

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

ATTORNEYS FOR SAN ALTOS – LEMON GROVE, LLC

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN DIEGO REGION

IN THE MATTER OF:)	SAN ALTOS – LEMON GROVE, LLC'S
)	RESPONSE TO THE AMENDED
ADMINISTRATIVE CIVIL LIABILITY COMPLAINT)	TECHNICAL ANALYSIS FOR
No. R9-2015-0110)	ADMINISTRATIVE CIVIL LIABILITY
AGAINST SAN ALTOS – LEMON GROVE, LLC)	COMPLAINT NO. R9-2015-0110
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I. INTRODUCTION

The first protection in the Administrative Adjudication Bill of Rights requires that, “The agency shall give the person to which the agency action is directed notice and an opportunity to be heard, including the opportunity to present and rebut evidence.” Cal. Govt. Code § 11425.10(a)(1). The agency failed to give San Altos-Lemon Grove, LLC (“San Altos”) notice of the evidence upon which it intended to rely and therefore San Altos has been denied its lawful right to rebut the evidence allegedly in support of Administrative Civil Liability Complaint R9-2015-0110 (“ACLC”) and violated San Altos’ right to due process.

Since December 4, 2015, when the Prosecution submitted the evidence it was supposedly relying on for Administrative Civil Liability Complaint R9-2015-0110 (“ACLC”), the Prosecution has introduced hundreds of pieces of new evidence with no notice to San Altos of how this new evidence related to the alleged violations. With this tactical advantage, the Prosecution relied on at least 30 new photographs at the March 9, 2016 hearing. This was the first time San Altos learned how this evidence would be used. After the hearing closed, the Prosecution was asked to present its case again through an amended Technical Analysis. Taking advantage of this opportunity, the Prosecution identified 186 new photographs and multiple new documents to support its case. Again, this was the first time San Altos had notice of how this evidence would be used. This deprived San Altos of notice of the Prosecution’s claims and the opportunity to cross-examine witnesses on the evidence, preventing San Altos from rebutting the evidence. This violated San Altos’ due process rights.

But even with multiple bites at the apple, the Prosecution still has not proven many of its allegations. The Prosecution’s new evidence still relies on inspections performed by people who are not familiar with the Storm Water Construction General Permit (the “Permit”)¹ or were applying a different standard, relies on hearsay evidence that is not authenticated, relies on

¹ State Water Resources Control Board Order No. 2009-DWQ, amended by Orders Nos. 2010-0014-DWQ and 2012-0006-DWQ, National Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities (2009).

1 incorrect interpretations of the Permit, and misapplies the Enforcement Policy.² Even if the San
2 Diego Regional Water Quality Control Board ("Water Board") considers this evidence, the
3 Prosecution's claims for almost \$1,000,000 in penalties should be rejected.³

4 On December 4, 2015, when the Prosecution submitted the evidence in support of the
5 ACLC. San Altos thereafter engaged in a costly investigation of the claims, including a careful
6 and thorough review of the Prosecution's purported evidence and its admissibility. The
7 depositions of key witnesses were taken and revealed, among other things, that many of the
8 alleged violations in the ACLC were unsupported by evidence and that the Prosecution would
9 assert privilege in lieu of evidence to differentiate this ACLC from prior cases prosecuted by the
10 Water Board. San Altos then prepared and submitted its written defense to the ACLC in
11 accordance with the procedures established by the agency, which defense was largely based on
12 the Prosecution's lack of evidence to support the ACLC.

13 Following San Altos' submission of its written defense, the Prosecution, likely
14 recognizing that its case suffered from significant evidentiary issues, has introduced hundreds of
15 pieces of new evidence into the record, including 186 photographs. The late submission was not
16 contemplated by the agency's procedural order and did not provide any notice to San Altos of
17 what violations the documents were intended to support. San Altos promptly objected to the
18 introduction of these new documents and requested that the hearing be continued for a
19 reasonable period sufficient to allow San Altos to determine for what purpose the documents
20 were being introduced, to assess their admissibility and to otherwise prepare an appropriate
21 defense. The agency overruled the objection and assured San Altos that, to the extent the

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24 ² The Prosecution contends that it is necessary to rely on the unqualified City inspectors due to RWQCB
25 staffing limitations (Hearing Transcript Page 160, lines 8 through 16). However, the Prosecution fails to
26 explain why it failed to rely on the professional opinions and reports of the Qualified SWPPP Practitioner
("QSP") engaged by San Altos; the individual identified in the Permit as having the professional
qualifications to determine if a project is in compliance with the Permit. (See Permit, App. 5, p. 8).

27 ³ San Altos cannot comply with the 10 page limit proposed by the Advisory Team's email of March 11,
28 2016. The amended Technical Analysis added 15 pages and identified approximately 200 pieces of new
evidence (*see* Ex. A). It is arbitrary and capricious to expect San Altos to be able to respond in 10 pages.

1 Prosecution relied on the evidence in support of the ACLC, San Altos would have an opportunity
2 to contest the new evidence during its 90 minutes of allotted time at the hearing.

3 At the March 9, 2016 hearing the Prosecution presented a slide show in support of the
4 ACLC. The slides included depictions of new documents and photographs. This was the first
5 time that San Altos had any notice of what the previously undisclosed photographs were
6 intended to support

7 In addition, despite its previous reliance on privilege, the Prosecution called Ms. Chiara
8 Clemente, head of the enforcement unit, who over San Altos' objection, testified that the
9 penalties sought in the ACLC were justified due to factual differences in the case as compared to
10 others previously prosecuted by the agency. This is the first time that San Altos had notice that
11 the Prosecution would introduce evidence previously withheld from San Altos on the basis of
12 privilege to support a claim that there are factual differences between the ACLC and prior
13 enforcement actions that justify the alleged penalties. San Altos objected and requested that the
14 hearing be continued to permit San Altos a reasonable opportunity to review the new evidence
15 and otherwise be prepared to rebut the surprise evidence.

16 In overruling San Altos' objections on the new photographs and documents, the Water
17 Board relied on the Prosecution's authentication of the documents, but did not consider how the
18 admission of the photographs and documents would violate San Altos' right to due process. For
19 instance, the violation of San Altos' right to due process is clearly demonstrated in the record
20 when San Altos took a few minutes 'on the fly' out of its allotted 90 minutes to call Tad
21 Nakatani to testify as to the authenticity of a particular new photograph relied on by the
22 Prosecution and to which he had testified was an accurate depiction of what he saw that day.⁴
23 On cross examination he testified that he did not recall taking the photograph in question and that
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26 ⁴ Testimony of Tad Nakatani and Linda Beresford, San Diego Regional Water Quality Control Board,
27 San Diego Region Pubic Hearing, Item 12, In the Matter of ACL Hearing: Complaint No. R9-2015-0110,
28 March 9, 2016 (hereafter referred to as the "Hearing Transcript"), p. 70:14-25, 71:1-6 (a true and correct
copy of the Hearing Transcript has been submitted as Exhibit C with this response); Testimony of Tad
Nakatani, Hearing Transcript, p. 67:21-25, 68:1-4.

1 he wasn't at the project on the day in question.⁵ Similarly, San Altos called Scot Sandstrom, the
2 general contractor for the project, who testified that one of the photographs the Prosecution
3 claimed was a depiction of a site condition on the project (but not otherwise authenticated
4 despite San Altos' objection) did not depict a site condition on the project because the
5 photograph was not a picture of the project.⁶

6 Even after the hearing the agency continued to ignore San Altos' right to due process
7 when it inexplicably ordered the Prosecution to amend its ACLC to include even more new
8 evidence upon which it relies in support of the ACLC. In response, the Prosecution has
9 incorporated not just the documents introduced at the hearing, but all 186 photographs as a part
10 of 12 entirely new exhibits.

11 Had San Altos been given reasonable notice of the new documents and photographs upon
12 which the Prosecution now relies, it would have availed itself of the opportunity afforded by
13 such notice to investigate the source of the photographs and to gather evidence to rebut the
14 evidence during a formal hearing as required pursuant to the Govt. Code. Similarly, San Altos
15 would have been prepared to introduce evidence contrary to the testimony offered by Ms.
16 Clemente if it had appropriate notice that such evidence would be introduced despite prior
17 reliance on privilege. By denying San Altos notice of the evidence that would be used against it
18 in support of the ACLC and by denying San Altos the right to a hearing on that evidence, the
19 agency violated Cal. Govt. Code § 11425.10(a)(1) and denied San Altos its right to due process.
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21 II. LEGAL DISCUSSION

22 A. Allowing the Prosecution multiple opportunities to introduce and rely on new 23 evidence deprives San Altos of its due process rights.

24 The State of California (including its agencies) may not deprive any person of life,
25 liberty, or property without due process of law. U.S. Const. Amend. XIV, § 1; U.S. Const.

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27 ⁵ Hearing Transcript, p. 70:14-25, 71:1-6.

28 ⁶ Testimony of Scot Sandstrom, Hearing Transcript, p. 88:9-25, 89:1-22.

1 Amend. V; Cal. Const., art. I, § 7. The exercise of a quasi-judicial power requires that an agency
2 must satisfy at least minimal requirements of procedural due process. *Horn v. County of Ventura*
3 (1979) 24 Cal.3d 605, 612. Minimum due process requires some form of notice and an
4 opportunity to be heard. *Id.* This is codified at § 11425.10(a)(1) of the Government Code which
5 mandates, “The agency shall give the person to which the agency action is directed notice and an
6 opportunity to be heard, including the opportunity to present and rebut evidence.”

7 Due process also includes a reasonable opportunity to know the claims of the adverse
8 party and to present objections. *See Ryan v. California Interscholastic Federation* (2001) 94
9 Cal.App.4th 1048, 1072. When an administrative agency conducts a hearing, the party must be
10 “apprised of the evidence against him so that he may have an opportunity to refute, test, and
11 explain it” *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1171-72. This
12 right is protected by Government Code § 11513(b) which guarantees the right to cross-examine
13 witnesses on any matter relevant to the issues. Indeed, an agency decision based on information
14 of which the parties were not apprised and had no opportunity to controvert amounts to a denial
15 of a hearing. *Clark v. Hermosa Beach*, 48 Cal.App.4th at 1171-72.

16 This is exactly what happened here. The day after San Altos submitted its Legal and
17 Technical Analysis, the Prosecution submitted more than 100 pieces of new evidence. The
18 Advisory Team allowed the submission; San Altos was denied the opportunity to object. But the
19 biggest violation was that the Prosecution did not identify how the evidence would be used. San
20 Altos was given no notice of which violations this new evidence allegedly supported. The Water
21 Board appears to have been just as confused as San Altos by this data dump of evidence, as it
22 needed the Prosecution to amend its Technical Analysis to specify which evidence supported
23 each allegation. But to do this after the close of both discovery and the hearing denied San Altos
24 notice of the charges against it, denied San Altos the ability to rebut the evidence and cross-
25 examine witnesses, and therefore violated San Altos’ due process rights.

26 Allowing this evidence also violates the State Water Resources Control Board’s policy
27 discouraging surprise testimony and evidence. 23 Cal. Code Reg. § 648.4(a). San Altos was not
28 aware of how any of this evidence would be used until it was either introduced at the hearing or

1 identified in the amended Technical Analysis. This is the epitome of surprise evidence and
2 directly violates the State Board's policy. The only remedy is to exclude the evidence submitted
3 by the Prosecution on February 4 and evaluate the claims as they were originally presented.

4 "[D]ue process generally requires consideration of (1) the private interest that will be
5 affected by the official action, (2) the risk of an erroneous deprivation of such interest through
6 the procedures used, and the probable value, if any, of additional or substitute procedural
7 safeguards, (3) the dignitary interest in informing individuals of the nature, grounds and
8 consequences of the action and in enabling them to present their side of the story before a
9 responsible governmental official, and (4) the governmental interest, including the function
10 involved and the fiscal and administrative burdens that the additional or substitute procedural
11 requirement would entail." *People v. Ramirez* (1979) 25 Cal.3d 260, 269 (citations omitted).

12 An evaluation of each of these factors shows that due process was violated here. The
13 private interest at issue is immense: almost one million dollars. The risk of an improper finding
14 based on the fact that San Altos could not conduct discovery or rebut the evidence is significant.
15 As expressed by non-party witnesses observing the hearing, it is extremely disturbing to the
16 public that the Water Board would allow the Prosecution to rely on evidence when the
17 responding party had no knowledge of how such evidence would be used, or to allow the
18 Prosecution to rely on evidence that they had refused to disclose in discovery.⁷ Finally, the
19 additional burden of requiring the Prosecution to identify how it relied on its evidence,
20 continuing the hearing, allowing for additional discovery, and providing San Altos more time at
21 the hearing to respond to the evidence, would have been minimal. Instead, San Altos is now
22 asked to respond to approximately 200 pieces of new evidence in a 10-page brief. (See Exhibit
23 A attached to this brief documenting the difference sources of evidence.) This violates San
24 Altos' due process "right to present legal and factual issues in a deliberate and orderly manner."
25 *White v. Board of Medical Quality Assurance* (1982) 128 Cal.App.3d 699, 705.

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28 ⁷ Testimony of Jonathan Shardlow, Hearing Transcript, p. 148:22-25; 149:1-25; 150:1-25; 151:1-5.

1 The following sections: a) discuss how these violations of the Government Code and the
2 California Code of Regulations result in erroneous conclusions; and b) demonstrate that even
3 though the Prosecution had multiple opportunities to present its case, it still fails to prove many
4 of the violations alleged.

5 **B. The Prosecution still fails to provide admissible evidence establishing its claims.**

6 1. There is no evidence of discharges on December 17, 31, and September 15.

7 Alleged violation number 1 alleges that San Altos discharged sediment laden storm water
8 from the Site on 6 days. The evidence does not support this claim for three days.

9 For the December 17 allegation, the Prosecution relies on a memo and photographs taken
10 on December 17, 2014. The record demonstrates that the only person on site on December 17,
11 2014 was Brian Nemerow of D-Max Engineering.⁸ At the hearing and in its amended Technical
12 Analysis, the Prosecution relied on four new photographs allegedly taken on December 17, 2014.
13 However, Mr. Nemerow did not authenticate these four photographs. The Prosecution attempted
14 to authenticate these photographs through the testimony of Mr. Tad Nakatani who, in one
15 response, stated that 41 new photographs were “true and accurate depictions of how [he] saw the
16 site on” 7 different days.⁹ However, when asked if he was on the San Altos Valencia Hills
17 project site (the “Site”) on December 17, 2014, Mr. Nakatani said, “I’m not positive. . . . I think
18 that one may have been Brian Nemerow and I just reviewed the photos with him.”¹⁰

19 “[C]ommon sense and fair play dictate certain basic requirements for the conduct of any
20 hearing at which facts are to be determined.” *Voices of Wetlands v. Cal. State Water Resources*
21 *Control Bd.* (2007) 157 Cal.App.4th 1268, 69 Cal.Rptr.3d 487, 532 (citations omitted) (overruled
22 on other grounds). Authentication of documents (including photographs) requires evidence
23 sufficient to sustain a finding that the photograph is what it is claimed to be. Cal. Evid. Code §
24 1400. Here, there is no testimony to establish that the photographs demonstrated the conditions
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26 ⁸ See Technical Analysis, Ex. 10.

27 ⁹ Testimony of Tad Nakatani, March 9, 2016 hearing, p. 67:21-25, 68:1-5.

28 ¹⁰ Testimony of Tad Nakatani, March 9, 2016 hearing, p. 70:18-21.

1 of the Site on December 17, 2014. Without such authentication, these photographs are hearsay,
2 and hearsay evidence is not “sufficient in itself to support a finding.” Cal. Govt. Code §
3 11513(d). San Altos renews its objections to Exhibit 40 photographs 0250, 0252, 0257, 0260 on
4 the basis of lack of authentication and hearsay; these photographs should be excluded.¹¹

5 Furthermore, the inability to cross-examine the witness who took the photographs and
6 prepared the December 17 memo is significant. Mr. Nemerow did not see a discharge into the
7 storm drain,¹² yet the Prosecution asserts that the photographs show a discharge. But San Altos
8 had no ability to explore why Mr. Nemerow didn’t attach these photographs to his original
9 memo, or whether these photographs would change his deposition testimony. To allow this
10 evidence violates Govt. Code § 11513(b) which guarantees the right to cross-examine witnesses.
11 These photographs should be excluded, and as explained in San Altos’ Brief, there is no
12 evidence of a discharge on December 17.

13 The additional photographs also still do not show a discharge to the storm drain on
14 December 31. Mr. Quenzer testified that, “At the time that I went to the site there was no
15 discharge”¹³ Clearly he did not believe that these other photographs showed a discharge to
16 the storm drain as he did not attach them to his memo; how does the Prosecution know better
17 what the photographs show than the person who inspected the Site and took the photographs?

18 Finally, San Altos disputes the alleged discharge on September 15, 2015. Previously, the
19 Prosecution only relied on a written report by Mr. Nakatani, but now that San Altos can see the
20 actual conditions of the Site (via the photographs only first introduced at the hearing and
21 identified in the amended Technical Analysis), it is clear that the alleged discharge was not from
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23 ¹¹ None of the reports prepared by the City or its contractor D-Max meet the hearsay exception of an
24 official record. This exception requires the writing to be made within the scope of a public employee’s
25 duty. Cal. Evid. Code § 1280(a). None of the City or D-Max inspections were performed for the purpose
26 of inspecting the Site for compliance with the Permit. Deposition of Malik Tamimi (Dec. 28, 2015) p.
27 29:2-10; Deposition of Leon Firsht (Dec. 28, 2015), p. 11:17-25, 12:1-6; Deposition of Gary Harper (Dec.
28 28, 2015), p. 17:1-23, 35:18-25, 36:1-2; Deposition of Tad Nakatani (Dec. 29, 2015), p. 24:15-25, 25:1-7.

26 ¹² Deposition of Brian Nemerow (Dec. 29, 2015), p. 15:22-25; San Altos – Lemon Grove. Legal and
27 Technical Arguments and Analysis in Opposition to Administrative Civil Liability Complaint R9-2015-
0110 (February 3, 2016) (hereafter referred to as “San Altos’ Brief”), pp. 24 – 25.

28 ¹³ Deposition of John Quenzer (Dec. 29, 2015), p. 34:2-3.

1 San Altos. As described by Scot Sandstrom at the hearing, the discharge in the street was not
2 from San Altos; it was from an adjacent neighbor whose yards were not landscaped.¹⁴ Finally,
3 San Altos objects to Ex. 40 photograph 6845, an up close photograph of a grate. While Mr.
4 Nakatani provided blanket authentication of 41 photographs at once, the Prosecution did not
5 identify this photograph either in its original Technical Analysis or at the hearing. Therefore San
6 Altos did not cross-examine Mr. Nakatani about it (particularly when San Altos was limited to
7 90 minutes to both present its case in chief and cross examine witnesses about surprise
8 evidence).¹⁵ However, the photograph provides no context of where it might be in relation to the
9 Site or any other property and should therefore be excluded due to insufficient authentication,
10 hearsay, and lack of San Altos' ability to cross-examine. Once the evidence in support of the
11 alleged discharge on September 15 is examined, it does not support a discharge on this date.

12 2. There is no evidence of failure to implement stockpile BMPs on December 5-8.

13 Alleged violation number 2 alleges that San Altos failed to implement stockpile BMPs
14 for 10 days. However, there is still no evidence of this violation for December 5-8.

15 There is no evidence for December 6-7 because nobody inspected the Site on those days.
16 If anything, the evidence infers that stockpiles were covered. The QSP report for December 5
17 (Ex. 37, p. 3) states that "crews were onsite to begin repairs" to cover stockpiles.¹⁶ This suggests

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21 ¹⁴ Testimony of Scot Sandstrom, March 9, 2016 hearing, p. 88:9-25, 89:1-22.

22 ¹⁵ The suggestion that San Altos could have asked each witness about every photograph during deposition
23 is not practical. Hundreds of photographs were produced during discovery of which only a small number
24 were relied upon by the Prosecution in its original ACLC. To ask every witness about every photograph
25 and how it might relate to every alleged violation on the chance that the Prosecution *might* rely on it in the
26 future would add days to every deposition. It also was impossible to cross examine every witness about
27 every additional piece of surprise evidence at the hearing given San Altos' 90 minute limitation. The
28 hearing procedures require the Prosecution to identify the evidence on which it relies for the precise
reason of allowing the responding party to focus on that evidence in the discovery and opposition process.

