

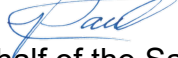


State Water Resources Control Board

TO (via email only):

David Gibson
Executive Officer
California Regional Water Quality Control Board, San Diego Region
David.Gibson@waterboards.ca.gov

Vincent Vu, Attorney III
Office of Chief Counsel
Vincent.Vu@waterboards.ca.gov

FROM: Paul Ciccarelli, Attorney III 
Office of Enforcement (on behalf of the San Diego Regional Water Quality Control Board, Prosecution Team)

DATE: July 5, 2023

**SUBJECT: PROSECUTION TEAM'S PREHEARING REBUTAL EVIDENCE
SUBMITTAL AND OBJECTIONS TO THE RESPONDENTS'
PREHEARING EVIDENCE**

In accordance with the Second Revised Hearing Procedure for Administrative Civil Liability Complaint No. R9-2023-0013 (Complaint), the San Diego Regional Water Quality Control Board (San Diego Water Board), Prosecution Team (Prosecution Team) submits its prehearing rebuttal evidence, objections to prehearing evidence submittals (excluding rebuttal evidence), and request to keep the current hearing time limits (60 minutes per Party). The Prosecution Team's prehearing rebuttal evidence exhibits discussed herein (PT Exs. 51-57) were uploaded to the FTP site created for this matter. Instructions for accessing and downloading electronic files from the FTP site are provided at the end of this submittal.

Prosecution Team's Prehearing Rebuttal Evidence

Respondents' prehearing argument submittal attempts to shift blame away from the Respondents and onto regulatory agencies but is inconclusive. The Respondents assert that the City of Oceanside (City) and San Diego Water Board staff (together Regulators) approved a drainpipe adjacent to the Respondents' site (Site) that caused stormwater run-on that overwhelmed the Site's "approved drainage plans, scouring the graded [S]ite to bedrock in some areas." The Respondents further state:

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

The [Regulators] were aware of the problem because they had requested in plans the enlargement of a [drainpipe] of the property from 3 feet to 4 feet diameter, allowing a cross sectional flow of water increase from about 7 square feet to 12 square feet, a 71% increase in capacity, for the drainage of the property. Officials had approved the higher elevation development and had experience with the result of heavy rains that could not be anticipated by Respondents when their plans were prepared and approved.

The Regulators did not request a change to the drainpipe design. The alleged violations occurred because the Respondents failed to: 1) install the storm drain infrastructure that they proposed ahead of the 2021-2022 rainy season, and 2) failed to implement alternative run-on controls. The Respondents' argument is based on unsupported claims and does not absolve them of their obligation to comply with the Construction General Permit.

1. Regulators Did Not Request Enlargement of a Drainpipe from 3 Feet to 4 Feet in Diameter

The Site is an approximately 3.5-acre residential housing project that is located on a previously undeveloped, steep hillside that had a natural creek bisect the property before construction began. The Site is a Risk Level 2 site that receives run-on directly from the existing Buena Hills development and City's municipal separate storm sewer system (MS4) located immediately east of the Site. Runoff from the Site enters the City's MS4 via inlets on Rancho Del Oro Drive and Vista Way and discharges directly to Buena Vista Creek and subsequently Buena Vista Lagoon, a sensitive waterbody with important ecological functions.

The Respondents' engineer, Buccola Engineering, Inc., prepared and submitted the Respondents' Storm Water Quality Management Plan (SWQMP) for the Site. (PT Ex. 1.) On September 26, 2018, the City deemed complete¹ (or approved) the Respondents' final design proposed in their third SWQMP submittal (Approved SWQMP) (PT Ex. 51), more than three years before the alleged violations occurred. As shown in *Figure 6.1 Pre-Development DMAs and Figure 6.2 Run-on Bypass Storm Drain Schematic* of the Approved SWQMP, the Respondents acknowledge that the Site receives "significant run-on flows" from the Buena Hills development through an "existing 27" [reinforced concrete pipe (RCP)] storm drain located at the terminus of Mira Pacific Drive." (PT Ex. 51; see also, PT Ex. 27, page 10.) The Respondents' proposed a 30-inch RCP to join the existing 27-inch RCP to transport run-on in the Site's drain schematic. (PT Ex 51; see also, PT Ex. 27, Appendix B, Exhibit B -

¹ City staff confirmed that its review of plans and reports is limited to ensuring that the design and information within those documents adhere to the City's design guidelines and ordinances. The "deemed complete" designation does not mean that the City agrees with an engineering analysis, and that the design engineer is ultimately responsible for the accuracy and functionality of their design. (PT Ex. 55; see also, PT Ex. 51 (Buccola Engineering, Inc.'s declaration in the Approved SWQMP acknowledging that the City's review of the SWQMP is confined to a review and does not relieve the Engineer in Responsible Charge of its responsibilities for project design).)

