



3151 Airway Avenue, Suite F-110
Costa Mesa, CA 92626
Phone 714-850-1965
www.coastkeeper.org

February 24, 2020

SENT VIA EMAIL: Catherine.Hagan@waterboards.ca.gov;
Vincent.Vu@waterboards.ca.gov

Catherine George Hagan
Senior Staff Counsel
State Water Resources Control Board
2375 Northside Drive, Suite 100
San Diego, CA 92108

Vincent Vu
Staff Counsel
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

**Re: Non-Evidentiary Policy Statement on Behalf of Orange County Coastkeeper – ACL
Complaint No. R9-2020-0006 – Baldwin & Sons, Inc. et al., Portola Center South
Construction Site, Orange County.**

Dear Ms. Hagan and Mr. Vu:

Orange County Coastkeeper (“Coastkeeper”) supports San Diego Water Board’s adoption of ACL Complaint No. R9-2020-006 (“the Complaint”) and the recommended penalties it prescribes.

Coastkeeper is a nonprofit clean water organization that serves as a proactive steward of our fresh- and saltwater ecosystems. Coastkeeper’s mission is to protect the region’s water resources so they are swimmable, drinkable and fishable for present and future generations.

As stated in the Complaint, stormwater discharges from the Portola Center South Construction Site flow directly into Aliso Creek and unnamed tributaries of Aliso Creek. Aliso Creek, which drains to the Pacific Ocean South of Laguna Beach, is designated as an impaired water body pursuant to Clean Water Act section 303(d). The Water Quality Control Plan for the San Diego Basin designates Aliso Creek and its tributaries as usable or potentially usable for Agricultural Supply, Contact Water Recreation, Non-contact Water Recreation, Warm Freshwater Habitat, and Wildlife Habitat. As was stated in the Technical Analysis, sediment-laden stormwater runoff has the potential to transport other pollutants, like nutrients, pesticides, metals, and oil and grease.¹ The discharge of nearly 6.3 million gallons of sediment-laden water can have serious implications for the continued health of Aliso Creek and the thousands of people in Orange County who rely on Aliso Creek for recreational values, including hiking, bicycling, and camping.²

¹ *Technical Analysis for ACL Complaint No. R9-2020-006, Portola Center South*, 113 (2020).

² *Id.*, 114.

As is discussed within the Technical Analysis, the California Water Code prescribes a Minimum Liability, Maximum Liability, and provides a methodology for calculating a Recommended Penalty for violators of the Construction Storm Water Permit and, by extension, the Water Code.

Under Water Code section 13385(e), the Minimum Liability is meant to recover the economic benefits derived from the acts that constitute the violation. As such, the Minimum Liability amount that the San Diego Water Board may assess against the Dischargers is \$821,983. Coastkeeper agrees with the Prosecution Team's conclusion that the imposition of the Minimum Liability would be insufficient to correct future behavior by the Dischargers, and could very well be seen simply as "the cost of doing business." To levy the Minimum Liability would be to impose a permitting fee for the Dischargers to wreak havoc on our environment and precious waters.

The Maximum Liability that can be imposed, under Water Code section 13385(a), is civil liability in an amount not to exceed the sum of

- (1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.
- (2) Where there is a discharge, any portion of which is not susceptible to cleanup or is not cleaned up, and the volume discharged but not cleaned up exceeds 1,000 gallons, an additional liability not to exceed ten dollars (\$10) multiplied by the number of gallons by which the volume discharged but not cleaned up exceeds 1,000 gallons.

Based on the above methodology combined with the number of days and amount of discharge, the Maximum Liability that the San Diego Water Board may assess for the alleged violations is \$64,554,380.

In calculating the Recommended Penalty, the Prosecution Team was required to consider factors including:

...the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violation, and other matters that justice may require.³

The penalty recommended by the Prosecution team, \$9,115,932, particularly when compared with the Minimum Liability of \$821,983, may seem high. However, upon consideration of the egregious damages to wildlife and water values and the Dischargers' attempts to shirk their responsibilities under the Construction Storm Water Permit through misrepresentation and their outright refusals to comply with the city of Lake Forest's stop work orders, it becomes clear that the Recommended Penalty is necessary to correct the wrongful behavior of the Dischargers and dissuade other

³ Water Code section 13385(e).

members of the construction industry from treating the requirements of their permits as recommendations. The stormwater discharges, along with the other violations alleged by the Complaint, could have been greatly reduced or avoided altogether if the Dischargers had implemented the required and recommended BMPs. The City of Lake Forest and the San Diego Water Board issued repeated warnings to the Dischargers to implement the necessary BMPs beginning with the first unauthorized discharge on September 15, 2015.⁴ Even the few BMPs implemented by the Discharger were shown to be lackluster, showing a lack of attention to detail and no concern for environmental impacts which may arise from their work.⁵