¹⁶ The Qualified SWPPP Practitioner ("QSP") is the "Individual assigned responsibility for non-storm
water and storm water visual observations, sampling and analysis, and responsibility to ensure full
compliance with the permit and implementation of all elements of the SWPPP, including the preparation
of the annual compliance evaluation and the elimination of all unauthorized discharges." Permit, App. 5,
p. 8. The QSP reports were prepared by the QSP engaged by San Altos for this Project. See Declaration
of Ben Anderson in Support of San Altos' Response to Amended Technical Analysis, ¶¶ 2, 3.

1 that stockpiles were covered on December 5-7 (and they did not need to be covered immediately
2 because rain was not expected in the next 48 hours on any of those three days).¹⁷

3 For December 8, the Prosecution relies on a report prepared by Mr. Harper (from the
4 City) that there was an uncovered inactive stockpile.¹⁸ But Mr. Harper testified that he did not
5 talk to anyone at the Site about whether the stockpile was active or inactive.¹⁹ Mr. Melbourn also
6 stated that he did not talk to anyone about whether stockpiles were being used during December
7 5-8 to implement BMPs.²⁰ Rain also was not expected in the 48 hours.²¹

8 This alleged violation also highlights the problem with the Prosecution's new (and
9 incorrect) interpretation of the term "active" as applied to stockpiles. Mr. Melbourn testified that
10 he interprets the term "active" for stockpiles to mean that a stockpile is "active" if, "when I'm
11 there on the site, are they actively pulling material from the stockpile or are they actively adding
12 material to the stockpile."²² However, that definition is not stated in the Permit, nor in any Water
13 Board policy or the California Stormwater Quality Association ("CASQA") Handbook.²³ In
14 fact, this definition is contradicted by the Permit, which defines "inactive" as areas "that are not
15 scheduled to be re-disturbed for at least 14 days"²⁴ as well as the CASQA Handbook which also
16 defines stockpiles as inactive only if they have not been used for 14 days.²⁵ Finally, multiple
17 third parties have contributed that this is not the standard used in the industry.²⁶

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19 ¹⁷ See Declaration of **Ben Anderson**, ¶ 5, Ex. F (Post-storm event inspection report, Dec. 5, 2014);
20 Declaration of Ben Anderson, ¶ 6, Ex. DD (Rain Event Action Plan, Dec. 9, 2014)

21 ¹⁸ Amended Technical Analysis, p. 8.

22 ¹⁹ Harper Depo., p. 46:15-25; 47:1-6.

23 ²⁰ Deposition of Frank Melbourn (Jan.13, 2016), Vol. I, p. 63:21-25, 64:1-25, 65:1-25, 66:1-25, 67:1-24.

24 ²¹ Declaration of Wayne Rosenbaum in Support of San Altos' Brief, ¶ 6, Ex. D.

25 ²² Testimony of Frank Melbourn, March 9, 2016 hearing, p. 83:16-22.

26 ²³ Testimony of Frank Melbourn, March 9, 2016 hearing, p. 84:13-21.

27 ²⁴ Permit, Attach D., p. 5, fn. 1.

28 ²⁵ Declaration of Wayne Rosenbaum in Support of San Altos' Response to Amended Technical Analysis
("Rosenbaum Dec."), ¶ 7, Ex. E.

²⁶ Testimony of Michael McSweeney, March 9, 2016 hearing, p. 147:1-24; February 18, 2016 Letter from
Marvin H Sachse, Brash Industries, to Borre Winkel, CEO & President, Building Industry Association of
San Diego County (Rosenbaum Dec. ¶ 9, Ex. G.)

1 “A penalty may not be based on a guideline, criterion, bulletin, manual, instruction,
2 order, [or] standard of general application . . . unless it has been adopted as a regulation pursuant
3 to [the Government Code].” Govt. Code § 11425.50(e). There is no evidence that Mr.
4 Melbourn’s definition of “active” as applied to stockpiles has been incorporated into the Permit
5 or any other regulation. The Water Board may not impose any penalties based on this definition.

6 3. The Prosecution still does not prove that San Altos failed to implement sufficient
7 BMPs in both active and inactive areas on 22 days of the 44 days alleged.

8 Alleged violations number 4 and 6 allege failure to implement sufficient BMPs in
9 inactive and active areas for 44 days (22 days for each violation; 20 of the days are the same).
10 However, there is still no evidence to support these violations for at least 22 of the days alleged
11 (12 days for alleged violation No. 4 and 10 days for alleged violation No. 6).

12 The ACLC alleges violations for failure to implement BMPs for both active and inactive
13 areas on December 6 and 7 and May 10-12. The Prosecution has no evidence to support the
14 allegations on these days; nobody inspected the Site on these days and there is no evidence
15 which areas were “active” vs. “inactive” on those days. This is also true for May 14 for alleged
16 violation number 4.²⁷

17 For December 8 and January 6, the Prosecution relies on reports prepared by Mr. Harper
18 and Mr. Nakatani as evidence of insufficient BMPs in both inactive and active areas; the
19 Prosecution relies on similar reports for December 9 and January 14 for insufficient BMPs in
20 inactive areas, and similar reports for March 23 and 24 for insufficient BMPs in active areas.²⁸

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22 ²⁷ San Altos renews its objection to the evidence submitted by the Prosecution on February 4, 2016 and
23 accepted by the Water Board as “rebuttal” evidence. Using alleged violation 4 as an example, the San
24 Altos Brief contested this allegation for December 5-9, January 6 & 14, and May 9-12 & 14, on the basis
25 that there was no evidence on these days or there was no evidence of which areas were active or inactive.
26 But the Prosecution’s February 4 evidence was used to provide at least 37 pieces of new evidence on days
27 where San Altos’ did not make this assertion (*See* Amended Technical Report, p. 13-14). Furthermore,
28 none of the evidence was used to rebut the argument that the Prosecution had no evidence of which areas
were “active” or “inactive” on the challenged days. Rebuttal evidence addresses the evidence produced
by the opposing party, and does not include mere cumulative evidence of the plaintiff’s case in chief.
Edgar v. Workman’s Comp. Appeals Bd. (1966) 246 Cal.App.2d 660, 665 (underline added). The
Prosecution’s February 4 evidence was used to buttress its original complaint; it was not rebuttal evidence
and should not have been admitted on that basis.

²⁸ Amended Technical Analysis, p. 13, 17.

1 But both Mr. Harper and Mr. Nakatani testified that they were inspecting for compliance with
2 the City's ordinances (which defines inactive areas as areas not scheduled to be disturbed for ten
3 days, not 14 days as provided by the Permit),²⁹ and both admitted that they did not talk to anyone
4 at the Site about what work was scheduled for the next two weeks.³⁰ Mr. Melbourn also admitted
5 that he did not ask anyone at the Site about which areas were implementing new BMPs, or if
6 they were working (despite the Stop Work Notice); he assumed he knew which areas were active
7 or inactive based on information he learned about the Project's schedule in March 2015, but he
8 never asked anyone about any specific areas.³¹ There is no evidence of insufficient BMPs in
9 either inactive or active areas on December 6-9, January 6 and 14, or May 9-12 and 14.³²

10 Mr. Melbourn also asserts that many of the inactive areas were construction roads that
11 "could have been inactive" even though people were driving on them. Mr. Melbourn asserts that
12 a road is "active" only if it is actively being graded.³³ But the Permit defines "active" as "All
13 areas subject to land surface disturbance activities related to the project including . . . **project**
14 **staging areas, immediate access areas and storage areas.**"³⁴ (emphasis added.) Mr.
15 Melbourn's definition of active for roads is not supported in the Permit. The Water Board
16 cannot impose penalties based on a guideline not adopted as a regulation. Govt. Code §
17 11425.50(e).

18 None of the Prosecution's new evidence supports the allegations for December 5-9,
19 January 6 and 14, or May 9-12 and 14 for alleged violation 4 or December 5-8, January 6,
20 March 23 and 24 or May 10-12 for alleged violation 6. If the Prosecution is going to allege
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22 ²⁹ Nakatani Depo., p. 26:6-25, 27:1-5; Harper Depo., p. 31:14-20.

23 ³⁰ Harper Depo., p. 76:14-20; Nakatani Depo., p. 76:14-20.

24 ³¹ Melbourn Depo., Vol. I, p. 163:12-23; Melbourn Depo., Vol. II, p. 60:16-25, 61:1-12.

25 ³² The same problem exists for December 5. The Prosecution relies on the QSP report for December 5 to
26 allege insufficient BMPs for both active and inactive areas. (Amended Technical Analysis, p. 13, 17,
citing Ex. 37). And while the report acknowledges that corrective action is required in certain areas,
nothing in the report indicates that the area noted on page 2 is "inactive" or that the area on page 3 is
"active." No evidence supports the assumptions made by the Prosecution in alleging these claims.

27 ³³ Melbourn Depo., p. Vol. I, p. 76:14-20.

28 ³⁴ Permit, App. 5, p. 1 (bold added).

1 violation of insufficient BMPs for inactive or active areas, it must be required to submit some
2 evidence showing which areas were active or inactive.

3 4. The Prosecution still does not submit evidence of violations on at least 8 days for
4 alleged violations 5, 7, 8, and 9.

5 Alleged violation 5 alleges failure to implement perimeter sediment control BMPs for 14
6 days; alleged violation 7 alleges failure to apply linear sediment controls on 9 days; alleged
7 violation 8 alleges failure to manage run-on and runoff for 7 days; and alleged violation 9 alleges
8 failure to remove sediment from the road on 10 separate days. In the San Altos Brief, San Altos
9 asserted that the Prosecution did not have evidence of these violations for 7 of the days (violation
10 No. 5), 3 of the days (violation No. 7, 8 and 9). With the exception of one day (December 5 for
11 violation No. 5 and 9), none of the Prosecution's new evidence demonstrates violations on any of
12 these days. There is no evidence to support the allegations for any of these four alleged
13 violations on December 6-7 and May 9-12 as there were no inspections on those days. The
14 Prosecution cannot assume ongoing violations based on no evidence, especially since there was
15 no rain on December 6 and 7 or May 10-12.³⁵

16 Furthermore, the Prosecution continues to seek penalties for alleged violations based on
17 the same or substantially similar facts, especially for violations 4-9, all of which are non-
18 discharge violations. For example, the amended Technical Analysis relies on 48 photographs for
19 multiple alleged violations: 35 of these photographs are relied on twice, 9 photographs are relied
20 on for three violations, and four photographs are relied on for 4 violations. (See Exhibit B
21 attached hereto.) Thus, the Prosecution relies on the same evidence to allege multiple violations,
22 and it seeks penalties for each. This violates the Enforcement Policy which encourages the
23 Prosecution to assess a single base liability for multiple violations when the violations are not
24 substantially distinguishable or when a single act violates multiple requirements. As discussed in
25 San Altos' Brief, it is neither fair nor consistent for the Prosecution to seek penalties for multiple
26 alleged violations on the same day based on the same or substantially similar facts.

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28 ³⁵Declaration of Wayne Rosenbaum in Support of San Altos' Brief (February 3, 2016), ¶ 6, Ex. D; Ex. E.

1 5. Surprise evidence of an entirely different storm drain should be excluded.

2 In the original Technical Analysis, the Prosecution alleged that San Altos failed to protect
3 storm drain inlets on 3 separate days (alleged violation 10). Figure 11 in the Technical Analysis
4 was a photograph of a storm drain that the Prosecution alleged San Altos had failed to protect on
5 May 13, 2015. However, discovery proved that this storm drain was not connected to the storm
6 sewer system on May 13 after all. Upon learning of this mistake, at the hearing the Prosecution
7 introduced three new photographs, including a photograph of an entirely separate storm drain
8 which it alleged San Altos failed to protect on May 13.³⁶ This was the first time San Altos was
9 notified that this different storm drain was at issue for this violation. This is no different than
10 alleging that someone robbed a bank on A Street on May 13, learning that the bank on A Street
11 was closed on May 13, and then showing up at trial and for the first time alleging that the
12 defendant robbed the bank on B Street instead. Such tactics violate due process.

13 Without notice of these allegations, San Altos was not able to prepare cross-examination.
14 This is the epitome of surprise evidence and violates San Altos' due process rights by preventing
15 its ability to rebut the evidence because it had no opportunity to investigate the allegations, a
16 critical part of due process protections. For example, in deposition Mr. Melbourn believed that
17 the original storm drain shown in Figure 11 of the Technical Analysis was connected to the
18 storm sewer system on May 13.³⁷ When asked at the hearing how he knew the newly alleged
19 storm drain was connected on May 13, he responded, "I looked into the drain."³⁸ Presumably he
20 would have looked into the first storm drain that was the subject of the May 13 allegation, but he
21 would have been incorrect. But without any advance notice of which storm drain was at issue,
22 San Altos could not prepare to rebut this evidence. This evidence should be excluded.

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26 ³⁶ Amended Technical Analysis, Ex. 33 ("IMG_5724").

27 ³⁷ Melbourn Depo., p. Vol. I, p. 149:9-11 (stating he had no evidence (visual or otherwise) to show that
this storm drain wasn't connected to the storm water conveyance system).

28 ³⁸ Testimony of Frank Melbourn, March 9, 2016 hearing, p. 79:4-6.

1 6. Surprise evidence of different stockpiles should be excluded.

2 Alleged violation 11 alleges that San Altos failed to protect stockpiled waste material for
3 9 days from January 6 through January 14. In its original Technical Analysis, the Prosecution
4 relied on two investigations (January 6 and January 14) conducted by Mr. Nakatani of D-Max
5 Engineering for this alleged violation.³⁹ There are no inspections of the Site from January 7
6 through January 13, and the Amended Technical Analysis does not introduce any new evidence
7 of inspections by either Water Board or City inspectors on these days. The January 6 inspection
8 report identified uncovered stockpiles, but these are reported as being active and therefore are
9 not required to be covered.⁴⁰ There is also no evidence active stockpiles remained uncovered
10 during the rain event during this time period, and the Prosecution has not introduced any wind
11 data.

12 The January 14 report says, “wood/scrap pile should be removed or protected.”⁴¹ But
13 there is no evidence of whether San Altos was actively using this pile. Furthermore, the reports
14 are clear that this wood pile is different from the stockpile noted on January 6.⁴² Finally, in a
15 memo dated January 16, Mr. Nakatani states the “stockpiles had been covered” and admits that
16 he did not know when that occurred (i.e., the coverage could have occurred on January 7).⁴³

17 The amended Technical Analysis introduced two new photographs from January 6 and
18 two photographs from January 14, 2015. However, one of the photographs noted for January 6
19 doesn’t show a stockpile; the other shows a stockpile, but there is no evidence that this was a
20 different stockpile than the one identified by Mr. Nakatani as being active. The photographs for
21 January 14 show covered stockpiles. Importantly, Mr. Nakatani, the person inspecting the Site
22 on January 14, did not identify these stockpiles as insufficiently protected. The only stockpiles

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25 ³⁹ Amended Technical Analysis, p. 26 (referring to Exhibits 24 and 25).

26 ⁴⁰ Technical Analysis, Ex. 24, p. 2.

27 ⁴¹ Technical Analysis, Ex. 25.

28 ⁴² Nakatani Depo., p. 60:23-25, 61:1-19.

⁴³ Nakatani Depo., p. 59:13-25, 60:1-11, Ex. 12.

1 that Mr. Nakatani noted as being uncovered on January 14 were “wood/scrap piles.” The
2 stockpiles in the new photographs are not wood/scrap piles.

3 The hearing was the first time San Altos was notified that the Prosecution intended to use
4 these photographs to support this allegation. This prevented San Altos from effectively cross-
5 examining witnesses or rebutting the evidence and therefore the photographs should be excluded.
6 Regardless, the photographs show different stockpiles at issue on January 6 and 14. There is no
7 evidence, and no inference, that other inactive stockpiles were unprotected during this time
8 period. The evidence does not support any violations, much less 9 days of violations.

9 7. There is insufficient evidence to support Violation No. 13.

10 Alleged violation No. 13 alleges that San Altos failed to prevent discharge of concrete
11 waste to the ground for 15 days (March 18-April 1). Neither the original nor the amended
12 Technical Analysis supports this allegation and the Permit doesn’t regulate this activity.

13 This allegation misinterprets the Permit, which requires dischargers to “ensure the
14 containment of concrete washout areas . . . that may contain additional pollutants so there is no
15 discharge into the underlying soil and onto the surrounding areas.”⁴⁴ The Permit does not
16 regulate stucco that falls on the ground during the application process (especially when there is
17 no rain and the stucco is cleaned up) and the CASQA Handbook’s discussion of concrete waste
18 management says nothing about stucco that falls to the ground during application.⁴⁵ This alleged
19 violation asserts a new interpretation of the Permit. However, “[a] penalty may not be based on
20 a guideline, [etc.] . . . unless it has been adopted as a regulation . . .” Govt. Code § 11425.50(e).
21 Extending the Permit’s guidelines on concrete washout areas to regulating stucco waste that falls
22 to the ground during application attempts to impose a penalty based on a new guideline that has
23 not been adopted as a regulation and is prohibited by Section 11425.50(e).

24 Regardless, the evidence does not support this allegation. As noted previously, there is
25 no evidence on at least 11 of the 15 days cited as nobody inspected the Site on those dates.

27 ⁴⁴ Permit, Att. D., p. 3.

28 ⁴⁵ Rosenbaum Dec., ¶ 8, Ex. F.

1 Additionally, the evidence shows that the “spills” were different on all of the days noted,⁴⁶
2 inferring that each spill was cleaned up and that the violation was not continuing day to day.

3 Finally, the evidence for at least two of the days is inadmissible. The amended Technical
4 Analysis includes two photographs allegedly taken on March 27, 2015 (p. 27), but this is the first
5 time the Prosecution identified evidence for March 27 for this alleged violation. Since the
6 Prosecution did not identify these photographs in either the original Technical Analysis or at the
7 hearing, San Altos was not on notice that they would be relied on, preventing San Altos from
8 cross-examining the witnesses on this evidence. Allowing this evidence now violates the
9 regulations preventing surprise evidence and violates due process by preventing San Altos from
10 rebutting the evidence or cross-examining witnesses. These photographs should be excluded.

11 The evidence for April 1 should also be excluded. The April 1, 2015 citation, which
12 included photographs, was signed by Tamara O’Neal. She has never authenticated the report or
13 the photographs. They are therefore hearsay, and, since there is no other evidence to support the
14 April 1 allegations, this evidence should be excluded. (The document also does not meet the
15 hearsay exception of official records because there is no evidence her duties included preparing
16 citations for non-compliance with the Permit.) The Prosecution again attempted to authenticate
17 these documents through testimony of Mr. Nakatani.⁴⁷ However, when questioned repeatedly,
18 and after reviewing multiple documents, Mr. Nakatani could not say he was on the Site on April
19 1.⁴⁸ The April 1 evidence was not authenticated; it is hearsay and should be excluded.

20 In conclusion, the Prosecution has been given (San Altos believes illegally) three
21 different opportunities to present its case. But all the Prosecution has done is provide more
22 evidence of the same information; the Prosecution has not addressed the underlying issues that
23 the allegations are based on: 1) inspections and reports by unqualified people who were applying
24 different standards; 2) improper interpretations of the Permit including “inactive” and “active”
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26 ⁴⁶ Harper Depo., p. 75:23-25, 76:1-25, 77:1-13; Melbourn Depo., Vol. I, p. 127:25, 128:1-12.

27 ⁴⁷ Testimony of Laura Drabandt and Tad Nakatani, Hearing Transcript, p. 67:22-25; 68:1-5.

28 ⁴⁸ Testimony of Linda Beresford and Tad Nakatani, Hearing Transcript, p. 71:8-25; 72:1-25; 73:1-9.

1 stockpiles and haul roads; 3) improper interpretation of the Permit regarding BMPs for stucco
2 application; 4) lack of evidence regarding which areas were “active” or “inactive”; and 5) lack of
3 evidence of ongoing violations.⁴⁹ The resolutions proposed in Exhibit A to San Altos’ Feb. 3
4 Brief remain appropriate and should be adopted by the Water Board.

5 **C. The Prosecution continues to misapply the Enforcement Policy.**

6 “The Water Boards have powerful liability provisions at their disposal which the
7 Legislature and the public expect them to fairly and consistently implement”.⁵⁰ The
8 Prosecution’s interpretation of the Enforcement Policy and its proposed application of the
9 Enforcement Policy in this case is at odds with those expectations.

10 1. The Prosecution improperly seeks multiple penalties for similar conduct.

11 The amended Technical Analysis demonstrates that the Prosecution continues to
12 misapply the Enforcement Policy. First, as noted above, the Prosecution seeks multiple penalties
13 for alleged violations occurring on the same days for essentially the same conduct. (See Ex. B to
14 San Altos’ Brief.) This unfair application of the Policy continues in the amended Technical
15 Analysis as the Prosecution relies on at least 48 more pieces of evidence for multiple alleged
16 violations. (See Ex. B attached hereto.) At the hearing the Prosecution could not articulate
17 “unique facts” that support this approach. They simply stated that “our penalty methodology has
18 evolved” – not that the specific facts of this case required a new and different approach.⁵¹

19 2. Ms. Clemente’s testimony at the March 9, 2016 hearing should be excluded.

