

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

San Diego Regional Water Quality Control Board

In the Matter of Complaint No. R9-2015-0110 for Administrative Civil Liability Against San Altos-Lemon Grove, LLC Valencia Hills Construction Site, Lemon Grove, California

RULING ON REQUEST FOR PREHEARING CONFERENCE, ADDRESSING MATTERS RAISED IN PREHEARING CONFERENCE REQUEST, AND RULING ON OBJECTIONS TO ADVISORY TEAM CONSIDERATION OF DRAFT ENFORCEMENT SUMMARY REPORT AND DRAFT TENTATIVE ORDER

Denial of Request for a Prehearing Conference

I have considered the request for a prehearing conference made by San Altos-Lemon Grove, LLC (San Altos) as well as the San Diego Water Board Prosecution Team (Prosecution Team) response to San Altos's request in the above Administrative Civil Liability (ACL) matter. Whether to hold a prehearing conference is at the discretion of the San Diego Water Board Chair as presiding officer for prehearing proceedings. Prehearing conferences may at times be a valuable tool in narrowing issues or resolving procedural issues but are not routinely used in San Diego Water Board quasi-adjudicative matters except when a proceeding involves numerous parties and/or voluminous materials, or possesses other similar characteristics. In this case, I have determined that a prehearing conference would not aid significantly in narrowing the issues, resolving procedural issues or conserving hearing time.¹

Many of the matters San Altos proposes for discussion in a prehearing conference can and should, if at all possible, be resolved by the Designated Parties (San Altos and the Prosecution Team) outside of such a conference. Resolution of some of these matters by the Parties will help to facilitate a more efficient and orderly hearing and conserve limited hearing time. Other matters proposed for discussion are addressed in the separate Order of Proceedings that will govern the conduct of the evidentiary hearing or are unnecessary to address.²

San Altos raises the prospect of exploration of settlement. I am aware that the Parties have engaged in some settlement discussions and note that they are not precluded

¹ The San Diego Water Board Prosecution Team did not request a prehearing conference but responded to San Altos's request, conveying a willingness to participate in a conference to address certain issues to facilitate an efficient hearing.

² For example, no requests or motions for intervention have been received. To my knowledge, no Party issued a subpoena for witness appearance at the hearing and no protective order motions have been filed.

from engaging in further discussions in advance of the hearing. San Altos also identifies preparation of stipulations as a matter for prehearing discussion. To facilitate the efficient and orderly conduct of the hearing and to avoid the undue consumption of hearing time, the Parties shall endeavor as much as possible to stipulate to the authenticity of documents sought to be relied upon by the Parties and to resolve in advance other evidentiary disputes.

Consistent with the section 648.5 of Title 23 of the California Code of Regulations, applicable to this proceeding, I am issuing an Order of Proceedings that also addresses some of the matters proposed for a prehearing conference. The Order of Proceedings supplements the Revised Hearing Procedures issued February 8, 2016, and addresses hearing logistics such as issuance of an oath, affirmation of written testimony, the order of presentations and testimony, time limits and the manner and timing of cross-examination and questioning.

Evidence already submitted (with the exception of the Prosecution Team's proposed Exhibit 33 submitted on February 4, and provisionally excluded in my February 8 ruling) will be provided to the Board Members with their agenda materials and included in the record, subject to later determination to exclude particular pieces of evidence. The agenda materials will include a list of supporting documents provided to the Board Members. Evidence need not (and should not) be introduced formally at the hearing for inclusion in the record. The Board Members, Parties and the public will be informed if any evidence is excluded from the record and in that event, the Board will not consider such evidence in making a decision on the complaint. Upon such notification, the Board Members are fully able to disregard excluded evidence.

As part of its prehearing conference request, San Altos asks that I require the Prosecution Team to "identify the specific evidence it intends to present for each alleged violation and which, if any, of San Alto's [sic] witnesses it intends to cross examine and the specific content of that cross-examination or, in the alternative, [that San Altos] be given a full four hours to present its case and cross-examine witnesses." (San Altos Prehearing Conference Request, p. 3.) San Altos's specific request is denied. The Parties may confirm their witness lists and may, but are not required, to stipulate in advance to which witnesses they intend to cross-examine and the subject matter of any cross-examination. The Parties are reminded that any cross-examination by a party of another party's witness is counted against the cross-examining party's hearing time. Moreover, as provided in the Revised Hearing Procedures and the Order of Proceedings, San Altos may renew its request for more time at the hearing. Such request may be granted upon a showing of good cause.