Each of the BMPs that would have prevented the eight listed Violations (Unauthorized Discharge of Sediment, Failure to Implement Material Stockpile BMPs, Failure to Implement Vehicle Fluid Leak BMPs, Failure to Implement Erosion Control BMPs in Inactive Areas, Failure to Implement Erosion Control BMPs in Active Areas, Failure to Apply Linear Sediment Controls, Failure to Properly Store Chemicals, and Failure to Prevent Discharge of Concrete Waste to the Ground) are fairly cheap to implement. As noted by the Prosecution team “the efforts related to BMPs were purely profit driven.”⁶

It is important to highlight the content of the Dischargers’ misrepresentations to the Water Board through their 401 Water Quality Certification application and SWPPP documentation, as mentioned above. The Dischargers claimed that the “construction would only occur during the dry season; that there was no need to deal with upgradient run-on; that on-site berming could adequately capture stormwater.”⁷ Indeed, construction at the Portola Hills Site did occur during the wet season. These are patently false statements made by the Dischargers that need to be prevented through the imposition of a higher penalty than simply the economic benefits associated with these violations.

Finally, it is vital to note that the Prosecution Team included in their Technical Analysis a brief description of the “coordinated efforts of the [Dischargers] to deplete corporate and individual assets so as to avoid governmental penalties and/or contractual obligations.”⁸ While the Complaint itself does not necessarily detail the Dischargers’ avoidance of city compliance orders, it does provide some additional detail of the Dischargers’ fight against the release of financial documents. Between 2017 and 2018, the San Diego Water Board’s Prosecution Team issued investigatory subpoenas to the named parties in this complaint. The Dischargers objected to the release of financial documents and instead offered to release these documents pursuant to a protective order, which the Prosecution Team rejected. These subpoenas were then referred to the Office of the Attorney General, ending with an Order by the San Diego Superior Court on February 11, 2019,

⁴ *Id.*, 118.

⁵ See, for example, *id.*, 103, these kiddie-pools, used as oil-pans, are cracked and seem to be leaking. Earlier documentation included in the Technical Analysis shows further disregard for good housekeeping and other BMPs.

⁶ *Technical Analysis for ACL Complaint No. R9-2020-006, Portola Center South*, 108 (2020).

⁷ *Id.*, 121.

⁸ *Id.*, 146.

which compelled production of most of the Prosecution Team's requests, except for the Dischargers' tax returns.

Despite these efforts by the Dischargers to hide their wealth and success from the San Diego Water Board to avoid the imposition of a higher penalty, there is no doubt that the Dischargers will be able to afford the Recommended Penalty. The list of Dischargers includes active for-profit large business enterprises. Baldwin & Sons claims to have built 20,000 homes from Los Angeles to San Diego and also asserts that it has been a distinguished leader in the Southern California Homebuilding industry for more than 60 years.⁹ Their Otay Ranch community, for example, represents the largest residential development in San Diego County history.¹⁰ Similarly, Sunrise Company, another developer involved in the Portola Hills Site, claims to have "constructed over 16,000 homes and condominiums, co-developed two resort hotels and developed 22 resort communities, numerous apartment buildings, a fractional ownership resort, office buildings, shopping centers and commercial hotels," not to mention 396 golf holes.¹¹ The homes being constructed at the "Oaks at Portola Hills," where these violations occurred, are advertised for the "low \$1 million" to the "mid \$1 million."¹² The rest of the named individuals and LLCs all own property valued in the millions.¹³ Since the liability of the Dischargers in this matter is joint and several, Coastkeeper is convinced that the Dischargers will not find any difficulty in satisfying the Recommended Penalty while also continuing to stay in business.

Orange County Coastkeeper has no interest in putting Dischargers out of business or halting all new home construction in Orange County. Instead, Coastkeeper is only interested in encouraging future developers and the Dischargers involved in this matter to take the requirements of their permitting seriously. Coastkeeper is certain that the adoption of the Recommended Penalty before this Board will accomplish this goal. We appreciate the opportunity to participate as an interested party in these proceedings before the San Diego Water Board and hope that ACL Complaint No. R9-2020-006 and the Recommended Penalty of \$9,115,932 will be adopted by the San Diego Water Board.

Regards,



Sarah J. Spinuzzi
Staff Attorney
Orange County Coastkeeper

⁹ See Baldwinsons.com

¹⁰ <https://www.sandiegouniontribune.com/business/real-estate/sd-fi-final-frontier-housing-20170805-story.html>

¹¹ See <http://www.sunriseco.com/>

¹² See <http://www.portolahills-homes.com/design-gallery>.

¹³ *Technical Analysis for ACL Complaint No. R9-2020-006, Portola Center South*, 147 (2020).