20 Whether or not the Prosecution was “fair and consistent” and what “unique facts” it relied
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22 ⁴⁹ The Prosecution alleges that it may reasonably infer that violation continued without any supporting
23 evidence on the theory that it is “pretty common at Regional Board matters and the law supports it”.
24 (Hearing Transcript, p. 155:19-20). First the cases cited by the prosecution in pages 7 and 8 of their
25 February 23, 2016 Brief, a DUI matter and a question of what constitutes substantial evidence in a CEQA
26 matter, are unpersuasive. Second, the Prosecution is seeking to create a new standard of general
27 application. A penalty may not be based on a guideline, criterion, bulletin, manual, instruction, order, [or]
28 standard of general application . . . unless it has been adopted as a regulation pursuant to [the Government
Code].” Govt. Code § 11425.50(e).

⁵⁰ Enforcement Policy, page 9.

⁵¹ Testimony of Chiara Clemente, Hearing Transcript, p. 60:14-15.

1 on to pursue twice as many penalties against San Altos as opposed to other cases, are significant
2 issues in this case. Discovering these facts was the purpose of taking Ms. Clemente's deposition.
3 But in response to questions on these issues, the Prosecution directed Ms. Clemente not to
4 answer based on attorney-client privilege. Yet, Ms. Clemente was permitted to testify at hearing
5 on these exact issues at the hearing over San Altos' objections. This is the epitome of surprise
6 evidence and actively prevented San Altos from rebutting the evidence. Moreover, as a litigation
7 strategy this behavior is clearly at odds with the expectations of the Legislature and the public.
8 Her testimony should be excluded.

9 For example, San Altos attempted to determine which cases the Prosecution compared
10 the San Altos case to when alleging violations and proposing penalties:

11 Q (Beresford): How do you accomplish consistency?

12 A (Clemente): We do look at other similar situations in other cases and determine
13 whether it was appropriate in those other cases and then we determine whether it's
appropriate to continue.

14 Q (Beresford): Did you look at other cases to compare for this complaint against San
15 Altos?

16 A (Drabandt): Objection. Attorney-client communication privilege.⁵²

17 ***

18 Q (Beresford): In drafting the San Altos complaint did you to be consistent, did you
19 consider other cases involving ACLs for the construction permit?

20 A (Clemente): Yes.

21 Q: (Beresford): Can you tell me what cases those were?

22 A: (Drabandt): Objection. Calls for attorney-client privilege.⁵³

23 ***

24 The record is clear: San Altos tried to find out which cases the Prosecution compared
25 San Altos to when drafting the complaint and the Prosecution refused to answer. However, at
26 the hearing, Ms. Clemente said, "[F]or my presentation, I'd like to explain how the methodology
was used in this case, how and why it's different from Encinitas but consistent with more recent

27 ⁵² Deposition of Chiara Clemente (Jan. 23, 2016), p. 25:15-23.

28 ⁵³ Clemente Depo., p. 28:4-10.

1 cases, and in so doing I hope to demonstrate why the penalty amount is appropriate.”⁵⁴ She then
2 used slides that compared the San Altos case to four other cases, cases they refused to identify in
3 deposition. It is a violation of due process to refuse to disclose facts in discovery, and then turn
4 around and present those exact facts at a hearing.

5 Similarly, San Altos tried to find out the “unique facts” that distinguished San Altos from
6 the other cases that warranted twice as many penalties:

7 Q (Beresford): I’m going to go back to something. We talked earlier – and please state it
8 differently if I’m mischaracterizing it – that the Encinitas ACL alleged violations for
9 failure to implement adequate controls, structures and management practice at the
10 project; that it did not distinguish between inactive and active areas.

11 A (Clemente): Correct.

12 Q (Beresford): The San Altos complaint alleges violations specific to active failure to
13 have BMPs on active areas and failure to have sufficient BMPs on inactive areas; is that
14 correct?

15 A (Clemente): Correct.

16 Q (Beresford): Can you describe for me the unique facts of the San Altos case that
17 caused this different approach?

18 A (Drabandt): Objection to the point where any attorney-client privileged information
19 regarding strategies. If you can answer, generally speaking, go ahead.

20 A (Clemente): The unique facts of the San Altos-Lemon Grove case that did what?

21 Q (Beresford): That resulted in having separate violations for inactive and active areas
22 versus one allegation overall for lack of BMPs.

23 A (Clemente): No, I cannot describe them.⁵⁵

24 ***

25 Q (Beresford): We were also talking about that the Encinitas ACL did not allege specific
26 violations for failure to have linear sediment controls, and the San Altos complaint does
27 allege specific violations for linear sediment controls. Can you describe the unique facts
28 that resulted in the different approach between the two complaints?

A (Drabandt): Same objection. Please do not answer anything that is attorney-client
privileged that relates to strategy.

A (Clemente): The same answer: No, I cannot describe the unique facts.⁵⁶

⁵⁴ Testimony of Chiara Clemente, March 9, 2016, p. 55:15-19.

⁵⁵ Clemente Depo., p. 41:16-25; 42:1-16.

⁵⁶ Clemente Depo., p. 42:21-25; 43:1-7.

1 Ms. Clemente did not answer questions asking how unique facts of this case were
2 distinguishable from Encinitas at least 9 more times.⁵⁷ Ms. Clemente also specifically testified in
3 her deposition, in response to a question from the Prosecution's attorney, that all facts supporting
4 the penalties were identified in the technical report.⁵⁸ However, Ms. Clemente's testimony at the
5 hearing specifically compared the San Altos matter to four other cases, but this information was
6 not in the technical report.⁵⁹ This is the exact information San Altos sought in deposition, but
7 could not obtain. Ms. Clemente's testimony should be excluded as surprise evidence.

8 3. The Prosecution cannot distinguish this case from other matters.

9 Even if the Water Board considers Ms. Clemente's testimony, the Prosecution's request
10 for penalties still is not fair or consistent. As explained in San Altos' Brief (pp. 18-20), this case
11 has been treated significantly different than other cases alleging similar conduct. Ms. Clemente
12 did not articulate why this case is so different from the Encinitas case to warrant almost four
13 times the amount of penalties for failure to implement adequate BMPs. Instead, the Prosecution
14 attempts to justify the penalties because their methodology has evolved to focus on the
15 BAT/BCT standard.⁶⁰ But these are facts that distinguish San Altos from the Encinitas case; the
16 conduct in the two matters is practically identical. Seeking almost four times as many penalties
17 for the same conduct is neither fair nor consistent as required by the Policy.

18 Ms. Clemente also tried to compare this case to the Jacobs Center and Scripps Mesa
19 Developers projects, which also relied on inspections done by third parties to determine
20 compliance with the non-discharge provisions of the Permit. Importantly however, those
21 inspections were performed by a QSP or by Regional Water Board staff.⁶¹ San Altos is the only
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23 ⁵⁷ Clemente Depo., p. 43:11-25; 44:1-25; 45:1-25; 46:1-2; 46:10-25; 47:1-13; 48:1-14; 48:15-25; 49:1-12;
24 52:10-20; 53:14-25; 54:20-22; 56:4-13; 57:7-16; 78:16-25, 79:5-11. While these questions compared the
25 San Altos and Encinitas ACLCs, San Altos wasn't able to ask about other cases because the Prosecution
26 refused to identify the other cases that San Altos was compared to.

27 ⁵⁸ Clemente Depo., p. 83:7-13.

28 ⁶⁰ Testimony of Chiara Clemente, March 9, 2016 hearing, p. 58:17-18.

⁶¹ Rosenbaum Dec., ¶ 11, Ex. I; ¶ 12, Ex. J.

1 complaint which relies on third party inspections performed by people who are not QSPs, who
2 have limited stormwater training, and who were not inspecting for compliance with the non-
3 discharge provisions of the Permit.⁶² To impose almost four times as many penalties based on
4 much less credible (and highly questionable) evidence is neither fair nor consistent.

5 **D. The Prosecution fails to consider San Altos' efforts to return to compliance.**

6 In calculating the penalties, the Prosecution assigned a culpability multiplier for all
7 violations. This does not reflect San Altos' efforts to address the requirements of the Permit
8 under unique circumstances. The test for culpability is "what a reasonable and prudent person
9 would have done or not done under similar circumstances" based on prevailing industry
10 practices.⁶³ The Prosecution fails to properly value that San Altos' actions were reasonable
11 given the unique circumstances during December 2014 and January 2015.

12 First, from December 1, 2014 through January 31, 2015, the 62 days which give rise to
13 the majority of alleged violations, the QSP inspected the site at least 23 times.⁶⁴ Many of those
14 reports demonstrate full compliance with the Permit, and when corrective actions were required,
15 the reports document that those actions were taken.⁶⁵ The Prosecution appears focused on the
16 period between December 1, 2014 and December 9, 2014. However, what the Prosecution fails
17 to disclose in its analysis is that between December 2 and December 4, the project experienced a
18 rain event that dropped 3.13 inches of rain on the site⁶⁶ This rain event was almost five times
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21 ⁶² The Prosecution contends that it is necessary to rely on unqualified City inspectors due to limited
22 RWQCB staff. (March 9, 2016 hearing, p. 160:8-16). However, the Prosecution fails to explain why it
23 did not consider the professional opinions and reports of the QSP engaged by San Altos, the individual
24 with the professional qualifications to determine if a project is in compliance with the Permit. Instead,
25 unlike the other complaints, the Prosecution relied on inspections performed by non-QSPs who were not
26 qualified to conduct these investigations. If the Water Board wants to rely on third-party inspections, they
27 must ensure that those inspectors are properly qualified and trained. That is not the case here.

28 ⁶³ Enforcement Policy, p.17.

⁶⁴ Anderson Dec., ¶ 4.

⁶⁵ Anderson Dec., ¶ 4; Ex. A; Ex. B; Ex. C; Ex. D; Ex. E; Ex. F; Ex. G; Ex. H; Ex. I; Ex. J; Ex. K; Ex. L;
Ex. M; Ex. N; Ex. O; Ex. P; Ex. Q; Ex. R; Ex. S; Ex. T; Ex. U; Ex. V; Ex. W; Ex. X; Ex. Y; Ex. Z; Ex.
AA; Ex. BB; Ex. CC.

⁶⁶ Anderson Dec., ¶ 8.

1 greater than the 85th percentile storm.⁶⁷ The 85th percentile storm is generally used by the
2 industry for sizing BMPs.⁶⁸ The Permit does not require absolute perfection; it requires Best
3 Management Practices based on what a reasonable person would do. When considering the
4 amount of rain fall, the BMPs implemented by San Altos were in fact reasonable. These facts
5 were not considered by the Prosecution when calculating the Culpability Factor for the period
6 between December 1 and December 9. Thus, the Board lacks substantial evidence to support a
7 finding that a Culpability Factor of 1.3 is appropriate for the period between December 1 and
8 December 9, 2014.

9 In calculating the penalties, the Prosecution assigned a value of 1.1 to the clean up and
10 cooperation multiplier for all violations. This multiplier is determined by the “extent to which
11 the discharger voluntarily cooperated in returning to compliance”. In light of this unusually
12 heavy rain, San Altos took significant voluntary steps to come into compliance as evidenced by
13 the QSP reports and the Corrective Action Report.⁶⁹ Based on these efforts, the City of Lemon
14 Grove lifted their stop work notice and City staff and consultants acknowledged significant
15 improvement at the Site.⁷⁰ Furthermore, Mr. Chiu and Mr. Melbourn visited the Site on March
16 27, 2015, at which time Mr. Chiu “found that the Discharger implemented corrective actions that
17 largely addressed the violations identified in Notice of Violation No. R9-2015-0153 [issued
18 December 19, 2015]”.⁷¹ If the Site had not been in significant compliance, wouldn’t Mr. Chiu
19 and/or Mr. Melbourn have issued another Notice of Violation, or at least some type of report for
20 the visit? It is disingenuous for the Prosecution to allege that the Site was out of compliance for
21 months, when its own staff visited the site in March 2015 and found it sufficient. Thus, the

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24 ⁶⁷ Rosenbaum Dec., ¶ 11, Ex. I.

25 ⁶⁸ Order No. R9-2013-001 as amended by Order No. R9-2015-0001 and Order No. R9-2015-0100, Fact
26 Sheet page F-102.

27 ⁶⁹ Amended Technical Analysis, Ex. 36; *see also* Anderson Dec., ¶ 4.

28 ⁷⁰ Firsht Depo., p. 39:17-25, 40:1-18; Nakatani Depo., p. 58:18-25, 59:1-12.

⁷¹ Amended Technical Analysis, Ex. 18, p. 3.

Board lacks evidence to support a finding that a Cleanup and Cooperation multiplier of 1.1 is appropriate for the period between December 1st 2014 and January 30, 2105 2014.

Finally, the Prosecution's own economic analysis opined that the benefit of non-compliance was less than \$30,000.⁷² The requested penalties of over \$800,000 are not supported by the facts, the Enforcement Policy, or any measure of common sense.

E. San Altos renews all of its evidentiary objections.

San Altos renews all objections stated in this submission, in the Feb. 3 San Altos Brief, in its submission of February 23, 2016, and as stated at the March 9, 2016 hearing. In addition, San Altos again highlights the following objections.

1. Inspections performed by the City of Lemon Grove and D-Max Engineering should be excluded as to "active" or "inactive" determinations.

Only relevant evidence should be admitted. Evidence is "relevant" if it is, "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" Cal. Govt. Code § 11513(c). All of the inspection reports, enforcement documents, and administrative citations issued by the City of Lemon Grove ("City") or its contractor, D-Max Engineering ("D-Max"), to San Altos should be excluded because those inspectors did not apply the Permit's standard regarding whether an area was "active" or "inactive."

All of the City's representatives, including the City's Storm Water Manager, stated that their inspections were to assure compliance with the City's Jurisdictional Urban Runoff Management Plan ("JURMP") and Municipal Ordinances, not to evaluate compliance with the Permit. However, while the Permit defines "active" areas as those that have been disturbed and are scheduled to be redisturbed within 14 days, the City's definition of "active" is whether an area will be disturbed in 10 days.⁷³ Thus, non-compliance with the City's JURMP does not necessarily mean non-compliance with the Permit. All reports prepared by the City or D-Max should be excluded for determinations of whether an area was active or inactive.

⁷² Technical Analysis, Ex. 28.

⁷³ Harper Depo., p. 31:14-20; Nakatani Depo., p. 26:6-24.

1 2. All inspection and enforcement documents by Mr. Harper or Mr. Firsht should be
2 excluded as they are not qualified to inspect for the Permit.

3 The two primary people at the City of Lemon Grove who inspected the Site and issued
4 administrative citations were Gary Harper, a City inspector, and Leon Firsht, the former City
5 Engineer for the City of Lemon Grove. Mr. Harper testified that he had two trainings on
6 “stormwater” in approximately five years that lasted “maybe an hour or two.”⁷⁴ Mr. Harper
7 further testified that he was not familiar with the Permit.⁷⁵

8 Mr. Firsht is an engineer with no formal training on construction storm water issues.⁷⁶
9 Mr. Firsht testified that he had two in-house trainings which were about half an hour.⁷⁷

10 Neither of these individuals is qualified to inspect the Site for compliance with the
11 Permit. For example, the Prosecution relies on Mr. Harper’s reports from December 2 and
12 December 4, 2014 to support the alleged failure to implement adequate BMPs in inactive areas
13 on those dates, and presumably the violations on December 1 and 3 as well.⁷⁸ Yet the QSP
14 Inspection reports related to the storm event during that period of time all state “[f]iber rolls and
15 hydroseed are in place in areas that are inactive” and this item requires no corrective action.⁷⁹
16 Given their lack of qualifications, no “responsible persons” would “rely [on the reports prepared
17 by Mssrs. Harper and Firsht] in the conduct of serious affairs,” especially when they are in direct
18 conflict with reports prepared by the QSP expert. Mr. Harper’s and Mr. Firsht’s reports and
19 citations should be excluded as irrelevant under the standard stated in Govt. Code § 11513(c).

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24 ⁷⁴ Harper Depo., p. 12:3-25, 13:1-25, 14:1-25.

25 ⁷⁵ Harper Depo., p. 15:1-14.

26 ⁷⁶ Firsht Depo., p. 8:20-25, 9:1-25, 10:1-3, Ex. 2.

27 ⁷⁷ Firsht Depo., p. 10:7-20, Ex. B.

28 ⁷⁸ Technical Analysis, Ex. 2; Ex. 3.

⁷⁹ Anderson Dec., ¶ 10; Ex. A; Ex. B; Ex. D; Ex. E.

1 3. The Prosecution's additional evidence submitted on February 4, 2016, and only
2 first identified at the March 9 hearing or in the March 18 amended Technical
3 Analysis should be excluded as it violates San Altos' due process rights.

4 Due process requires a party to be "apprised of the evidence against him so that he may
5 have an opportunity to refute, test, and explain it" *Clark v. City of Hermosa Beach*, 48
6 Cal.App.4th at 1172. Government Code Section 11425.10(a)(1) mandates that, "The agency
7 shall give the person to which the agency action is directed notice and an opportunity to be
8 heard, including the opportunity to present and rebut evidence."

9 On February 4, the Prosecution submitted 98 new photographs and multiple documents
10 with no discussion regarding which of the alleged 13 violations the photographs and documents
11 were intended to support. Due process includes "the right to present legal and factual issues in a
12 deliberate and orderly manner." *White v. Board of Medical Quality Assurance*, 128 Cal.App.3d
13 at 705. But it is impossible for San Altos "to present legal and factual issues in a deliberate and
14 orderly manner" in response to this new evidence, or to "refute, test, [or] explain it" without any
15 information regarding which violations the new evidence allegedly supported.

16 At the hearing the Prosecution relied on 27 new photographs of which San Altos had
17 never received notice of how they would be used. In the amended Technical Analysis, the
18 Prosecution relies on 186 new photographs of which San Altos had never before received notice
19 of how such photographs would be used. This means that since the original complaint and the
20 completion of discovery, the Prosecution has sought to rely on more than 200 pieces of new
21 evidence of which San Altos was not apprised before the hearing, including at least 186 pieces of
22 new evidence *since* the hearing. San Altos cannot adequately refute, test or explain any evidence
23 that it only learns of after the hearing. How can it cross-examine witnesses on such evidence?
24 How can it rebut 200 pieces of new evidence in a matter of eight business days? While San
25 Altos has been able to discount much of the evidence, it was not able to prepare the defense that
26 it was entitled to prepare under the Government Code and the United States and California
27 Constitutions. This is why the regulations prevent "surprise evidence." Allowing this evidence
28 violates San Altos' due process rights and it should be excluded.

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III. CONCLUSION

In accordance with the hearing guidelines, the Prosecution submitted its evidence on December 4, 2015. Relying on that submission, San Altos conducted lengthy and expensive discovery and prepared to submit its Brief on February 3, 2015. The day before San Altos' submission, the Prosecution sought to submit additional evidence. The Advisory Team allowed the submission on February 4; San Altos was not allowed to review it or object. The submission did not identify how any of the new evidence would support any of the alleged violations.

The Water Board held a hearing on March 9, 2016. The Prosecution identified 31 new pieces of evidence at the hearing of which San Altos had not been on notice. Regardless, San Altos presented its best case in the limited 90 minutes it had to defend against almost \$1 million in penalties. San Altos identified the Prosecution's lack of evidence, including that the alleged violations relied on: a) inspections performed by non-qualified individuals; b) inspections performed by individuals applying a different standard than the Permit; c) erroneous interpretations of the Permit as it related to stockpiles, "inactive" areas, and the management of concrete waste; d) complete lack of evidence as to which areas were active or inactive; e) and lack of evidence for alleged continuing violations. San Altos' briefs and presentation also demonstrated that the Prosecution has failed to follow the Enforcement Policy, treating the San Altos matter completely differently than other matters, and failing to recognize the efforts San Altos made to come into compliance and respond in a reasonable way.

Apparently, the Water Board agreed that the Prosecution didn't prove its claims as it asked the Prosecution to submit an amended Technical Analysis. The Prosecution took advantage of this, and just identified another 200 pieces of evidence. This violates San Altos' due process rights, but the evidence *still* doesn't support the alleged violations. The Water Board should adopt the recommendations submitted in Attachment A to San Altos' February 3 brief.

Dated: March 30, 2016

OPPER & VARCO LLP



S. Wayne Rosenbaum

Attorney for San Altos – Lemon Grove, LLC

EXHIBIT A

EXHIBIT A

The following table counts the pieces of evidence identified by the Prosecution for each violation in the original Technical Analysis, at the hearing, and then in the amended Technical Analysis. Evidence is “new” when it was identified as evidence the Prosecution would rely on.