San Altos proposes for prehearing discussion rulings on identity and limitation on the number of witnesses. A ruling on these matters is not required. The Order of Proceedings addresses the logistics of affirming written testimony and making witnesses available for cross-examination and questioning. Parties are advised that witnesses submitting declarations shall attend the hearing to affirm their testimony and be available for cross-examination and for questions from Board Members and the

Advisory Team. The Parties are encouraged to consider stipulating that the deposition excerpts attached to the Declaration of Dee Dee Everett are true and correct and that Ms. Everett not be required to attend the hearing to affirm the truth of her declaration.

As the Parties were previously advised, deponents are not required to attend the hearing to affirm the truth of their testimony or be available for cross-examination and questioning. However, unless a deponent attends the hearing and affirms his or her deposition testimony, the transcript may be considered hearsay and limited accordingly. (See Gov. Code § 11513, subd. (d).³) Transcripts of an adverse party deponent are not hearsay. (See Code Civ. Proc., § 2025.620.)

San Altos proposes that a prehearing conference allow a further opportunity either to respond to previously submitted evidence to which it objects or to respond to rebuttal testimony and evidence. As San Altos notes, on February 8 I extended the deadline for the Parties to submit rebuttal testimony and evidence and to submit specific evidentiary objections and related legal argument. I reminded the Parties that they should “include with their rebuttal submittals any legal argument in support or opposition to the proposed evidence being accepted into the record and should include any evidentiary objections to specific pieces of proposed evidence.” (February 8, 2016, Chair’s Ruling, p. 2.) Rebuttal submittals were received February 23, 2016. The Parties may object to rebuttal evidence in writing in advance of the hearing (by close of business March 4). Absent stipulations by the Parties concerning previously submitted evidentiary objections, I intend to issue final rulings on prior to the hearing without further opportunity for response. I also intend, if possible, to issue rulings on objections to rebuttal evidence prior to the hearing.

Finally, San Altos requests that a prehearing conference would allow for discussion of whether this proceeding should be held as an informal hearing or should be referred for mediation to help resolve due process issues. The proceeding does not meet the qualifications for an informal hearing under Article 10, commencing with section 11445.10 of the Administrative Procedures Act. As indicated in the notice of hearing issued with the Complaint and the hearing procedures for this matter, this proceeding will be conducted as a formal hearing. While an agency, by the consent of all parties, may refer a matter for resolution to mediation, all parties have not consented. Moreover, it is squarely within the Board’s purview to hear and resolve the issues in this matter, including procedural matters related to due process.

³ Government Code section 11513, subdivision (b) provides: “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.”

**Ruling on Objections to Advisory Team Consideration of Prosecution Team's
Draft Enforcement Summary Report and Draft Tentative Order**

On February 18, 2016, San Altos submitted objections to the Prosecution Team's transmittal to the Advisory Team of a draft Enforcement Summary Report and draft Tentative Order for Advisory Team consideration prior to inclusion in the Board's agenda materials for the upcoming hearing. The Advisory Team is preparing an independent Advisory Team Summary Report for inclusion in the Board's agenda materials so objections to the Prosecution Team's draft Enforcement Summary Report are moot. No Enforcement Summary Report will be provided to the Board Members. Likewise, San Altos's objections to Advisory Team consideration of the Prosecution Team's draft Tentative Order are moot. Either Party is free to provide a Proposed Tentative Order for Advisory Team consideration and such drafts may assist the Advisory Team. However, the Advisory Team will prepare its own Tentative Order for consideration by the San Diego Water Board as directed by the San Diego Water Board following the conclusion of the hearing and deliberations by the board on the evidence considered in the hearing.



Henry Abarbanel, Ph.D., Chair and
Presiding Officer for Prehearing Proceedings

February 26, 2016