Proposed Site Condition – Drainage Map.) On June 9, 2023, the City confirmed that staff inspected the Site and that the drainage pipe size, material, layout, and pipe burial was in conformance with the Approved SWQMP. (PT. Ex. 52.) The City provided photographs (PT Exs. 53 and 54) of the 30-inch RCP that the Respondents ultimately installed at the Site in October 2022, well *after* the alleged violations occurred. (PT Ex. 56; see also, PT Ex. 57 (Revised Economic Benefit Analysis based on October 10, 2022 completion date).) Drainpipes larger than 30-inch were never proposed nor required by the Regulators.

2. The Respondents Are Obligated to Comply with the Construction General Permit

The Respondents are Risk Level 2 dischargers and have sole responsibility for compliance with the Construction General Permit. The Respondents had the duty to design and implement controls to effectively manage all run-on, all runoff within the Site, and all runoff that discharges off the Site. (Construction General Permit, Provision X.) The Respondents were also required to direct run-on from all disturbed areas within the Site. (Id.) The Respondents commenced construction in April 2020 before installing the storm drain infrastructure, or alternative run-on management strategy ahead of the 2021-2022 rainy season. In fact, the Respondents did not implement any of the alternative strategies for run-on management from their own Stormwater Pollution Prevention Plan (SWPPP). (PT Ex. 27.) Instead, the Dischargers dug an impromptu pit at a depression on the Site to capture the run-on. The pit was not engineered to satisfy minimum run-on volumes, failed, and caused the significant unauthorized discharges alleged in the Complaint.

Prosecution Team's Prehearing Evidentiary Objections

The Prosecution Team hereby objects to the following:

1. Defense (Def.) Exhibits 8-28, 30-35, 37-49, 51-56, and 58-73 lack foundation:

The Prosecution Team objects to each exhibit in the Respondents' June 7, 2023 prehearing evidence submittal because the exhibits are unreliable evidence due to lack of foundation.

The Respondents' prehearing evidence is comprised of 55 photographs in .jpg format (Def. Exhibits 8-28, 37-49, 51-56, and 58-72) and one video in .MP4 format (Def. Exhibit 73). The Respondents have provided no information explaining *who* took the photographs and/or video, *why* the photographs and/or video are relevant, and most importantly, *when* the photographs and/or video were taken. A review of the .jpg and .MP4 files shows that the metadata was removed from each photograph, excluding the GPS coordinates for Def. Exhibits 10, 13, 15, 20-21, 23-24, 43, 46-48, 51-52, 54, 61-65, 67-68, 70-72. The file properties for Def. Exhibit 73 state that the media was created on March 28, 2022 at 10:30 PM. The video, however, was taken during daylight at an unidentifiable location.

Unless proper foundation is provided through testimony of the individual(s) who took the photographs and video, the referenced photographs and/or video should not be admitted as evidence. If testimony reveals that any of the photographs and/or video were taken after installation of the Site's storm drain system (on or around October 10, 2022) (PT Ex. 56), the Prosecution Team objects on the grounds that those photographs and/or video are irrelevant.

2. **Def. Exhibits 58, 60, and 69 are cumulative:** The Prosecution Team would like the record to reflect that Def. Exhibits 60 and 61, 58 and 62, and 67 and 69 appear to be duplicates. Def. Exhibits 61, 62, and 67, however, have GPS coordinates in their metadata, whereas Def. Exhibits 60, 58, and 69 do not. To the extent that Def. Exhibits 60, 58, and 69 are duplicates, the Prosecution Team objects to those exhibits as cumulative.

Hearing Time Limits

The Second Revised Hearing Procedure allocates a total of 60 minutes for each Party to present evidence (including examining witnesses), cross-examine witnesses, and provide a closing statement. The Respondents' Witness List, however, proposes almost 5 hours of time for their witnesses to present direct testimony. It is unclear whether the Respondents are requesting additional hearing time. If so, the Prosecution Team objects and requests that the Advisory Team keeps the original hearing time limit of 60 minutes for each Party. The Respondents already had the opportunity to request additional time during the comment period for the proposed Hearing Procedure. Nothing in the record to date justifies a hearing longer than 120 minutes. The current hearing time limit is more than sufficient for this administrative hearing.

FTP Site Instructions

1. Go to the following website: <https://ftp.waterboards.ca.gov/>
2. Log in using the following information:
 - a. Username: RB9Public
 - b. Password: rqfa51
3. Click on the blue triangle to the left of the "2022" folder.
4. Locate and double-click on the folder named "Vista Pacific supporting docs_CMA."
5. To access electronic copies of the Prosecution Team's rebuttal exhibits and Revised Exhibit List, click on the blue triangle to the left of the "Rebuttal_Evidence_P_Team" folder. To download the entire folder, click on the box to the left of that folder and select "Download." To download a specific file, click on the box to the left of the file, then select "Download."

cc: (see transmittal email for full distribution list)