NOV	Evidence identified in the original Technical Analysis	New evidence identified at the Hearing	New evidence identified in the amended Technical Analysis
1	7 exhibits with 35 photos	8 new photos	3 new exhibits; 18 new photos
2	7 exhibits with 7 photos	1 new exhibit; 2 new photos	5 new exhibits; 14 new photos
3	2 exhibits with 3 photos	1 new exhibit; 4 new photos	1 new exhibit; 3 new photos
4	14 exhibits with 19 photos	1 new exhibit; 3 new photos	4 new exhibits; 36 new photos
5	7 exhibits with 10 photos	No new evidence	1 new exhibit; 16 new photos
6	14 exhibits with 16 photos	1 new exhibit; 1 new photo	2 new exhibits; 29 new photos
7	5 exhibits with 13 photos	No new evidence	1 new exhibit; 36 new photos
8	3 exhibits with 11 photos	1 new photo	19 new photos
9	7 exhibits with 0 photos	1 new exhibit	2 new exhibits; 4 new photos
10	3 exhibits with 0 photos	3 new photos	4 new photos
11	2 exhibits with 0 photos	2 new photos	2 new photos
12	3 exhibits with 2 photos	1 new photo	No new evidence
13	2 exhibits with 9 photos	1 new photo	5 new photos

Total evidence identified in original Technical Analysis: 76 exhibits; 125 photos

Total new evidence identified at the March 9, 2016 hearing: 5 new exhibits; 26 new photos

Total new evidence identified in amended Technical Analysis: 19 new exhibits; 186 new photos

Total new evidence identified at March 9, 2016 hearing or in the amended Technical Analysis:
24 new exhibits; 212 new photos

EXHIBIT B

EXHIBIT B
NEW PICTURES USED MULTIPLE TIMES

Exhibit	Date	1	2	3	4	5	6	7	8	9	10	11	12	13	Times Used	Used to Support Alleged Violations
32.5039	12/15/2014														3	4, 6 & 7
33.5092	12/15/2014														3	2, 4 & 6
32.5042	12/15/2014														2	5 & 8
32.5043	12/15/2014														2	5 & 8
32.5061	12/15/2014														2	4 & 7
32.5063	12/15/2014														2	4 & 7
32.5066	12/15/2014														2	4 & 7
33.5026	12/15/2014														2	5 & 8
33.5028	12/15/2014														2	4 & 7
33.5029	12/15/2014														2	2 & 5
33.5071	12/15/2014														2	6 & 7
33.5074	12/15/2014														2	7 & 8
38.0061	12/16/2014														2	4 & 7
40.9528	12/16/2014														2	4 & 7
40.9529	12/16/2014														2	4 & 7
40.9536	12/16/2014														2	4 & 7
40.9607	1/6/2015														2	4 & 6
40.9629	1/14/2015														2	4 & 11
32.191716	5/8/2015														4	1, 4, 7 & 8
32.191955	5/8/2015														4	1, 4, 7 & 8
32.191734	5/8/2015														3	1, 4 & 8
32.192214	5/8/2015														2	4 & 6
32.192234	5/8/2015														2	1 & 5
32.5712	5/13/2015														4	5, 6, 7 & 8
32.5715	5/13/2015														3	6, 7 & 8
32.5745	5/13/2015														3	6, 7 & 8
32.5758	5/13/2015														3	6, 7 & 8
33.0266	5/13/2015														3	2, 5 & 8
40.6434	5/13/2015														3	6, 7 & 8
32.5721	5/13/2015														2	5 & 8
32.5726	5/13/2015														2	5 & 8
32.5727	5/13/2015														2	2 & 6
32.5738	5/13/2015														2	7 & 8
32.5750	5/13/2015														2	6 & 8
32.5763	5/13/2015														2	4 & 7
32.5770	5/13/2015														2	4 & 7
33.0271	5/13/2015														2	1 & 10
33.0273	5/13/2015														2	1 & 10
33.0274	5/13/2015														2	1 & 10
32.0354	5/15/2015														2	4 & 6
40.6842	9/15/2015														4	1, 5, 7 & 9
40.6852	9/15/2015														3	2, 5 & 9
40.6841	9/15/2015														2	4 & 5
40.6845	9/15/2015														2	1 & 9
40.6865	9/15/2015														2	2 & 6
40.6866	9/15/2015														2	2 & 7
40.6883	9/15/2015														2	4 & 7
40.6885	9/15/2015														2	4 & 7
TOTAL		9	7	0	22	11	13	26	18	2	4	1	0	0	113	

EXHIBIT C

SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

SAN DEIGO REGION

PUBLIC HEARING

PARTIAL TRANSCRIPT

ITEM 12

In the Matter of:

ACL Hearing: Complaint No. R9-2015-0110 for Administrative
Civil Liability against San Altos-Lemon Grove, LLC, for
\$848,374 for violations of State Water Resources Control
Board Order No. 2009-0009-DWQ, as amended

_____/

SAN DIEGO REGIONAL WATER QUALITY CONTROL BOARD

BOARD MEETING ROOM

2375 NORTHSIDE DRIVE, SUITE 108

SAN DIEGO, CALIFORNIA

WEDNESDAY, MARCH 9, 2016

9:00 A.M.

Reported by:

Martha Nelson

APPEARANCES

BOARD MEMBERS:

Henry Abarbanel, Chair

Tomas Morales

Eric Anderson

Stefanie Warren

Betty Olson

ADVISORY TEAM:

Catherine Hagan, Staff Counsel

Adriana Nunez, Staff Counsel

Bea Griffey, Senior Environmental Scientist

Deborah Jayne, Senior Environmental Scientist

Christina Arias, Water Resources Control Engineer

Michael Buckman, Hearing Unit Supervisor

PROSECUTION TEAM:

James Smith, Assistant Executive Director

Frank Melbourn, Water Resources Control Engineer

Wayne Chiu, Stormwater Management Unit, Water Resources
Control Engineer

David LaBrie, Sanitary Engineer

Chiara Clemente, Regional Enforcement Coordinator, Office of
Enforcement

David Boyers, Assistant Chief Counsel

Laura Drabandt, Staff Counsel

APPEARANCES (CONTINUED)

SAN ALTOS-LEMON GROVE, LLP

Linda C. Beresford
S. Wayne Rosenbaum
Opper & Varco, KKP
225 Broadway, Suite 1900
San Diego, CA 95818

Josh Rosenbaum

PUBLIC COMMENT

Michael McSweeney, BIA San Diego

Jonathan Shardlow, Gresham Savage Nolan & Tilden

I N D E X

PRESENTATIONS AND EXAMINATIONS

PROSECUTION TEAM

	DIRECT	CROSS
Frank Melbourn, Wayne Chui, and Chiara Clemente	12	70
Leon Firsht	66	
Gary Harper	67	
Tad Nakatani	67	70
John Quenzer	68	

SAN ALTOS-LEMON GROVE, LLP

	DIRECT
Frank Melbourn and Chiara Clemente	70
Ben Anderson	87
Wayne Rosenbaum	87
Scott Sandstrom	88

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P R O C E E D I N G S

March 9, 2016

11:13 a.m.

CHAIRMAN ABARBANEL: Okay. If we're ready, let us proceed with Item Number 12. Item Number 12, I am going to turn over the gavel and the Chair for this item to Mr. Morales. His experience with activated carbon might be less than others, but his experience in making this an efficient, fair and timely hearing is well above other -- the rest of us.

So, Tomas? And thank you for doing that.

It is to be done with the agreement of the Board. So if there is a disagreement, one of you will have to do it. Okay.

Thank you, Tomas.

EXECUTIVE DIRECTOR GIBSON: Mr. Chairman, Board Member Morales. Item Number 12 is a hearing regarding Complaint R9-2015-110, Administrative Civil Liability against San Altos-Lemon Grove, LLC, for \$848,374 for violations of State Water Resources Control Board Order Number 2009-009-DWQ, as amended.

The hearing procedures dated February 8th, revised hearing procedures, identify the representatives of the parties, including the members of the Prosecution and the Advisory Team. The Advisor Team today includes Catherine

1 Hagen and Adriana Nunez as Counsel, Engineering Geologist
2 Bea Griffey, Senior Environmental Scientist Deborah Jayne,
3 myself, and today we have added Christina Arias, Water
4 Resources Control Engineer to the Advisory Team. She has
5 had no contact with the Prosecution Team or Staff in the
6 preparation of this case. And she is available to advise us
7 later in the day during the Board's deliberations.

8 Rachel O'Donovan will be assisting today, keeping
9 time over here to my right. And we are at your service.

10 BOARD MEMBER MORALES: Very good. This is the
11 time and place for a public hearing to consider Complaint
12 Number R9-2015-0110 issued by the San Diego Water Board's
13 Prosecution Team alleging that San Altos-Lemon Grove, LLC
14 violated the State Water Resources Control Board
15 Constructions Stormwater General Permit Water Code Section
16 13376, and Clean Water Act section 301 at its Valencia Hills
17 Construction site in Lemon Grove.

18 As an initial matter, does any Board Member need
19 to make any disclosures with respect to an ability to
20 participate in this matter?

21 BOARD MEMBER WARREN: Yes. I'd like to make a
22 disclosure. Approximately five to six years ago I had a
23 case where I was co-counsel with one of the attorneys here
24 today, Ms. Beresford. That will not impact my role here
25 today. Thank you.

1 BOARD MEMBER MORALES: Very good.

2 This hearing will be conducted in accordance with
3 the hearing procedures and Order of Proceedings prepared in
4 this matter. Dave Gibson has already identified the members
5 of the Staff and Counsel who are advising the Board in this
6 matter. In prosecutorial matters such as this the Board
7 institutes a separation of functions between Staff and
8 Counsel that are investigating and prosecuting a matter and
9 those who are advising the Board as decision makers, which
10 separation is outlined in the hearing procedure for this
11 matter. The Board's Prosecution Staff will introduce its
12 own representatives, and San Altos will have the same
13 opportunity.

14 At this time the evidence should be introduced on
15 the following general issues.

16 One, whether San Altos-Lemon Grove, LLC has
17 violated one or more of the provisions of the Construction
18 Stormwater General Permit and related violations as alleged
19 by the Prosecution Staff in the complaint and, if so, on all
20 or fewer of the days alleged by the Prosecution Staff.

21 Two, whether the penalties proposed by the
22 Prosecution Staff in the complaint are appropriate or should
23 be imposed in some other amount based on consideration of
24 the penalty methodology and the State Water Board's
25 Enforcement Policy.

1 The designated parties are as follows: San Diego
2 Water Board Prosecution Staff, and San Altos-Lemon Grove,
3 LLC. Each designated party will be allowed a total of 90
4 minutes during this hearing to provide testimony, present
5 evidence, cross-examine witnesses and give closing
6 statements. Cross-examination of another designated party
7 will count towards a party's total time. The parties may
8 use their time as they choose. The Chair may modify these
9 procedures and time allocations as needed and upon request.
10 A timer will be used to keep track of remaining time. And
11 at the discretion of the Chair the timer may be stopped for
12 procedural discussions, question from Board Members or
13 Advisory Staff, or for other causes.

14 One thing that I would ask of the Prosecution Team
15 and San Altos is that you should consider whether you would
16 like our timekeeper to advise you of remaining time limits,
17 such as 30 minutes, 15 minutes, 5 minutes, et cetera. I
18 leave that up to you, but please advise us before you
19 proceed if you would like that.

20 Interested persons presenting non-evidentiary
21 policy statements shall have three minutes to present their
22 statements. They need not have submitted a written
23 statement in advance in order to provide an oral policy
24 statement. Interested persons may not provide evidence and
25 are not subject to cross examination.

1 The order of this hearing is as follows.

2 One, preliminary matters, if any.

3 Two, administration of the oath to all persons who
4 may testify today.

5 Three, presentation or testimony by Prosecution
6 Staff, followed by cross-examination of Prosecution Staff,
7 if any.

8 Four, presentation and testimony by San Altos-
9 Lemon Grove, followed by cross-examination of San Altos, if
10 any.

11 Five, comments or non-evidentiary policy
12 statements by interested persons. So for any folks out
13 there who are interested in providing comments, bear in mind
14 that that time will probably not be prior to 2:30 this
15 afternoon.

16 Finally, closing statements by San Altos-Lemon
17 Grove, LLC, then closing statements by Prosecution Staff.

18 After the hearing is closed the Board intends to
19 adjourn to closed session to conduct its deliberations as
20 noticed in the agenda and Notice of Meeting. If necessary,
21 the Board may continue its deliberations at a subsequent
22 noticed meeting. The Board will not adopt an order today.

23 As indicated in the Order of Proceedings issued
24 February 26th, witnesses whose advanced written testimony
25 has been submitted shall affirm the truth of their written

1 testimony and shall be available for cross-examination and
2 any Board Member's or Advisory Team's questions.

3 When a designated party begins its presentation it
4 may ask all of its witnesses who have submitted a written
5 declaration or whose deposition transcript has been
6 submitted to affirm the truth of their written testimony, if
7 they haven't already done so. During these presentations
8 more of the testimony rather than questions and answers is a
9 format that's encouraged to save time.

10 For purposes of cross-examination the cross-
11 examining party may direct questions to a particular witness
12 or a panel to allow the testifying party to designate which
13 witnesses should answer.

14 Attorneys making only legal argument are not
15 required to take the oath.

16 The time for Board Member Advisory Team questions
17 and answers do not count against a party's time.

18 So are there any preliminary matters that either
19 of the designated parties would like for us to consider at
20 this time?

21 MS. BERESFORD: I have some.

22 BOARD MEMBER MORALES: Yes. And again, make sure
23 the microphone is on and state your name for the record
24 please.

25 MS. BERESFORD: Sure. Good afternoon. My name is

1 Linda Beresford. I'm one of the Counsel for San Altos, LLC.

2 I have two procedural questions.

3 The first is that if we have objections to
4 evidence during the presentation should we make the
5 objections at the time that the evidence is being presented
6 or is it something that we need to reserve for later?

7 BOARD MEMBER MORALES: Let me ask generally, have
8 you reviewed the March 8th ruling on evidentiary objections?

9 MS. BERESFORD: Yes, we have.

10 BOARD MEMBER MORALES: Okay. Are there any
11 objections that you believe you currently have to any of the
12 noted exhibits or items that are not already contained in
13 the column for either your February 3rd objectives or your
14 February 23rd objections?

15 MS. BERESFORD: It's not clear. We just got their
16 presentation two minutes ago, so I can't say for sure. But
17 we will both want to restate some of the objections that we
18 made before, and then some it we won't know until the
19 hearing is actually in proceeding.

20 BOARD MEMBER MORALES: Well, I understand you have
21 general objections as almost a blanket sort of objection; is
22 that correct?

23 MS. BERESFORD: Yes. We have both blanket and
24 specific objections. I can wait for the blanket objections
25 later. But there is specific evidence that we won't know

1 how it's authenticated, we won't know what the testimony is
2 until we hear it.

3 BOARD MEMBER MORALES: Well, then I guess those
4 we'll take at the time. And you can -- let's just say any
5 objections as to the forms of questions, et cetera, all
6 reserved. You don't need to make them at the time of.

7 MS. BERESFORD: Okay. So just to be clear, you
8 still want specific objections during the hearing time?

9 BOARD MEMBER MORALES: If you have specific
10 objections. But I would caution that hopefully they are
11 specific objections that you haven't already made. And I
12 think based upon the information that's being presented
13 you'll know whether we already have it or have seen it or
14 it's in the -- the documentary materials. I basically just
15 want to avoid duplication of objection when we've already
16 seen it and issued preliminary rulings. Final rulings on
17 objections will not be made at today's hearing. They will
18 be issued at the same time, in written form, as we adopt or
19 do not an adopt an order in this matter.

20 MS. BERESFORD: I understand. And certainly as it
21 comes up if we need to change something during the course of
22 the hearing, we can address it then.

23 My second question is with respect to reaffirming
24 deposition testimony. We were told that parties that -- or
25 witnesses who had given deposition testimony did not need to

1 appear today to affirm that deposition testimony. And I
2 believe that there's at least one individual who gave
3 deposition testimony who is not here today. Is -- did I
4 misunderstand that you were saying that people who provided
5 deposition testimony still needed to affirm that today?

6 BOARD MEMBER MORALES: Well, to the extent it's
7 deposition testimony that's already contained in materials
8 that we have received, I don't know that it would be
9 necessary for someone who has already testified under oath
10 to be here to affirm that. To the extent that there is
11 testimony that comes from another portion of the deposition,
12 for example, should anyone such as San Altos want to use it
13 for rebuttal or any other person, then I might request that.
14 But currently that's not necessary.

15 MS. BERESFORD: Okay. We will reserve our
16 objections on that. We were informed that deposition
17 testimony did not need to be affirmed by people appearing
18 today.

19 BOARD MEMBER MORALES: Right.

20 MS. BERESFORD: So again, I guess we'll address
21 that at the time, if it arises.

22 BOARD MEMBER MORALES: And if it arises. I don't
23 anticipate there being a problem there.

24 MS. BERESFORD: Okay. Thank you.

25 BOARD MEMBER MORALES: Okay. Anything from the

1 Prosecution Team, preliminary matters?

2 MS. DRABANDT: Good morning. I'm Laura Drabandt
3 with the Office of Enforcement, representing the Prosecution
4 Team.

5 We wanted a little more clarification on one
6 specific blanket objection. We wanted to find out if the
7 Discharger, San Altos, is objecting to the authentication of
8 all of our exhibits or if the ruling covers that already?

9 BOARD MEMBER MORALES: I believe there was an
10 objection lodged to, is it every exhibit that --

11 (Colloquy between Hearing Officer Morales and
12 Ms. Hagan)

13 BOARD MEMBER MORALES: Is your question
14 specifically whether there is an objection, lack of
15 foundation?

16 MS. DRABANDT: Mostly authentication for the
17 exhibits.

18 BOARD MEMBER MORALES: Which would be a
19 foundational objection. So we'll --

20 MS. BERESFORD: Yes. If there are photographs
21 that have not been authenticated -- I'm sorry.

22 If there are photographs that have not been
23 authenticated during deposition testimony, and if people are
24 not here today to authenticate those photographs during the
25 hearing presentation, then we will be objecting for lack of

1 authentication.

2 BOARD MEMBER MORALES: That's already in here
3 though; right? Yeah. I believe for the most part those
4 objectives have already been made and, you know, we're
5 addressing them. But if you feel that there is an instance
6 where that's not the case or an extreme necessity to make it
7 during the proceedings, you may make the objection.

8 MS. BERESFORD: And unfortunately I do, because we
9 could not object in advance because we didn't know who was
10 going to appear today to authenticate things.

11 BOARD MEMBER MORALES: Okay. Then we'll -- then
12 we'll take it as it's presented.

13 MS. BERESFORD: Thank you.

14 BOARD MEMBER MORALES: Okay. So at this time I'll
15 administer the oath. So all persons who are either parties
16 or witnesses that are expecting to testify, please stand at
17 that time and raise your right hand, and if you will, take
18 the following oath.

19 (Whereupon all prospective witnesses were sworn.)

20 BOARD MEMBER MORALES: Okay. Thank you. When you
21 come up to testify please state your name, your affiliation,
22 and whether you've taken the oath before testifying.

23 With that we'll begin the testimony by Staff.

24 Timekeeper?

25 BOARD MEMBER WARREN: Mr. Morales, would like 90

1 minutes on the clock then?

2 BOARD MEMBER MORALES: Yes.

3 BOARD MEMBER WARREN: Do you all want the --

4 BOARD MEMBER MORALES: Stephanie, the timekeeping
5 is being handled specific by Rachel --

6 BOARD MEMBER WARREN: Excellent.

7 BOARD MEMBER MORALES: -- so that you may devote
8 your full attention.

9 BOARD MEMBER WARREN: Perfect.

10 (Colloquy between Board Members)

11 PRESENTATION AND TESTIMONY BY PROSECUTION TEAM

12 MR. MELBOURN: Good morning, Members of the Board.
13 My name is Frank Melbourn. I have taken the oath. I am a
14 member of the Prosecution Team, and also of the Compliance
15 Assurance Unit for Regional Board. I'd like to go ahead and
16 introduce the rest of the Prosecution Team. We have
17 Assistant Executive Officer Jimmy Smith. From the Office of
18 Enforcement we have David Boyers, Laura Drabandt, my
19 supervisor Chiara Clemente, and Wayne Chui from our
20 Stormwater Management Unit.

21 At this point I'd like to describe to you what the
22 Prosecution Team will present. First I will describe the
23 construction project in Valencia Hills, and also some of our
24 concerns for water quality of the receiving waters.

