Policy Statements

The following information must be submitted in advance of the hearing:

1. All evidence (other than witness testimony to be presented orally at the hearing) that the Designated Party would like the San Diego Water Board to consider. Evidence and exhibits already in the public files of the San Diego Water Board may be submitted by reference as long as the exhibits and their location are clearly identified in accordance with Title 23, California Code of Regulations, section 648.3.
2. All legal and technical arguments or analysis.
3. The name of each witness, if any, whom the designated party intends to call at the hearing, the subject of each witness' proposed testimony, and the estimated time required by each witness to present direct testimony.
4. The qualifications of each expert witness, if any.
5. (Discharger only) If the Discharger intends to argue an inability to pay the civil liability proposed in the Complaint (or an increased or decreased amount as may be imposed by the San Diego Water Board), the Discharger should submit supporting evidence as set forth in the "ACL Fact Sheet" under "Factors that must be considered by the Board."
6. (Discharger only) If the Discharger would like to propose a Supplemental Environmental Project (SEP) or Enhanced Compliance Action (ECA) in lieu of paying some or all of the civil liability in accordance with the State Water Board's Water Quality Enforcement Policy, the Discharger shall submit a detailed SEP or ECA proposal including a specific implementation timetable.

The Prosecution Team shall submit two (2) hard copies and one (1) electronic copy of the information to Catherine Hagan, Senior Staff Counsel, so that it is received no later than 5:00 p.m. on **November 30, 2015**.⁴

⁴ By email dated November 23, 2015, this deadline was extended to December 4, 2015.

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The remaining designated parties shall submit two (2) hard copies and one (1) electronic copy of the information to Catherine Hagan, Senior Staff Counsel, so that they are received no later than 5:00 p.m. on **February 3, 2016**.

In addition to the foregoing, each designated party shall send one (1) copy of the above information to each of the other designated parties by 5:00 p.m. on the deadline specified above.

Interested persons who would like to submit written non-evidentiary policy statements are encouraged to submit them to Catherine Hagan, Senior Staff Counsel, as early as possible, but they must be received by **February 19, 2016**. Interested persons do not need to submit written comments in order to speak at the hearing.

In accordance with Title 23, California Code of Regulations, section 648.4, the San Diego Water Board endeavors to avoid surprise testimony or evidence. Absent a showing of good cause and lack of prejudice to the parties, the San Diego Water Board may exclude evidence and testimony that is not submitted in accordance with this hearing procedure. Excluded evidence and testimony will not be considered by the San Diego Water Board and will not be included in the administrative record for this proceeding. PowerPoint and other visual presentations may be used at the hearing, but their content may not exceed the scope of other submitted written material. A copy of such material intended to be presented at the hearing must be submitted to the Advisory Team at or before the hearing for inclusion in the administrative record. Additionally, any witness who has submitted written testimony for the hearing shall appear at the hearing and affirm that the written testimony is true and correct, and shall be available for cross-examination.

Request for Pre-hearing Conference

A designated party may request that a pre-hearing conference be held before the hearing in accordance with Water Code section 13228.15. A pre-hearing conference may address any of the matters described in subdivision (b) of Government Code section 11511.5. Requests must contain a description of the issues proposed to be discussed during that conference, and must be submitted to the Advisory Team, with a copy to all other designated parties, no later than 5:00 p.m. on **February 17, 2016**.

Evidentiary Objections

Any designated party objecting to written evidence or exhibits submitted by another designated party must submit a written objection so that it is received by 5:00 p.m. on **February 17, 2016**, to the Advisory Team with a copy to all other designated parties. The Advisory Team will notify the parties about further action to be taken on such objections and when that action will be taken.

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Evidentiary Documents and File

The Complaint and related evidentiary documents are on file and may be inspected or copied at the San Diego Water Board office at 2375 Northside Drive, Suite 100, San Diego, California 92108. This file shall be considered part of the official administrative record for this hearing. Other submittals received for this proceeding will be added to this file and will become a part of the administrative record absent a contrary ruling by the San Diego Water Board. Many of these documents are also posted online at www.waterboards.ca.gov/sandiego. Although the web page is updated regularly, to ensure access to the latest information, you may contact Catherine Hagan, Senior Staff Counsel.

Questions

Questions concerning this proceeding may be addressed to Catherine Hagan, Senior Staff Counsel.

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IMPORTANT DEADLINES

| | |
|--------------------------------|---|
| October 19, 2015 | Prosecution Team issues ACL Complaint to Discharger and Advisory Team, sends proposed Hearing Procedure to Discharger and Advisory Team, and publishes Public Notice. |
| November 20, 2015 ⁵ | Objections due on proposed Hearing Procedure. |
| November 20, 2015 | Deadline for submission of request for designated party status. |
| November 23, 2015 ⁶ | Deadline for opposition to request for designated party status. |
| November 30, 2015 ⁷ | Prosecution Team's deadline for submission of all information required under "Evidence and Policy Statements," above. |
| December 4, 2015 | Advisory Team issues Hearing Procedure, and issues decision on requests for designated party status, if any. |
| February 3, 2016 | Remaining Designated Parties' Deadline for submission of all information required under "Evidence and Policy Statements," above. |
| February 17, 2016 | All Designated Parties' deadline for submission of request for pre-hearing conference. |
| February 17, 2016 | All Designated Parties' deadline for submission of rebuttal evidence (if any) and evidentiary objections. |
| February 19, 2016 | Interested Parties' deadline for submission of non-evidentiary policy statements. |
| March 9, 2016 | Hearing. |


CATHERINE GEORGE HAGAN
Senior Staff Counsel

12-28-15
Date

⁵ By email dated November 23, this and the next deadline were extended to November 25.

⁶ By email dated November 23, this date was extended to November 30.

⁷ By email dated November 23, this date was extended to December 4.