25 Next, Wayne Chui will discuss the Construction

1 Stormwater Permit, and specifically its focus to prevent and
2 minimize pollutants in stormwater runoff from construction
3 sites.

4 Next, I will relate what it is that San Altos did
5 that justifies the issuance of the complaint and the
6 liability, such that it is appropriate to issue the
7 recommended liability against San Altos.

8 Next, I will go ahead and summarize the violations
9 providing greater focus on such things as sediment
10 discharges, erosion controls, touching on the distinction
11 between active and inactive areas, stockpiles, concrete
12 discharges, and also run-on and runoff controls.

13 Finally, Chiara Clemente will speak to how the
14 complaint and technical analysis were developed in a manner
15 consistent with this Board's interpretation of the
16 Enforcement Policy.

17 So here is the location of the site. It is in the
18 southwest corner of the City of Lemon Grove. It abuts
19 against the City of San Diego. You can see the site rest
20 right along Encanto Channel which connects into Chollas
21 Creek. This site is approximately 18 acres. It is owned by
22 San Altos-Lemon Grove, LLC. Construction began there
23 somewhere around the summer of 2014 of 73 single-family
24 homes, and the project has recently been completed.

25 San Altos filed a Construction Stormwater Permit

1 application with the State Water Resources Control Board in
2 the spring of 2014, and they identified themselves as a Risk
3 Level 2 construction site which is medium risk.

4 And then here is a site map from their Stormwater
5 Pollution Prevention Plan. I've also posted a copy over
6 here in the easel that might be of assistance to the Board
7 Members to be able to see where some of the different
8 locations that we're talking about are.

9 So the first thing I would note is, again, Encanto
10 Channel runs along the side of the project at the bottom
11 edge there. The site is sloped quite a bit, so runoff
12 generally flows from the upper right to the lower left. And
13 then these red circles here are the areas where the sediment
14 discharges occurred. The one in the upper left is where the
15 bulk or the majority of the discharges occurred, and that is
16 on to Akins Avenue.

17 And then finally, the triangle that I just put
18 there on the far left, that is the location on Akins Avenue
19 of the storm drain inlets. There's one on each side of the
20 street for Akins Avenue, and that's where the sediment
21 discharges -- some of the sediment discharges occurred into
22 those that were then connected into the Encanto Channel.

23 So Encanto Channel connects into Chollas Creek,
24 which then goes into San Diego Bay. Chollas Creek has the
25 following beneficial uses: Contact water recreation; non-

1 contact water recreation; warm freshwater habitat; and
2 wildlife habitat. Chollas Creek is also listed as impaired
3 for several constituents for which the Regional Board has
4 adopted three total maximum daily loads.

5 At this point I'd like to turn over the podium to
6 discuss the Construction Stormwater Permit.

7 CHAIRMAN ABARBANEL: Frank, may I ask a question?

8 MR. MELBOURN: Sure.

9 BOARD MEMBER MORALES: Rachel, when we ask
10 questions the timer -- that's okay. Thank you.

11 CHAIRMAN ABARBANEL: Thank you.

12 MR. MELBOURN: Thank you.

13 CHAIRMAN ABARBANEL: The discharges occurred
14 during the construction onto Akins Avenue?

15 MR. MELBOURN: Some discharges occurred onto Akins
16 Avenue, and then into the storm drain inlets --

17 CHAIRMAN ABARBANEL: Right.

18 MR. MELBOURN: -- on Akins Avenue. There was also
19 a site, if I back up, so if you -- this is Akins Avenue
20 here. This is the entrance to the site. Over here are the
21 inlets on Akins Avenue. But there's also a site here where
22 runoff, I'll show later on, where runoff came through here
23 and discharged directly into Encanto Channel.

24 CHAIRMAN ABARBANEL: Okay. Did these discharges
25 occur during inclement weather, rainstorms, or it was

1 induced by activity on the site itself?

2 MR. MELBOURN: It happened during construction and
3 during storm events.

4 CHAIRMAN ABARBANEL: Okay. Thank you.

5 MR. CHIU: Okay. Thank you. Oh, did you turn it
6 off? I'll try this one. Can you hear me on this one?

7 Wayne Chui with the Prosecution Team. I'm with
8 the Stormwater Management Unit.

9 Oh, let's see here. I'm sorry, I'm -- here we go.
10 Okay.

11 Good morning. The Prosecution Team would like to
12 provide a little context for why we are here before you
13 today. We need to begin with the Statewide Construction
14 General Stormwater Permit and why we have this permit.
15 Construction sites are regulated because they can have a
16 significant impact on water quality. Construction sites
17 disturb and expose large areas of soil, like you see was the
18 case at the site when I visited it in December, and can
19 discharge more sediment to creeks and streams during one
20 storm event that would be discharged naturally over several
21 years or even decades.

22 In addition to sediment, there are several other
23 pollutants that are present and can be discharged from
24 construction sites, like metals, oil and grease from
25 construction vehicles and equipment, pH altering compounds

1 in concrete and stucco, and trash, bacteria, metals and
2 other toxic substances in construction materials and waste.

3 The Construction Permit includes a narrative
4 effluent limitation which actually allows construction sites
5 to discharge pollutants if they minimize or prevent
6 pollutants in discharges through the use of controls,
7 structures and management practices that are the best
8 available technology for toxic and nonconventional
9 pollutants, and the best conventional technology for
10 conventional pollutants like sediment, also known as the
11 BAT/BCT standard. So in other words, construction sites are
12 not allowed to have discharges containing pollutants if
13 those pollutants have not been minimized or prevented
14 through the use of controls that achieve the BAT/BCT
15 standard.

16 The controls for achieving the BAT/BCT standard
17 consist of implementing best management practices, or BMPs.
18 Construction BMPs basically fall into two general
19 categories, source control and pollutant transport control
20 BMPs. Housekeeping, non-stormwater management and erosion
21 controls are source control BMPs. Source controls BMPs
22 minimize the amount of pollutants that come into contact
23 with rainfall and runoff and keep those pollutants from
24 moving to begin with.

25 For example, if the Discharger had implemented a

1 simple erosion control practice such as putting together and
2 following a schedule to minimize the amount of area that was
3 disturbed and continued to be exposed, they could have
4 significantly reduced how much sediment on the site was
5 exposed to erosion. In general, source control BMPs are
6 typically more cost effective by preventing pollution at the
7 source than treating or controlling it after it's been
8 mobilized.

9 However, if pollutants have been mobilized, then
10 run-on and runoff controls and sediment controls, which are
11 the pollutant transport control BMPs, need to be in place to
12 prevent those pollutants from being transported too far from
13 the source and minimize the amount of pollutants that can be
14 transported off the site.

15 So implementing all of these source control and
16 pollutant transport control BMPs are required to achieve the
17 BAT/BCT standard to adequately minimize and prevent
18 pollutants and discharges from a construction site.

19 So you might be asking yourself: How do you
20 containment sites know what specific BMPs need to be
21 implemented at their site? Well, I'm glad you asked.

22 So each construction site is required to develop a
23 Stormwater Pollution Prevention Plan, sometimes referred to
24 as a SWPPP. I'll refer to it as a plan. The plan includes
25 a description of how all of these BMPs will be tailored to

1 the site and implemented to achieve the BAT/BCT standard and
2 minimize and prevent the pollutants from being discharged.
3 Pollution Prevention Plans also are required to describe how
4 the BMPs will be inspected and maintained, as well as how
5 the construction personnel are supposed to be trained to
6 make sure BMPs are properly implemented and remain
7 effective.

8 Developing these plans and implementing all these
9 BMPs have been required and expected to be implemented at
10 construction sites in California since the early 1990s. So
11 the industry has been aware of and even helped to develop
12 some of the BMP technologies to meet these requirements over
13 the last 20-plus years. But under earlier iterations of the
14 Construction Permit, many construction sites failed to
15 adequately implement these BMPs because they did not have
16 properly trained and knowledgeable persons developing the
17 plans and implementing the BMPs.

18 The Construction Permit was changed in 2009 to
19 require trained and knowledgeable persons then to develop
20 and implement these BMPs and plans. So now Pollution
21 Prevention Plans have to be developed by a qualified plan
22 developer, and implementation plans have to be managed by a
23 qualified plan practitioner.

24 The Construction Permit was also changed in 2009
25 to include separate requirements that clearly specify the

1 controls and practices expected to be implemented at each
2 construction site. Each and every one of these separate
3 requirements has a specific role and needs to be implemented
4 so it works together with the other requirements to achieve
5 the BAT/BCT standard.

6 Additional and separate erosion and sediment
7 control requirements were also included for sites that have
8 a higher risk of discharging sediment. Medium-risk
9 construction sites like this one and high-risk construction
10 sites, referred to as Risk Level 2 and Risk Level 3
11 construction sites, are required to implement additional
12 erosion controls to minimize and prevent sediment from
13 coming into contact with rainfall and runoff in active
14 areas, in addition to inactive areas of construction, and
15 additional sediment controls to minimize and prevent
16 sediment from being transported down slopes, onto and over
17 roads and into storm drain inlets.

18 Now I'll hand it back to Frank who will describe
19 for you how the Discharger failed to implement BMPs that
20 achieve the BAT/BCT standard and failed to minimize or
21 prevent pollutants in discharges from this Risk Level 2
22 construction site.

23 CHAIRMAN ABARBANEL: May I ask a question of
24 Wayne?

25 BOARD MEMBER MORALES: Of course.

1 CHAIRMAN ABARBANEL: The qualified plan developer
2 and qualified plan practitioner, are they specified
3 employees of the persons running the construction site? Do
4 they have to be identified in the plan?

5 MR. CHIU: The do. The plan has to be developed
6 and certified by a qualified SWPPP developer. They're known
7 as QSDs. That's a specific requirement of the Construction
8 Permit. The plan should have like the certification of the
9 QSP, or the qualified SWPPP practitioner who is managing the
10 implementation of the plan, and that should be incorporated
11 in the SWPPP.

12 CHAIRMAN ABARBANEL: And that was done in this
13 case?

14 MR. CHIU: Yes.

15 CHAIRMAN ABARBANEL: Thank you.

16 (Colloquy between Board Members)

17 MR. CHIU: So maybe I should clarify that. The
18 QSD and the QSP are also employed or retained by the legally
19 responsible person for the site to provide these services,
20 to develop the plan and implement the plan.

21 CHAIRMAN ABARBANEL: And in this case, San
22 Altos --

23 MR. CHIU: Correct.

24 CHAIRMAN ABARBANEL: -- Lemon Grove --

25 MR. CHIU: Yeah.

1 CHAIRMAN ABARBANEL: -- LLC?

2 MR. CHIU: Right.

3 CHAIRMAN ABARBANEL: Okay. Thank you.

4 MR. MELBOURN: I know that there are a lot of
5 violations. I know there are a lot of violations. But
6 before I talk about the violations, I'd like to talk to you
7 about the site's plan, what San Altos should have done, and
8 then all the efforts between the City and the Regional Board
9 staff to try to get San Altos to comply with the permit.
10 And then I will show you the permit violations.

11 So first off, this was a very poorly run site.
12 San Altos failed to prevent and minimize pollutants in the
13 stormwater runoff from its construction activities. This is
14 the reason that there were four sediment discharges in
15 December of 2014, another sediment discharge in May of 2015,
16 and then most recently September 2015 was the last sediment
17 discharge that we documented.

18 So even when they came close to bringing the site
19 back into compliance at the end of January 2015, they
20 couldn't maintain it. What was the problem? Why couldn't
21 they? Didn't they have a plan?

22 Well, we know they had a plan. You have it as
23 Exhibit 35. And Wayne Chui was just discussing that plan,
24 so they had a plan. But it's not effective if you don't
25 implement the plan.

1 So let me give you a quick snapshot of one of the
2 requirements that San Altos should have done. The plan says
3 that they should have gravel bag chevrons in the streets.
4 So you can see it. Here it is on the plan. And you might
5 ask, well, what's a gravel bag chevron? This is an example
6 of a gravel bag chevron. It's several gravel bags lined up
7 in a row. Often they will be at least two high, and
8 sometimes will go 50 to 75 percent out into the street
9 width. In this case it's just a small one here. But the
10 purpose of these BMPs is to slow down the flow of stormwater
11 runoff, and then drop out some of the sediment that's there,
12 and then it would later be cleaned up.

13 CHAIRMAN ABARBANEL: Frank, is this a picture from
14 the site or --

15 MR. MELBOURN: It is

16 CHAIRMAN ABARBANEL: -- is this a gravel bag
17 chevron?

18 MR. MELBOURN: This is from the site. So in the
19 corner you'll see the exhibit number and the image ID. And
20 so all the photos that I'll be showing today are from the
21 site.

22 CHAIRMAN ABARBANEL: Thank you.

23 MR. MELBOURN: So here's a photo of the area of
24 the plan that I just showed you that indicates that there
25 should be chevrons out there, and you can see that there are

1 none.

2 So now I'm going to tell you about all the efforts
3 that the Regional Board and the City did to try to get San
4 Altos to do what it had planned to do and said that it would
5 do to be in compliance with the permit. And you will see
6 that they completely missed the mark. When I show the
7 specific violations you'll see that they completely missed
8 the mark.

9 So the City tried hard to get them into
10 compliance. They issued eight citations to San Altos and a
11 stop work order, and they couldn't get them to comply. So
12 they turned to the Regional Board for help and we got
13 involved.

14 We inspected the site five times over a six-month
15 period. We still saw violations. We informed them of the
16 violations. We thought they would correct them and they
17 didn't, and that is why we are here today.

18 So here are the 13 specific allegations of
19 violation for a total of 136 days of violation. The days of
20 violation are in parenthesis behind each of the individual
21 violations. I'm not going to spend all of my time going
22 through each and every of the violations. But I will tell
23 you that the complaint and the technical analysis does the
24 job of providing all the evidence and is sufficient. But I
25 would like to highlight some of the violations and focus in

1 on those.

2 So I'd first like to start with the sediment
3 discharges. So this is exactly what we are trying to
4 prevent. This is a result of not implementing all of the
5 BMPs that are required by the permit. You get a road full
6 of dirt and it's in front of residential homes right next to
7 Encanto Channel. This picture was taken on December 4th,
8 and it's from the Akins Avenue entrance to the site looking
9 to the west, down Akins Avenue. And I want to tell you that
10 this is not a dirt road. This is an asphalt city street.
11 It just looks like a dirt road with all the sediment.
12 Towards the end of the street are the two storm drain inlets
13 that I talked about that go into Encanto Channel.

14 And I would like to note that two days prior to
15 this photo a City inspector noticed in his inspection
16 report, "Discharge is imminent." They also noted that they
17 left a voicemail message that the situation needed attention
18 ASAP with the developer, and no return call.

19 On this day the City issued a stop work notice to
20 San Altos, meaning that all work on the site has to stop and
21 that it will not be removed until compliance with the
22 stormwater -- the City stormwater ordinance is completed.
23 The stop work itself notes illegal discharge. And based
24 upon the inspection reports and the photographs provide by
25 the City, I conclude that this is a discharge of stormwater

1 runoff from the site that violates the permit based upon
2 those and the inadequacy of the BMPs onsite.

3 BOARD MEMBER WARREN: I'm sorry, before you go too
4 much further, the channel is just to the left of the fence
5 line?

6 MR. MELBOURN: So the channel is right here.

7 BOARD MEMBER WARREN: All right. Thank you

8 MR. MELBOURN: San Altos did this six times over a
9 ten-month period, and what I said was most recently was is
10 September. And so we know the sediment discharges have
11 dramatic and damaging impacts to water quality and the
12 beneficial uses of the receiving waters.

13 BOARD MEMBER MORALES: So when you say San Altos
14 did this, is this a condition similar to what we just saw in
15 that last photograph?

16 MR. MELBOURN: I'm not sure I understand you.
17 Could you clarify?

18 BOARD MEMBER MORALES: Well, you said there were,
19 I guess, six of these particular issues. Was it this
20 extreme every time or was it --

21 MR. MELBOURN: I'm going to go ahead and show you
22 each of the six --

23 BOARD MEMBER MORALES: Okay.

24 MR. MELBOURN: -- sediment --

25 BOARD MEMBER MORALES: Okay.

1 MR. MELBOURN: -- discharge violations so you can
2 see for yourself what each one looked like.

3 So this is December 12th, 2014. This is from the
4 report, the engineering report from DMax Engineering, a City
5 consultant that was hired to help out with stormwater
6 inspections and sampling. And this photograph was taken
7 from the southeast entrance of the site. And over here is
8 Encanto Channel. And so this right here is the runoff in
9 the gutter from the residential neighborhood in the City of
10 Lemon Grove. It is just to the east of the site. And so
11 you can see that the water is clear. Here's a sample of
12 that runoff. It looks like you could drink it.

13 Over here in the green arrow is a turbid water in
14 the gutter. And that turbid water came from the site which
15 is indicated by the green construction fencing there. The
16 sediment and the stormwater runoff from the site came
17 underneath the fence, hit the gutter there and then
18 discharged. I'll show you in a second where the discharge
19 went. So DMax Engineering took a sample of the runoff from
20 the site, and you can see that it is turbid.

21 And then this black arrow here shows that there
22 was a break in the gutter, and that that is where
23 sediment -- the sediment latent stormwater runoff from the
24 site then discharged directly into Encanto Channel.

25 CHAIRMAN ABARBANEL: Frank, you mentioned that

1 stop work orders were issued.

2 MR. MELBOURN: There was one stop work order
3 issued.

4 CHAIRMAN ABARBANEL: Did the work stop?

5 MR. MELBOURN: The work stopped. That happened on
6 December 4th. I think it was December 4th, let me check.

7 CHAIRMAN ABARBANEL: I think you said it was
8 December 4th.

9 MR. MELBOURN: Yeah, December 4th it stopped. And
10 then that was removed on January 22nd, so almost two months
11 of stop work.

12 CHAIRMAN ABARBANEL: Okay. Thank you.

13 MR. MELBOURN: San Altos asserts the Prosecution
14 Team lacks evidence or proof to support a sediment discharge
15 on this day. We disagree. And we can prove that there was
16 another sediment discharge from the site into the Akins
17 Avenue inlet on the very same day.

18 So again, same --

19 MS. BERESFORD: I would like to object. This
20 photograph has not been authenticated in any deposition
21 testimony, and it is not in the technical report. So I
22 would ask for authentication before there's further evidence
23 of it.

24 BOARD MEMBER MORALES: Okay. Do you know where
25 this photograph came from?

1 MS. BERESFORD: No.

2 BOARD MEMBER MORALES: Was -- was this photograph
3 obtained from the City of Lemon Grove?

4 MR. MELBOURN: Yes.

5 BOARD MEMBER MORALES: Is it your understanding
6 that it was taken by an employee of the City of Lemon Grove
7 while he or she was employed and doing work on behalf of the
8 City?

9 Mr. Fahey Yes.

10 BOARD MEMBER MORALES: Is this photograph the only
11 basis for your, I guess, determination that there was a
12 violation at this day?

13 MR. MELBOURN: No.

14 BOARD MEMBER MORALES: Okay. Thank you.

15 Overruled.

16 MS. BERESFORD: I would still like to object. I
17 think we are entitled to know who took the photograph so
18 that we can cross-examine them if we deem appropriate.

19 BOARD MEMBER MORALES: So noted.

20 MR. MELBOURN: Okay. So again, this is the same
21 day as the other sediment discharge that I showed. This is
22 the storm drain inlet on Akins Avenue to the west of the
23 site.

24 So I'd like to -- I would like to point out that
25 even though there are two separate locations of sediment

1 discharge, the Prosecution Team has only alleged or charged
2 one day of sediment discharge violation. I think it goes to
3 show that we used our discretion and reasonableness in these
4 allegations.

5 Looking at the photo you can see that there is
6 turbid stormwater runoff. It comes from the site, from the
7 southwest Akins entrance of the site, flows down Akins
8 Avenue. And you can see that it is overwhelming the gravel
9 bags that are put out to protect the inlet and discharged
10 into the storm drain.

11 Based upon the City's inspection report and these
12 photos, I conclude that this discharge of stormwater runoff
13 from the site violates the permit based upon the
14 documentation of the City's reports that there were
15 inadequate site BMPs.

16 BOARD MEMBER WARREN: I have a quick question
17 about that picture before you go further. Are those bags
18 properly set up?

19 MR. MELBOURN: We would say no. And the reason I
20 say no is that typically you would see a filter fabric on
21 there, and then more gravel bags than just a single layer
22 which you see there. So I would say that's an inadequate
23 best management practice.

24 This is December 17th, 2014.

25 MS. BERESFORD: I apologize. We're going to

1 object again. This is a new photo. It was not part of the
2 technical report. We don't know who took the photo. And we
3 would ask for authentication of who took it, when they took
4 it, and verification when they were on the site.

5 BOARD MEMBER MORALES: Okay. Were these
6 photographs that were obtained by the Prosecution Team
7 through discovery? In other words, was this a request that
8 was made of the City?

9 MR. MELBOURN: This photograph here was obtained
10 during the discovery process when San Altos conducted
11 depositions of City Staff. And so the City provided those
12 photographs during the deposition.

13 BOARD MEMBER MORALES: Okay. So these were
14 depositions that were noticed by San Altos?

15 MR. MELBOURN: Yes.

16 MS. BERESFORD: They were depositions that were
17 noticed by San Altos. But we received a CD of hundreds of
18 photographs, so we were not able to read all of them. And
19 they're not authenticated. And we request that the
20 Prosecution authenticate the photograph. Who took the
21 photograph? How do we know it's the site? We think we're
22 entitled to that authentication.

23 BOARD MEMBER MORALES: I assume the San Altos
24 discovery request was for documents and photographs of the
25 site; is that -- is that fair?

1 MS. BERESFORD: Yes. But they also produced some
2 photographs that were not part of the site. And during the
3 deposition process we had to clarify which photographs were
4 part of the site and which photographs were not part of the
5 site.

6 BOARD MEMBER MORALES: Okay. Your objection is
7 noted. Overruled.

8 Go ahead.

9 MR. MELBOURN: So on December 17th, San Altos
10 asserts that the Prosecution Team has no evidence to support
11 a sediment discharge. Again, this is the Akins Avenue storm
12 drain inlet on the north side of the street. This is
13 connected directly into Encanto Channel. You can see around
14 the inlet is fresh sediment and mud. Also, you can see the
15 turbid water in the gutter. And also I'd like to point out
16 that you can see, one of the gravel bags has been removed
17 and thereby allowed the stormwater runoff to flow directly
18 into the curb unchecked. And this completely disables the
19 BMP. As --

20 CHAIRMAN ABARBANEL: Frank, sorry. Is this the
21 inlet that was marked by a black triangle on an earlier
22 photograph?

23 MR. MELBOURN: Yes.

24 CHAIRMAN ABARBANEL: Okay. Thank you.

25 BOARD MEMBER MORALES: And one other question, Mr.

1 Melbourn. Did the Prosecution Team base its decision with
2 respect to this location solely on this photograph?

3 MR. MELBOURN: No.

4 BOARD MEMBER MORALES: Thank you.

5 BOARD MEMBER WARREN: Sorry. Can you -- can you
6 flash back to the pictures before please? Sorry. Yeah. So
7 I'm just trying to understand, and it might just be the
8 angle of the picture, but is there not a bag in front, what
9 would be nearest to us? Whereas in the picture we were just
10 looking at there it kind of circled the inlet?

11 MR. MELBOURN: It's my understanding that there
12 was a bag right here.

13 BOARD MEMBER WARREN: Yeah, that's exactly what
14 I'm looking at.

15 MR. MELBOURN: Yeah. I think it's just that there
16 was so much flow that it overwhelmed, it was overtopping.

17 BOARD MEMBER MORALES: It appears there is a bag
18 there, if you look.

19 BOARD MEMBER WARREN: Oh, there is? So it's
20 there, the water is just going over it in this picture?

21 MR. MELBOURN: Right.

22 BOARD MEMBER WARREN: Thank you.

23 CHAIRMAN ABARBANEL: This is also five days
24 earlier, so the bag could have been absent and somebody -- I
25 don't know.

1 MR. MELBOURN: Okay. So we notice that the bag
2 has been removed. There's the -- the mud in the street.
3 And then this is a photograph, a close-up of the inlet, and
4 you can see some debris in there, but --

5 MS. BERESFORD: Excuse me. I need to object again
6 because the photograph has not been authenticated. It was
7 not part of the technical report. We don't know who took
8 it. So when they don't identify who took the photographs we
9 are not able to cross-examine them on the authentications
10 that are associated with these photographs.

11 BOARD MEMBER MORALES: Okay. Well, was this part
12 of the same batch of photographs that was produced pursuant
13 to your discovery request?

14 MS. BERESFORD: We don't know. And I -- we don't
15 know who took this photograph. We don't know who produced
16 it.

17 BOARD MEMBER MORALES: That's a different
18 question.

19 Mr. Melbourn, do you know if it was part of that
20 same group of photographs?

21 MR. MELBOURN: Yes, it was.

22 BOARD MEMBER MORALES: Okay. Then I'll say this,
23 to the extent there is any photograph that was produced in
24 response to San Altos' discovery request at the deposition,
25 all -- let the record reflect that you will object on the

1 same basis to every single photograph.

2 Now, Mr. Melbourn or anyone else on the
3 Prosecution Team, if you do pull up one of those
4 photographs, you know, what I would ask in each instance is
5 that you advise the Board whether or not that was the only
6 basis for your decision as to that particular location or
7 for that violation. But unless the answer is yes, for now
8 we will overrule all of those standing and blanket
9 objections with respect to that batch of photographs in an
10 effort to save time.

11 MS. BERESFORD: I understand. I just want to say
12 in response that therefore we are totally unable to respond
13 to this evidence since we don't know who provided the
14 evidence.

15 BOARD MEMBER MORALES: So noted.

16 MR. MELBOURN: Okay. So it's a little hard to see
17 I there. So here is the next photo showing inside the storm
18 drain inlet, and you can see the sediment inside.

19 So based upon inspection reports by the City and
20 photos by the City documenting the inadequate site BMPs and
21 the sediment in the street and in the gutter and in the
22 storm drain inlet, I conclude that this discharge of
23 stormwater runoff from the site violated the permit.

24 So this is December 31st. You can see the highly
25 turbid runoff coming from the site. This is the Akins

1 Avenue entrance to the site. It was flowing through the
2 gravel bags and the gravel here. It's very, very dark in
3 color. And this then runoff went down along the gutter and
4 Akins Avenue here on this photo in the left. It rained on
5 this day and the day before. And given the rain, it is more
6 likely than not that the turbid stormwater runoff overtopped
7 any gravel bags that may have been protecting the storm
8 drain in this instance.

9 This is May 8th, 2015. In the photograph here on
10 the lower left, it's documenting the sediment that was in
11 the street after a stormwater -- or a storm event. This is
12 an interior street of the project. I was standing, when I
13 took this photograph, on Avalon Way. And I'm looking at
14 this point up Orlando Drive.

15 In the photo here, in the upper right, I was
16 standing at Seville Way which is a steep street down. And
17 this is where Encanto Channel is right here. They had some
18 perimeter control best management practices here. But as
19 you can see they pulled -- they -- someone pulled the gravel
20 bags there and thus allowed the sediment-laden water to be
21 able to be discharged. And you can see some of the sediment
22 has dropped out here in the ponding.

23 So based upon my observations of the site during
24 this visit I conclude that this was a discharge of the
25 Stormwater Permit.

1 CHAIRMAN ABARBANEL: A violation of the Stormwater
2 Permit.

3 MR. MELBOURN: Right. Thank you.

4 So here we are. This is the September discharge.
5 This is nine months after the claimed that they were in
6 compliance with the Construction Stormwater Permit, and four
7 months after the May discharge. The City inspector that
8 took this photograph is standing at the Akins Avenue
9 entrance to the site. This was the location of most of the
10 sediment discharges from the site. This was a very tough
11 point. A lot of the runoff just comes shooting down through
12 this Seville Way here and through these side sections here.

13 I would like to note that the City citation that
14 was issued to San Altos states, "Evidence of discharge," as
15 well as the City inspection report for this day noted
16 "Significant sediment on streets within project and in
17 gutter on Akins," and direction to "Clean sediment out of
18 roadways and gutter."

19 So based upon the inspection reports, the
20 citation, the photos that were provided by the City, I
21 conclude that this discharge from the site out of the Akins
22 Avenue inlet and into the storm drain inlet on Akins Avenue
23 and into Encanto Channel, therefore, is a violation of the
24 permit.

25 So I'm not going to go -- take these violations

1 completely in order. I'm going to jump around a little bit
2 so that I can highlight a few. So let me start out with, on
3 this one, on erosion control issues that we saw for inactive
4 areas. I will note that since this is a Risk Level 2 site
5 the permit has specific requirements for erosion control,
6 that the developer provide effective soil cover for inactive
7 areas, finished slopes, open space, utility backfill and
8 completed lots.

9 So this is what happens when you don't have
10 erosion control BMPs, the soil is exposed, eroded. This is
11 a completed pad and a finished slope. Therefore, this is a
12 violation.

13 Effective soil cover for this inactive area could
14 be sprayed on hydraulic mulch. It would look like --
15 something like that. It could also be straw blankets, or
16 plastic. There are additional BMPs that would have also
17 helped prevent and minimize the pollutants in the stormwater
18 runoff at this location. And we don't see those BMPs
19 either, specific say linear sediment control BMPs, like
20 fiber rolls that would have been placed at the top and the
21 toe of the slope. And also runoff controls. There could
22 have been something placed on the edge of the pad to prevent
23 any runoff with sediment from going on to the next pad and
24 traveling to the other parts of the site.

25 CHAIRMAN ABARBANEL: Is the cut in the slope that

1 was visible in the -- yes. Is that due to erosion or simply
2 wasn't filled in?

3 MR. MELBOURN: This is due to erosion.

4 CHAIRMAN ABARBANEL: Thank you.

5 MR. MELBOURN: The permit also requires erosion
6 controls for active areas. And the permit defines active
7 areas as areas undergoing land surface disturbance. For a
8 Risk Level 2 site like this the permit requires the
9 Discharger to implement appropriate erosion control BMPs.
10 Here's an active area.

11 So what is an appropriate erosion control for this
12 active area? It's implementation of runoff controls and
13 soil stabilization. San Altos here attempted to protect the
14 area with an earthen berm that you can see here. This is
15 potentially a runoff control. However, in my opinion it's a
16 very poor runoff control. Use of an earthen berm is risky.
17 It is made of sediment, soil, so it is erodible.
18 Furthermore, if you have a fairly strong flow it's likely to
19 blow out and you have an even bigger discharge of sediment
20 from the site.

21 I think it's better to implement the soil
22 stabilization that is called for in the permit, which we do
23 not see. So that's my kind of indication of what that would
24 have looked like. And then also, if you recall, the plan
25 called out for chevrons. So you might have seen some

1 chevrons placed. What is nice about the chevrons versus the
2 berm is that they're placed at a more frequent basis and
3 they have a greater efficiency of dropping out sediment, not
4 allowing sediment to travel as far.

5 BOARD MEMBER MORALES: Betty, are you --

6 BOARD MEMBER OLSON: I just wanted clarification.
7 So an earthen berm may not be what you personally would
8 advise, but is it acceptable? Is it an acceptable best
9 management practice?

10 MR. MELBOURN: It is a best management practice,
11 yes.

12 BOARD MEMBER OLSON: Okay.

13 MR. MELBOURN: What I would like to note is
14 that -- so they did have a runoff control but it is lacking
15 soil stabilization, which is also required.

16 CHAIRMAN ABARBANEL: So do I translate that to
17 mean that if they chose as they did to use this berm they
18 should also have stabilized the soil?

19 MR. MELBOURN: Correct. Thank you.

20 CHAIRMAN ABARBANEL: Thank you.

21 BOARD MEMBER OLSON: So does the BMP require both?
22 It says in the document that you have to have a berm and
23 soil stabilization?

24 MR. MELBOURN: What the permit says is that you
25 need appropriate erosion control, and in parens it says

1 "soil stabilization" -- let me see here, I want to get it
2 right for you -- "soil stabilization and runoff controls."

3 BOARD MEMBER OLSON: Okay. Thank you.

4 MR. MELBOURN: So I'm going to provide you with
5 some examples of violations from the site for erosion
6 controls in both active and inactive areas. I apologize for
7 the poor quality of this photo. We got this photo from San
8 Altos' contracted qualified plan practitioner, from their
9 report that they produced on December 5th, 2014.

10 And what I'd like to point, it is very difficult
11 to see, but what you have is you've got a slope here, you've
12 got a roadway here, and the you've got another slope here.
13 For the inactive areas, which would be the slopes here and
14 here, you would expect to have the soil stabilization that I
15 just talked about, and you can see they had some on here,
16 but there was none here. You also see some of the effects
17 of erosion here, and then some of the effects from erosion
18 up here and here where they had some failures. These areas
19 up here would need to be touched up.

20 The lower slope was uncovered, so it should have
21 been covered. Additionally, there should have also been
22 what we call linear sediment controls, BMPs on the slopes,
23 and so those could have been something like fiber rolls,
24 again at the top and then at the toe or bottom of the slope.
25 You can see them on the upper slope, that they had them.

1 But some of them failed when there was runoff from the storm
2 events prior to this day. And this perhaps was a failure on
3 their part to properly deal with some of the run-on that was
4 happening to the site. So again, the bottom slope was
5 missing linear sediment controls and soil stabilization.

6 And then for the roadway here we would have needed
7 to have seen the soil stabilization, and then runoff
8 controls, and those were missing.

9 Here we are on December 8th, 2014. And the upper
10 photo here, I've highlighted in blue the inactive areas, the
11 slopes. These should have been covered, like that.

12 Also, the road here is active. There should have
13 been soil stabilization on it. It could have been gravel.
14 It could have been a sprayed on soil binder.

15 And then also I can see two runoff controls there
16 and there. I would -- in my opinion, those are inadequate.
17 They need to come out further. Typically I've seen 50 to 75
18 percent of the roadway width.

19 And then in this lower photo I've highlighted the
20 slopes here. These are inactive areas. They needed to be
21 covered. And then also the site, this area is missing
22 linear sediment controls, so you could have put fiber rolls
23 there and there.

24 And then the active areas, you can see they had
25 some piping here. They were working on that. Those areas

1 should have had soil stabilization, and I've identified it
2 with that.

3 So here we are on January 6th, 2015. In this
4 photo this is an inactive area. It's a completed pad. This
5 soil should have been covered and sprayed with a hydraulic
6 mulch or something similar to that, or plastic. I've
7 indicated it with that.

8 The road over here is what we call an active area.
9 And they could have addressed that with some runoff controls
10 and soil stabilization. The runoff controls, since it's a
11 slope especially, they could have put in either some gravel
12 bags or some fiber rolls that would help to slow down any
13 flow of stormwater runoff there.

14 The permit requirement for stockpiles states,
15 "Cover and berm loose stockpiled construction materials that
16 are not actively being used."

17 Here's an example from the qualified plan -- plan
18 practitioner's report on January 1st. Well, it's a report
19 that was submitted by San Altos on January 1st in the NOV
20 response, but it's a report that was prepared by their
21 qualified practitioner. This is -- this is how you properly
22 protect stockpiles. You cover them with plastic and then
23 you put some sort of berm around them. In this case they
24 used fiber rolls. And over here you can see, same thing,
25 fiber rolls, and then some sort of coverage.

1 And you will see that in this -- these examples
2 from -- this was towards the end of December 2014, you can
3 see that these are vastly different than what was seen
4 onsite.

5 This is the City's inspection report from December
6 8th where they documented a stockpile violation here. And
7 then the inspector also took a photograph. And so you can
8 see that it is a stockpile that is uncovered. It does not
9 have a fiber roll or other sort of berm around it. So
10 therefore, that would be a violation.

11 San Altos has attempted to apply the active areas
12 definition that we discussed for erosion controls. When
13 we're talking about erosion controls, we mean the
14 distinction between inactive areas and active areas. And so
15 they were asserting to apply the active areas definition
16 from the permit to stockpiles, and to do so would be
17 incorrect.

18 First, the term "actively being used," which is
19 what the permit says for stockpiles, is not the same as
20 active areas. So they're just -- they're not the same term.

21 Secondly, the permit requirements for stockpiles
22 comes before those for the erosion control requirements.
23 And so the definition for active areas was listed under
24 erosion control in a footnote for that section. So
25 therefore, you know, if the permit writers had wanted to

1 apply the same term they would have used the same term, one.
2 And two, they would have defined it the first instance, not
3 at the instance under erosion controls that occur later in
4 the permit.

5 Run-on and runoff controls. The permit states
6 that,

7 "Discharger shall effectively manage all run-on to the
8 site, all runoff within the site, and all runoff that
9 discharges from the site."

10 So here we are looking at a housing pad
11 that's within the site, so it's an internal part of the
12 site. So for that reason, in this case for runoff controls
13 we're looking at internal runoff controls. We want to keep
14 the soil in place. So if you recall the permit talks about
15 preventing and minimizing pollutants in the stormwater
16 runoff. So one of the first things that we can do is to
17 keep the soil in place, don't allow it to travel far. So we
18 want to minimize how far it even can move on the site.

19 So what is missing here is effective soil cover.
20 So we would see that on the slopes and on the pad itself.
21 Additionally, you would want to install some sort of linear
22 sediment controls, like fiber rolls that would be here at
23 the top of the slope and at the bottom of the slope. This
24 would prevent some of this runoff from the site up above
25 from coming down here and causing problems here, and then

1 having it come across the driveway and discharge.

2 This is the driveway. You would probably want to
3 protect this part here with some sort of perimeter control,
4 and so you could lay down a fiber roll. You can see that
5 they had put some gravel bags here.

6 Part of the permit requires not only do you have
7 to implement these BMPs, but you have to maintain them. So
8 here in this photo you can see that the gravel bags were
9 decomposing. So an important part of the permit is to
10 maintain your BMPs. You can't just put them down once and
11 expect that they'll last forever. There is a shelf life to
12 them.

13 Also, there could have been, like I said, pursuant
14 to the plan, the plan says there would be chevrons in the
15 street. That would also help to protect that, the internal
16 runoff for the site.

17 So this is the same day. So you can see that
18 these violations are not isolated. They happened throughout
19 the site, especially in this site, even though it's a
20 smaller site, 17 acres, 18 acres, it had a lot of roadways
21 and it was a steep sloped site. So you have these big
22 thoroughfares that allow for stormwater runoff to pick up a
23 lot of speed. However, if you implement the runoff controls
24 and soil stabilization and erosion control and other things,
25 you will reduce that. But in this case you don't see here

1 the runoff controls. So the plan calls out for those --
2 those gravel bag chevrons. We don't see them being
3 implemented.

4 The permit requires that all storm drain inlets be
5 protected. Here we are in May 2015, five months after San
6 Altos claimed that they were in compliance with the permit,
7 and we still have unprotected storm drain inlets. This
8 storm drain inlet is connected to Encanto Channel. As you
9 can see here, Encanto Channel rests over here on the side of
10 the site. And then furthermore, you can see that sediment
11 from the site has then discharged through there and has
12 blanketed the plant and any animal life that might have been
13 there.

14 The permit states,
15 "The Discharger shall contain and securely protect
16 waste material from wind and rain at all times, unless
17 actively being used."

18 These are two photographs taken of what we call a
19 post-construction best management practice. This is what is
20 going to be a bioretention basin. And in the middle of the
21 basin, you can see, is a storm drain inlet. It is protected
22 with a filter fabric. But what I'd like to note -- you to
23 note is that you have these uncovered stockpiles that are
24 near this storm drain inlet.

25 And then this -- furthermore, this photo is just

1 five days after they told us they were in complete
2 compliance with the permit. And then this photo up here is
3 taken eight days later. And though -- although you have
4 coverage of the stockpiles, you do not have the berm. You
5 do not have fiber rolls protecting it.

6 MS. BERESFORD: I'm going to object. I would like
7 to know if there is additional evidence. You had asked him
8 to identify if this is the only evidence they're relying on.
9 To my knowledge these are the only photographs and they have
10 not been authenticated. I'd like to know who took the
11 photographs.

12 BOARD MEMBER MORALES: Okay. Mr. Melbourn, are
13 these photographs the only bases upon which the Prosecution
14 Team is of the opinion that there is a violation at this
15 location on this day?

16 MR. MELBOURN: No.

17 BOARD MEMBER MORALES: Thank you.

18 MR. MELBOURN: So you're asking what additional
19 information? Well, we have a City inspection report for
20 this day and -- for both dates, for January 6th and January
21 14th. And the City inspector in his reports directed San
22 Altos to remove the stockpiles from the basin because they
23 were too close to the inlet, and thus it would have been
24 easily discharged potentially to the stormwater conveyance
25 system. And the location of these stockpiles is also in

1 conflict with the plan, San Altos' own plan. Their plan
2 states,

3 "Locate stockpiles a minimum of 50 feet away from the
4 concentrated flows of stormwater, drainage courses and
5 inlets."

6 Now I would like to finish my presentation with
7 some quick comments about a few more violations. The permit
8 it with its focus on preventing and minimizing pollutants
9 and stormwater runoff from construction sites seeks to
10 prevent the discharge of concrete materials to the ground.
11 As you can see here in these photos --

12 MS. BERESFORD: I apologize. I have to object
13 again. This was part of the ACLC technical report. But
14 this document has not been authenticated. I don't believe
15 the person who created this document is here today to
16 authenticate. And so we ask that it be excluded, unless
17 they can authenticate these photos in the report.

18 BOARD MEMBER MORALES: Okay. And where did these
19 photos come from?

20 MR. MELBOURN: This was a photograph that was
21 attached -- these photographs were attached to a City
22 inspection report.

23 BOARD MEMBER MORALES: Okay. And --

24 MR. MELBOURN: It was a City inspection report and
25 administrative citation.

1 BOARD MEMBER MORALES: Okay. That's fine. And
2 again, same question, is the Prosecution Team's basis for a
3 finding of a violation of problem on this date based solely
4 upon these photographs?

5 MR. MELBOURN: No.

6 BOARD MEMBER MORALES: Okay. Overruled.

7 MS. BERESFORD: I would like to clarify, t's on
8 the photographs and the report by the same person; is that
9 correct?

10 MR. MELBOURN: Yes.

11 MS. BERESFORD: So the only evidence on April 1st
12 is by an inspector who has not authenticated their report or
13 the photographs.

14 BOARD MEMBER MORALES: Understood. And I think
15 that's outlined as one of the -- yeah. We'll issue our
16 final rulings on objection in written format when this all
17 comes out. But there will be a couple of bases, included
18 public records exceptions.

19 MS. BERESFORD: I would like to respond to that in
20 that that exception only applies when the person -- when
21 doing work is the scope of the duty. And submit there's
22 significant evidence that none of the City reports were for
23 the purpose of inspecting for the permit. That's the exact
24 reason why they're relying on it. So it is not within the
25 scope of the duty of the person who took these photographs.

1 BOARD MEMBER MORALES: Yeah. And I -- that has
2 been considered and it is in some of the written materials
3 that I believe you've been provided, so for the purposes of
4 today's hearing we'll proceed.

5 MR. MELBOURN: So what we see is some stucco
6 waste. When they apply the stucco to the houses, some of
7 the material falls off to the ground. So in my years of
8 doing construction inspections at sites I've often seen
9 within this region where they will place plastic down or
10 some fabric material down underneath this area and catch the
11 stucco waste as it falls. And then they will then take and
12 then shake it out or dump it into the -- the concrete
13 washout bins. I've also even seen some laborers following
14 behind with shovels, picking it up and then dumping it in.
15 But the most effective that I've seen is where they lay out
16 like a fabric or a plastic material.

17 San Altos asserts that it is impractical or
18 impossible to place fabric or plastic around the house when
19 it is being stuccoed, and we find that hard to believe.
20 This is a photograph from the same day, and you can see that
21 the stucco applicators have placed plastic underneath their
22 stucco mixer here. And they've also, in an effort to
23 protect the garage from the stucco, they've placed plastic
24 here, and then it falls out over here underneath the -- the
25 scaffolding. So it does appear to be practical that they

1 can put down some sort of materials underneath there to
2 collect this stucco waste. Okay.

3 Next I'm going to jump to drip pans. So the
4 permit requires dischargers to prevent oil, grease or fuel
5 leaks to the ground, storm drain or surface waters. And
6 this is often accomplished by placing a drip pan underneath
7 the heavy equipment. And here in these photos from San
8 Altos they've shown that at the end of December they knew
9 how to place these drip pans underneath here. And so then
10 here from our Regional Board inspection, Wayne Chui went out
11 there on December 15th. And in this case, you know, he
12 walked around and he looked underneath everything and he
13 didn't see any sort of drip pan, so he cited that in his
14 inspection report. We've cited it here.

15 But also when Wayne Chui and I went out to the
16 site on May 13th, you know, five months after they said
17 they, you know, figured out compliance, we walked around
18 this piece of equipment and, again, no drip pan underneath.

19 The permit requires that at a minimum daily and
20 prior to any rain event that the discharger shall remove any
21 sediment or other construction materials that are deposited
22 on roads. So here is a photograph from the -- San Altos'
23 qualified plan practitioner that documented areas of the
24 site that needs correcting. And so on this date from
25 December 5th, the photograph not only shows the sediment in

1 the street, but it also talks about that it needs to be
2 cleaned up.

3 I would also note that five days later their
4 qualified plan practitioner submitted another report that
5 said, "Continue removing sediment from the streets." So it
6 appears that sediment was in the street here on Akins Avenue
7 from at least the 5th through the 10th of December.

8 All right, my last violation that I'm going to go
9 over, the permit requires dischargers to store chemicals in
10 watertight containers with appropriate secondary containment
11 to prevent any spillage or leakage.

12 Here is a photograph from March 18th provided by
13 the City. And -- so notice, as you can see here, they've
14 got their containers segregated here. They have them up on
15 a pallet, but there is no secondary containment. And
16 several of these buckets, also, are not watertight. They
17 have openings in the top which would allow stormwater to
18 enter in, so this is a violation of the permit.

19 So I know that this is a lot of material to
20 digest. But to summarize, there was sufficient evidence to
21 document the violations of the permit for the alleged
22 periods at the site.

23 And I will now turn over the podium to Chiara
24 Clemente. She's going to speak to how the complaint and
25 technical analysis were developed in a manner consistent

1 with this Board's interpretation of the Enforcement Policy.

2 BOARD MEMBER MORALES: Can I get an estimate of
3 the time for your presentation, Ms. Clemente?

4 MS. CLEMENTE: Ten minutes.

5 BOARD MEMBER MORALES: Ten minutes. Okay. And
6 will that be the -- the last presentation for the
7 Prosecution?

8 MS. CLEMENTE: Yes.

9 BOARD MEMBER MORALES: Okay. Then my intent will
10 be that you finish your presentation, we'll take a break for
11 lunch, and immediately upon lunch San Altos may cross-
12 examine if it chooses to, and then begin its presentation.
13 Very good.

14 MS. CLEMENTE: Okay. Just before we get started I
15 want to point out that my photos are from -- correct me if
16 I'm wrong, Frank -- but my photos are all from Board Staff.
17 I won't be walking you through what you're seeing. I'm not
18 going to be alleging any violations with these photos. It's
19 just so you're not staring at a blank screen for the next
20 ten minutes.

21 So good morning. My name is Chiara Clemente. I'm
22 the Board's Regional Enforcement Coordinator. And I'm here
23 to explain how the proposed penalty conforms to the
24 Enforcement Policy.

25 The Enforcement Policy notes that:

1 "The Board shall strive to be fair, firm and consistent
2 in taking enforcement actions, while recognizing the
3 unique facts of each case."

4 The discharger is not alleging that we -- that we
5 weren't firm, so I'll leave that one alone.

6 But the discharger claims that we got the penalty
7 calculations all wrong and that our assessment is not fair
8 or consistent with one of our other penalties issued to the
9 City of Encinitas and USS Cal Builders.

10 I'm going to assume you're familiar with the
11 Enforcement Policy and the calculation methodology described
12 in the policy which was intended to bring consistency to the
13 enforcement cases by its implementation. So one could say
14 we are being consistent in accordance with the policy,
15 simply by applying the calculation methodology. But for my
16 presentation I'd like to explain how the methodology was
17 used in this case, how and why it's different from Encinitas
18 but consistent with more recent cases, and in so doing I
19 hope to demonstrate why the penalty amount is appropriate.

20 Many of the discharger's arguments have been built
21 around we want what Encinitas got. The Encinitas complaint,
22 up here at the top, was issued in 2013. It was the first
23 construction stormwater penalty issued after the new
24 Construction General Permit became effective, and it was
25 eventually resolve by settlement where the city paid the

1 full amount and proposed a supplemental environmental
2 project.

3 Since that time we have issued four other penalty
4 actions related to construction stormwater, and those are
5 the rows below. The ones issued to San Altos and SANDAG in
6 the two bottom rows are pending complaints. The remaining
7 two, which I'll refer to as Jacobs and Scripps Mesa
8 Developers, have been resolved by settlement.

9 So why does the discharger want to compare itself
10 to Encinitas and not the rest of the more recent cases?
11 Because it works most to their favor economically. Without
12 going into each of the penalty calculations, let's unpack
13 some key examples.

14 In Encinitas we observed violations of erosion
15 control, sediment control and run-on/runoff. But in the
16 complaint we alleged only one violation for failure to
17 implementation BAT/BCT. That's in the top row there. Since
18 that time we have evolved. We are now going a better job of
19 communicating the value and need of each BMP requirement.

20 MS. BERESFORD: I would like to object here. We
21 took the deposition of Ms. Clemente and specifically asked,
22 "Were there any facts of why these complaints were different
23 from the City of Encinitas?" And she refused to answer on
24 the basis of attorney-client privilege.

25 To allow this testimony to proceed is the epitome

1 of surprise evidence. We asked this specific information
2 and we were told, "No, we can't answer as it's attorney-
3 client privilege." It should not be admitted today.

4 I don't know of any regulatory or legal matter
5 that allows people to hind behind privilege and then present
6 testimony today.

7 BOARD MEMBER MORALES: Okay. On that one I'll
8 reserve pending cross-examination.

9 MS. BERESFORD: How can I cross-examine her when
10 she tells me before it's privileged, and yet she gets to
11 present testimony today. We cannot prepare for cross-
12 examination under such instances.

13 (Colloquy between Hearing Office Morales and
14 Ms. Hagan)

15 BOARD MEMBER MORALES: Well, for now that's --
16 that's the decision, pending cross-examination.

17 And is it specifically with respect to the
18 comparison to the City of Encinitas?

19 MS. BERESFORD: It's with respect to all of them.
20 We asked for the unique facts. That's one of the things
21 that the Prosecution is supposed to consider in preparing
22 their complaints. And we said, "What were the unique facts
23 in this case that resulted in the allegations here?"

24 And they answered, "We cannot answer because of
25 attorney-client privilege."

1 So I would say it's within the comparison to any
2 of them.

3 BOARD MEMBER MORALES: Yeah. That's, I think, a
4 slightly broader question in terms of unique facts. As I
5 understood your objection, that related specifically to a
6 comparison to the City of Encinitas.

7 MS. BERESFORD: It is specific to the City of
8 Encinitas but -- as we'll see if she proceeds. But we did
9 ask for comparisons to all -- all other cases, and they
10 refused to provide any facts in deposition.

11 BOARD MEMBER MORALES: Okay. Let's proceed.

12 MS. CLEMENTE: If I recall my deposition
13 correctly, I think it was focused on Encinitas. Anyway, so
14 resuming, I just want to bring you back to what -- you heard
15 Wayne describe the purpose of these substantially
16 distinguishable BMPs. And Frank talked you through some of
17 the pictures. But I want to underscore the need for all of
18 them to be there to achieve that BAT/BCT standard.

19 So basically, imagine if the inspector's checklist
20 said "Are BMPs being implemented, yes or no?" Is that
21 specific enough to minimize or prevent a discharge? Does
22 that adequately communicate to the discharger what they need
23 to correct? No. What it does is it gives the regulated
24 community the false impression that it's an all-or-nothing
25 thing. So a discharger with no BMPs would be subject to the

1 same penalty calculation as one with some.

2 Is that what the Enforcement Policy had in mind as
3 fair?

4 Also by way of the Encinitas penalty we learned
5 that calculating BMP violations this way is not a sufficient
6 deterrent. Case in point, this is what the discharger is
7 asking you for today.

8 As you can see, with the subsequent penalty
9 assessments we've evolved from that approach by alleging
10 separate BMP violations, as required, separately and
11 explicitly in the Construction General Permit, and we are
12 doing this in a fairly consistent manner. For San Altos
13 this amounts to more money. That's because at the San Altos
14 site the -- the inspectors observed and documented more
15 violations and more days of violation.

16 So next let's talk about the days of violation.
17 The discharger also wishes for you to extend or combine the
18 alleged days of violation and then apply page 18 of the
19 Enforcement Policy here which allows, not mandates, for a
20 reduction of days and the resulting penalty as we had done
21 for the Encinitas penalty.

22 The Prosecution Team believes that this section of
23 the Enforcement Policy should not be applied in this case
24 because we are not alleging that any one of the violations
25 lasted more than 30 days. Moreover, we do not recommend

1 creating a fiction by increasing and then reducing the
2 number of days of violation alleged because it would send
3 the message that prolonged noncompliance costs less. So in
4 essence, reducing days alleged in the San Altos case is not
5 fair to dischargers like SANDAG and Jacobs who went to
6 extensive efforts to quickly return to compliance.

7 If the discharger wishes you -- for you to compare
8 days for consistency's sake, the one that is most like the
9 San Altos case is the Scripps Mesa Developers project. And
10 in that case the days of violation was assessed in the same
11 manner as the San Altos complaint. And in both of those
12 cases we made accurate assessments of days of violation
13 based on the extensive evidence we had before us.

14 So once again with days, our penalty methodology
15 has evolved since we issued the Encinitas penalty. We are
16 being consistent in the way we assess this in more recent
17 penalties. And we believe the proposed penalty for San
18 Altos is appropriately reflective of their lengthy period of
19 noncompliance.

20 The discharger also alleges that we could prove no
21 harm to the beneficial uses, so the potential for harm
22 scores should be lowered throughout.

23 I want to clarify that the Enforcement Policy does
24 not require that we demonstrate actual harm to beneficial
25 uses, nor is it a fair argument to say that the beneficial

1 uses are already not being realized or attained. The
2 Enforcement Policy asks us to calculate potential for harm
3 based on the harm that may directly or indirectly result
4 from exposure to pollutants or contaminants in the
5 discharge.

6 We know the discharger's Pollutant Prevention Plan
7 identified certain materials onsite, including metals. We
8 know the site discharged sediment. We know that sediment
9 acts as a binding carrier to metals and organic
10 contaminants. And we know that the receiving waters of
11 Chollas Creek are impaired for dissolved metals, so there is
12 no assimilative capacity for these constituents. And
13 besides that, sediment in and of itself can act as a
14 pollutant, smothering benthic communities and affecting the
15 designated warm and wild beneficial uses.

16 For these reasons we assigned a moderate or three-
17 out-of-five potential for harm for the discharge violations,
18 and for the non-discharge of BMP violations we assigned a
19 range from minor to major, depending on the violation
20 itself.

21 Finally, the discharger would also like for you to
22 lower their culpability and clean-up and cooperation scores
23 because, A, they have a different interpretation of what
24 permit requires, B, they have a different interpretation of
25 what a reasonably prudent person should do and, C, they

1 claimed the discharger thought everything was just fine
2 since they sent us a corrective action letter.

3 We've described the intent and requirements of the
4 relevant sections of the Construction General Permit. A
5 reasonably prudent person would comply with those specific
6 and clear requirements, thereby minimizing and preventing
7 the discharge of pollutants.

8 The evidence is clear that the discharger was
9 warned many, many times by us and the City that their site
10 was a mess. So how they thought their site was fine, I
11 don't know.

12 We maintain that the conduct scores are reasonable
13 and appropriate as drafted and supported in the technical
14 report, that is a 1.3 for culpability and a 1.1 for cleanup
15 and cooperation. The discharger agreed to comply with the
16 permit requirements when it filed for enrollment. There was
17 nothing stopping them from implementing the requirements.
18 They never asked for clarification when we alleged
19 violations in our inspection. Only after we issued the
20 complaint did they challenge how the permit requirements
21 should be interpreted. Yet despite multiple notices from
22 the City and Board Staff over nearly a year the discharger
23 repeatedly failed to comply with its requirements.

24 So in closing, the Prosecution Team maintains that
25 the proposed penalty is fair, firm and consistent with the

1 Enforcement Policy and with more recent construction
2 stormwater penalty assessments in our region. Moreover, we
3 assert that the total penalty amount is appropriate and
4 commensurate with the egregiousness of the case, and that a
5 reduction I'm the penalty amount may undermine the deterrent
6 effect that penalties are intended to have on both the
7 discharger and the rest of the regulated community.

8 And finally, any different interpretation of the
9 Construction General Permit requirements, as the discharger
10 suggests, would result in the implementation of less BMPs
11 throughout the regulated community and poor water quality.

12 This concludes our presentation.

13 BOARD MEMBER MORALES: Okay. Are there any Board
14 questions before we break for lunch?

15 MR. MELBOURN: The Prosecution Team would like to
16 know how much time we have remaining?

17 MS. O'DONOVAN: Twenty-eight. I'm sorry, 32.

18 MR. MELBOURN: Thirty-two? Thank you.

19 BOARD MEMBER MORALES: That's 32 minutes, not
20 microseconds. Okay.

21 So any Board questions before we break for lunch?
22 I do have maybe one very quick question.

23 If the Prosecution Team could, without regard to
24 what occurred or what the decisions were in Encinitas,
25 Jacobs and Scripps Mesa, say standing alone does the

1 Prosecution Team believe that the enforcement actions and
2 penalties recommended in this case are appropriate?

3 MS. CLEMENTE: Yes.

4 BOARD MEMBER MORALES: Okay. Thank you.

5 We'll break for lunch. It's 12:40, so let's go --
6 let's come back at 1:15.

7 (Off the record at 12:42 p.m.)

8 (On the record at 1:26 p.m.)

9 BOARD MEMBER MORALES: Let's go back, I guess, on
10 the record. And my understanding is the Prosecution Team
11 has a comment or slight part of the presentation. So let's
12 run the clock on the Prosecution Team's time once they
13 begin. And then we'll go over to San Altos.

14 MS. DRABANDT: Thank you. It's Laura Drabandt
15 again. Just wanted to offer to you, if there are any
16 outstanding authentication concerns we do have the witnesses
17 present who can -- and we can sit here and go through every
18 exhibit and authenticate it the -- the formal way, if you'd
19 like to.

20 BOARD MEMBER MORALES: And, frankly, not. Is
21 there --

22 MS. BERESFORD: I don't believe that all the
23 people who took the photographs are here to authenticate, so
24 we will not release those objections because we think
25 critical photographs have not been authenticated and cannot

1 get authenticated today, as far as we know.

2 MS. DRABANDT: Yeah. We're going to need to have
3 you speak into the mike the next time.

4 BOARD MEMBER MORALES: All right.

5 MS. BERESFORD: Should I restate it?

6 MS. DRABANDT: Sure. Actually, that would be
7 good.

8 MS. BERESFORD: We've stated before, we don't know
9 who took all the photographs. We suspect certain
10 photographs but we can't say for certain because we just
11 don't know. So we cannot waive the authentication
12 arguments, and so we are not -- we're going to continue with
13 those objections. So if the Prosecution is concerned about
14 wanting to authenticate documents, then we have to ask that
15 they do that.

16 BOARD MEMBER MORALES: And if there is a desire to
17 authenticate documents I don't think, one, it could hurt.
18 But if there is somebody here from the -- the City of Lemon
19 Grove or someone else that can authenticate, if he or she is
20 able to, I'm fine with them saying, you know, these
21 photographs and, you know, referencing a range, rather than
22 going photograph by photograph by photograph for the
23 purposes of authentication, just getting that into the
24 record. But --

25 (Colloquy between Hearing Officer Morales and

1 Ms. Hagan)

2 BOARD MEMBER MORALES: and again, if there is some
3 type of reference, it could be, you know, to only the
4 photographs that have been used or -- you know, I won't tell
5 you how to do your jobs, but just something that would
6 hopefully be efficient.

7 MS. DRABANDT: And again, I'm going to ask each
8 witness as you're called up, please state your name and
9 state whether or not you took the oath.

10 MR. FIRSHT: Good afternoon. Leon Firsht. Yes, I
11 took the oath.

12 BOARD MEMBER MORALES: Thank you. And --

13 MS. DRABANDT: Is this one on? Okay.

14 DIRECT EXAMINATION BY PROSECUTION TEAM

15 BY MS. DRABANDT:

16 Q. So, Mr. Firsht, can you stay up here please?

17 Did you have an opportunity to review Exhibit 6,
18 7, 9 and 41, and the photos from 44, May 18th, 2014, along
19 with Exhibit 14, the citation without attached inspection
20 reports?

21 A. Yes, I have.

22 Q. Were they true and accurate depictions of your
23 reports, citations, documents and photos?

24 A. Yes.

25 Q. Were the photos true and accurate representations

1 of the site on the day you viewed the?

2 A. Yes.

3 MS. DRABANDT: Thank you.

4 May I please have Gary Harper?

5 MR. HARPER: My name is Gary Harper. And, yes, I
6 did swear in.

7 BY MS. DRABANDT:

8 Q. Thank you, Mr. Harper.

9 Did you have an opportunity to review Exhibits 2,
10 3, 4, 15, 16, the photos for 16, 5, 21, 15, 41, and Exhibit
11 40 for the days December 9th, 2014 and September 15th, 2015?

12 A. Yes.

13 Q. Were those documents correct work notices and
14 photos true and accurate representations of your documents
15 and the site as you saw it on those days?

16 A. Yes.

17 MS. DRABANDT: Thank you.

18 Is Mr. Nakatani available?

19 MR. NAKATANI: Tad Nakatani, Dmax Engineering.
20 And, yes, I took the oath.

21 BY MS. DRABANDT:

22 Q. Thank you. Did you have -- did you have an
23 opportunity to review Exhibits 11, 24, 9, 25, 13, 22, 23, 40
24 for December 16th, 40, December 17th, 40, January 6th, 40,
25 January 14th, 40, March 18th, 40, April 1st, and 40,

1 September 15th?

2 A. Yes.

3 Q. Were they true and accurate depictions of how you
4 saw the site on those days?

5 A. Yes.

6 Q. Same with the documents, were they true and
7 accurate copies of your documents?

8 A. Yes.

9 MS. DRABANDT: Thank you.

10 Mr. Quenzer?

11 MR. QUENZER: John Quenzer, and I took the oath.

12 BY MS. DRABANDT:

13 Q. Thank you. Did you have an opportunity to review
14 the documents and photos in Exhibits 7, 12, 10, Exhibit 40
15 for December 31st, 2014, and Exhibit 40 for December 12th,
16 2014?

17 A. Yes.

18 Q. Were they true and accurate copies of the
19 documents that you have provided?

20 A. Yes.

21 Q. Were the photos true and accurate representation
22 of the site on those days?

23 A. Yes.

24 MS. DRABANDT: Thank you. And the rest of the
25 authentication would be with Wayne Chui and Frank Melbourn,

1 who you heard from. They already testified to the
2 documents. If you want I can go through authentication with
3 them also.

4 MS. BERESFORD: We're not going to require
5 authentication for those documents. We don't require
6 authentication for documents for Mr. Melbourn or Mr. Chui.

7 I did want to ask some clarification. Did you
8 have authentication for the photographs for December 17? I
9 did not hear that in your review.

10 MS. DRABANDT: Mr. Tad Nakatani explained that
11 Exhibit 40, 40-0, on December 17th, 2014, the photos, he
12 recognized they were true and accurate depiction of the site
13 that day.

14 MS. BERESFORD: Oh, I'm sorry, I'm -- I have one
15 more clarification, just to get it all done.

16 For April 1, can you clarify who authenticated the
17 photographs for that day?

18 MS. DRABANDT: Again, Mr. Tad Nakatani has
19 testified that on April 1st -- so Exhibit 40, April 1st, the
20 photos were true and accurate depiction of how the site
21 looked that day.

22 BOARD MEMBER MORALES: Thank you. Can you please
23 advise the Prosecution Team how much time they have
24 remaining?

25 MS. O'DONOVAN: They have 28 minutes, 51 seconds.

1 BOARD MEMBER MORALES: Twenty minutes, fifty-one
2 second.

3 BOARD MEMBER OLSON: Twenty-eight.

4 BOARD MEMBER MORALES: Twenty-eight?

5 BOARD MEMBER OLSON: Uh-huh.

6 BOARD MEMBER MORALES: Oh, 28 minutes, 51 seconds.
7 Okay.

8 At this point, San Altos, you can begin with
9 cross-examination if you choose to, or begin your
10 presentation.

11 MS. BERESFORD: Good afternoon. My name is Linda
12 Beresford. I'm one of the Counsel for San Altos. And we
13 will start with cross first.

14 I actually do want to bring up Mr. Nakatani about
15 some of the photographs that he just authenticated.

16 CROSS-EXAMINATION

17 BY MS. BERESFORD:

18 Q. Were you on the site on December 17?

19 A. I'm not positive. Is that -- was that one of the
20 sampling days? I think that one may have been Brian Nemerow
21 and I just reviewed the photos with him.

22 Q. So you actually were not on the site on December
23 17th? Mr. Nemerow was on the site on December 17th?

24 A. I believe so. I'm not positive. I would want to
25 look at the records, the forms and reports to verify that.

1 MS. BERESFORD: So we're going to renew our
2 objection. We do not believe the photographs of December 17
3 have been properly authenticated. The witness cannot verify
4 that he was onsite, and did not verify that the took the
5 photographs. We'll leave it to the Prosecution if they wish
6 to reopen and cure on that authentication.

7 BY MS. BERESFORD:

8 Q. I'd like to talk about April 1st. Were you on the
9 site on April 1st?

10 A. I'm not positive. I'd like to review the exhibit,
11 if that's possible.

12 Q. I'm showing Mr. Nemerow the PowerPoint
13 presentation with the photographs of April 1st -- I'm sorry,
14 not Mr. Nemerow, Mr. Nakatani.

15 A. This slide?

16 Q. I can't tell you.

17 A. (Off mike). Which one? Was it this slide? Oh,
18 this one?

19 MS. DRABANDT: A copy of the exhibit.

20 THE WITNESS: I think I have the larger one.

21 MS. DRABANDT: I'm sorry, which exhibit number?

22 THE WITNESS: Forty, I believe. Is that the one
23 you were talking about?

24 MS. BERESFORD: Exhibit 17, page 2.

25 THE WITNESS: Oh, just this. It looks like

1 there's only one photograph here.

2 BOARD MEMBER MORALES: And for the -- for the
3 record, will you describe, Counsel, either one of you or the
4 witness, specifically what you're looking at?

5 THE WITNESS: Yeah. This is a photo that Frank
6 spoke about, the stucco application. And there's the shot
7 of the mixer here.

8 MS. DRABANDT: Exhibit 40 for April 1st.

9 BOARD MEMBER MORALES: Thank you.

10 THE WITNESS: And, yeah, I don't recall offhand if
11 this is a photo I took myself there. But based on
12 inspections I performed around that time, yes, this does
13 look like it.

14 BY MS. BERESFORD:

15 Q. Were you on the site on April 1st?

16 A. I don't recall offhand. If we have the inspection
17 forms, then I could verify that, but I don't have them.

18 Q. I do believe we have the inspection forms. It's
19 an exhibit to the ACLC. I believe they were filled out by
20 Ms. O'Neal. I suppose I can get that.

21 (Pause)

22 BY MS. BERESFORD:

23 Q. I have Exhibit 17 to the ACLC. And I'm referring
24 to the photographs that were attached to that, and I'm
25 trying to authenticate whether Mr. Nakatani took those

1 A. Oh, so this is -- this is the different exhibit,
2 not 40? This is 17?

3 Q. Correct.

4 A. Again, just looking at these I can't recall if
5 these were my photos or not.

6 Q. Do you know if you were on the site on April 1st?

7 A. I don't recall still.

8 MS. BERESFORD: We would like to renew our
9 objection to the evidence for April 1st.

10 Thank you very much. That's all I have for Mr.
11 Nakatani.

12 My next question is for the panel.

13 BY MS. BERESFORD:

14 Q. In talking about calculating penalty factors, one
15 of the things that you asserted was that we know that you
16 asserted was that we know that sediment binds to metals.
17 And when calculating the penalty factor for Notice of
18 Violation number one there -- in the technology report it
19 says,

20 "Stormwater runoff containing sediment discharge from
21 the site likely transported other pollutants, such as
22 metals."

23 Can you please state the factual basis for that
24 statement?

25 A. (Ms. Chiara) What page was that?

1 Q. It's on page 36 of the technical analysis for the
2 ACLC.

3 I apologize. It's on page 21 of the technical
4 analysis which says, "Stormwater runoff containing sediment
5 discharge from the site likely transported other pollutants,
6 such as metals."

7 MR. MELBOURN: Since I was over consulting with
8 somebody else, could you -- my name is Frank Melbourn.

9 Linda, would you rephrase your question for me?

10 MS. BERESFORD: Yes, please.

11 BY MS. BERESFORD:

12 Q. Earlier I believe Ms. Chiara asserted that we know
13 that sediment binds to metals, and that presumably was the
14 basis for including this analysis as part of your
15 culpability factor. And I'm trying to determine, what's the
16 factual basis for that statement?

17 A. (Mr. Melbourn) There are two documents that I can
18 point to. One is the fact sheet to the Construction
19 Stormwater Permit that discusses that. And then secondly,
20 in the Stormwater Pollution Prevention Plan for the San
21 Altos site there is a table that identifies the construction
22 activities and the construction materials that contain
23 metals.

24 Q. Can you provide a copy of the fact sheet?

25 A. Yes.

1 MS. BERESFORD: I would like to state for the
2 record that we asked this question in deposition and Mr.
3 Melbourn responded that he didn't know, or he had studies
4 but he couldn't identify them at the time.

5 (Pause)

6 MS. BERESFORD: Does the Board object if I ask
7 other questions while he's looking, given that we have
8 precious little time to present our case? I'd like to ask
9 the next question of the panel.

10 CHAIRMAN ABARBANEL: You mean -- you mean the
11 Prosecution Team?

12 MS. BERESFORD: Yes.

13 CHAIRMAN ABARBANEL: Okay.

14 MS. BERESFORD: I'm sorry, the --

15 CHAIRMAN ABARBANEL: I thought --

16 MS. BERESFORD: Earlier -- earlier --

17 CHAIRMAN ABARBANEL: We don't have the --

18 MS. BERESFORD: I'd love to ask you questions.

19 I'm not sure I'm entitled to do that.

20 BY MS. BERESFORD:

21 Q. For the Prosecution Panel, in the Scripps Mesa
22 Administrative Civil Liability Complaint, did you rely on
23 reports prepared by qualified stormwater professionals?

24 MS. DRABANDT: This is Laura Drabandt again.

25 I'm sorry, but that's a Board order. So really

1 that question would be directed best at the Board who issued
2 the order.

3 MS. BERESFORD: Why don't we table that one for a
4 moment. We'll just note that the Prosecution Team could not
5 respond, one way or the other.

6 BY MS. BERESFORD:

7 Q. Do you again, for the Prosecution Panel, do you
8 know if the San Altos Administrative Civil Liability
9 Complaint, is that the only complaint where the Prosecution
10 Team has relied on reports prepared by non-qualified
11 stormwater professionals?

12 A. (Ms. Chiara) So I'm going to break that answer a
13 little bit. Non-qualified stormwater professionals, I'm not
14 going to attempt to answer that because I think there's a
15 difference in opinions on qualifications, and it's
16 irrelevant. I think the question you're really asking is on
17 any other case did we rely on City evidence?

18 Q. No, that's not my question.

19 A. Okay.

20 Q. So there is a specific qualification that you can
21 obtain as a qualified stormwater professional. And I'm
22 trying to determine if this is the only case where they have
23 relied on inspections performed by people who are not
24 specifically designated qualified stormwater professionals?

25 A. Okay. So in the City of Encinitas we relied on

1 the city inspector's report. It had a very different
2 outcome, but we relied on those city inspectors. And I
3 don't know whether those city inspectors were QSPs or not.

4 Q. Thank you.

5 I have some specific questions for Mr. Melbourn,
6 but it seems like he's still looking for things.

7 A. (Mr. Melbourn) I'm ready to respond to your
8 question.

9 Q. Okay. Excellent. This goes back to the facts for
10 the support that they're relying that metals were
11 transported off the site in sediment.

12 A. So I was incorrect. It was not in the
13 Construction Stormwater Permit. It's actually in the order
14 itself. On page three of the order, Finding 11 of the
15 Construction Stormwater Permit, it says on Finding 11,
16 "Sediment also transports other pollutants such as
17 nutrients, metals, and oils and greases." It says, "A
18 primary stormwater pollutant at construction sites is excess
19 sediment."

20 CHAIRMAN ABARBANEL: You're referring to the State
21 Board order?

22 MR. MELBOURN: Correct.

23 CHAIRMAN ABARBANEL: Not -- not -- okay.

24 MR. MELBOURN: Correct.

25 CHAIRMAN ABARBANEL: I wanted to know whose order.

1 MR. MELBOURN: Then in Exhibit 35, which is the
2 Stormwater Pollution Prevention Plan, on page 48 of the
3 plan, Table 7.10 has the common non-visible pollutants and
4 water quality indicator constituents worksheet. And it
5 describes that metals are often in various of these
6 products. And it will take me a second to find, but there's
7 also a table in here that shows the constituents specific to
8 this site that have metals in them.

9 So the table itself points out what activities and
10 what materials, and then if it has -- what potential
11 constituents it has. And so there's numerous ones on here
12 that have metals, such as drywall, treated wood, insulation,
13 aluminum sulfate, fertilizers. That's page 48, Table 7.10.

14 BY MS. BERESFORD:

15 Q. I'd like to refer you now to Exhibit 33, C7. It
16 was in your PowerPoint presentation. I don't know what
17 slide it is. It shows a stormwater inlet on May 13. It's
18 on page 14 of your PowerPoint presentation.

19 And my question is: Do you know if that storm
20 drain was actually connected?

21 CHAIRMAN ABARBANEL: Actually, what? I didn't --

22 BY MS. BERESFORD:

23 Q. If the storm drain was actually connected to the
24 storm sewer system?

25 A. (Mr. Melbourn) Could you show me the photo? Yes.

1 It's my understanding that it was connected to the
2 stormwater conveyance system. That's why I showed the
3 photograph of the outlet that was there.

4 Q. And on what basis do you have that it was
5 connected on May 13?

6 A. I looked into the drain.

7 Q. And you can see that it goes to the storm sewer
8 system and not a basin?

9 A. Yes.

10 Q. Okay. Let's talk about Notice of Violation number
11 two which alleges that San Altos failed to implement
12 material stockpile BMPs on ten days, which includes December
13 2 through 9; is that correct?

14 A. In which document are you referring to?

15 Q. The complaint, the Notice of Violation -- or
16 violation alleged, number two.

17 A. So I'm looking at page three of the complaint
18 dated October 19, 2015. Violation number two is listed as
19 paragraph 16, states,

20 "The discharger violated Construction Stormwater Permit
21 Attachment D, section (b)(1)(B), by failing to
22 implement material stockpile BMPs at the site on the
23 following ten days: December 2nd through 8th, 2014;
24 December 15th, 2014; May 13th, 2015; and September 15,
25 2015."

1 Q. Does the Prosecution Panel know if any Regional
2 Board Staff inspected the site on any of the days between
3 September 2 through 8?

4 A. No.

5 Q. They did not inspect the site; is that correct?

6 A. That is correct.

7 Q. Okay. For the allegation of failure to implement
8 stockpile BMPs on December 8, did you rely on the report
9 prepared by Mr. Harper, which I believe is Exhibit 4 to the
10 technical analysis?

11 A. That is one of the things that I relied upon in
12 making my finding.

13 Q. Can you state what other evidence you relied on
14 for December 8?

15 A. Photographs. The photograph that I provided.

16 Q. And who took those photographs?

17 A. The City of Lemon Grove.

18 Q. Can you state who?

19 So I'm willing -- to move things along, you're
20 relying solely on the City report of December 8; is that
21 correct?

22 A. Yes.

23 Q. Okay.

24 BOARD MEMBER MORALES: I think he also stated the
25 photographs.

1 BY MS. BERESFORD:

2 Q. Were they attached to the City report?

3 MS. BERESFORD: I'm sorry to belabor this. We did
4 not get all of the additional photographs until the day
5 after we submitted our legal analysis. And the photographs,
6 they did not identify which photographs were attached to
7 which notice of violation. We only learned that during the
8 presentation today. So we're trying to determine how we're
9 using some of this evidence, which we did not have any of
10 that information previously.

11 BOARD MEMBER MORALES: Just -- when were the --
12 for my own information, when were the photographs provided
13 to San Altos in response to your discovery request, in what
14 month?

15 MS. BERESFORD: So the first depositions occurred
16 on December 28. We received photographs on a rolling basis
17 starting on approximately December 23rd. There's no ability
18 to review every single photograph. And, of course, when
19 you're in a deposition you can't ask about every single
20 photograph. There are hundreds of them. So we asked about
21 the photographs that the Prosecution relied on for their
22 complaint.

23 The day before we were going to submit our legal
24 analysis the Prosecution said, "We would like to rely on 75
25 more photographs." We objected. That's the purpose of

1 discovery, to ask what is the evidence that you're relying
2 on? Some of those photographs they already had. Some of
3 them they certainly could have had through their own
4 subpoena process, but they didn't do so.

5 But even when they submitted the photographs on
6 February 4 there was no statement of what they were going to
7 be used for. So there's no way to prepare in advance when
8 you don't know what the evidence goes to.

9 So that's -- that's part of the problem with what
10 we're trying to determine today.

11 BY MS. BERESFORD:

12 Q. Can you please -- this will be for Mr. Melbourn.
13 Can you please state how the -- the permit defines what an
14 active area is?

15 A. The permit has a definition in the permit itself.

16 Q. And can you please state what that is?

17 A. Looking at Attachment D, which is the requirements
18 for a Risk Level 2 construction site in the Construction
19 Stormwater Permit, on page five there is a footnote number
20 two at the bottom that says, "Active areas of construction
21 are areas undergoing land surface disturbance."

22 Q. Do you apply a different definition of active when
23 it comes to stockpiles?

24 A. There is not a use of the word "active" when it
25 comes to stockpiles.

1 Q. I'm sorry, when you're evaluating what BMP should
2 be applied to stockpiles, does the permit not discuss
3 stockpiles actively being used?

4 A. The permit for stockpiles on page one of
5 Attachment D states, "Cover and berm loose stockpiled
6 construction materials that are not actively being used."

7 The definition that you are requiring -- or
8 talking about is on page five, and it is for "active areas
9 of construction."

10 Q. So just to be clear, the permit does provide a
11 definition of active. And you do not use that definition of
12 active when you're talking about stockpiles, when you're --
13 when you're evaluating violations for stockpiles; is that
14 correct?

15 A. Yes.

16 Q. So for your definition of -- can you please
17 elaborate on how determine or define actively being used
18 when it comes to stockpiles?

19 A. When it comes to actively being used I would look
20 to see when I'm there on the site, are they actively pulling
21 material from the stockpile or are they actively adding
22 material to the stockpile.

23 Q. So your definition for a stockpile of active is
24 they have to be using it as you see it, whereas the
25 definition of an active area talks about whether it's going

1 to be used in the next 14 days; is that correct?

2 A. Could you rephrase that?

3 Q. Sure. So when you're looking at a stockpile to
4 evaluate BMPs you say actively being used is do I see it
5 actively being used right now when I'm on the site, but the
6 permit defines an active area as somewhere that's going to
7 be disturbed in 14 days; is that correct?

8 A. The definition that -- that is in the permit says
9 "Active areas of construction."

10 Q. Which is whether the area is going to be under
11 construction in the next 14 days; is that correct?

12 A. Yes.

13 Q. So for your definition of actively being used, is
14 that defined in the permit anywhere?

15 A. No.

16 Q. Is it -- is that definition provided in a Water
17 Board policy document anywhere?

18 A. No.

19 Q. Is that definition provided in the California
20 Stormwater Quality Association Handbook?

21 A. I don't believe so.

22 Q. Okay. Now I'd like to talk about your knowledge
23 of the construction site schedule.

24 In your deposition you testified that you were not
25 aware of the construction site schedule until March 27,

1 2015; is that correct?

2 A. Yes.

3 Q. So in December of 2014 and January of 2015 you did
4 not know what the construction site schedule was; is that
5 correct?

6 A. Yes.

7 Q. Have you ever talked to a site representative to
8 ask them what were they doing on the site on any particular
9 day of December 2014 or January 2015?

10 A. No.

11 Q. So then when you met with the site representative
12 on March 27 you discussed the schedule. And I believe you
13 testified that there was discussion regarding the stop work
14 notice and the impact on some of the activities, but the
15 bulk of the scheduling conversation that you had was on what
16 was to come, that is the bulk of your conversation was on
17 the future site schedule; is that correct?

18 A. I don't recall.

19 Q. So when you are looking at photographs from
20 December of 2014 and photographs and figures from January
21 2015 to evaluate which areas were active and which areas
22 were inactive, that's not based on direct information from a
23 site representative, it's based on what you learned about
24 the site construction schedule during your conversation of
25 March 27?

1 A. Boy, that's a long question. The information that
2 I gathered from the site came from multiple site
3 inspections. March was the first time that I stepped foot
4 on the site, March in 2015. When we did talk with site
5 representatives we did talk about the scheduling, and the
6 scheduling in the future and the scheduling in the past. I
7 don't recall that it was, you know, the bulk was one way or
8 the other right now. But I know we discussed scheduling
9 that had occurred and scheduling that was to occur.

10 Q. Now I'd like to direct your attention to Exhibit 8
11 to the technical report. I'm asking Mr. Melbourn to review
12 photographs four through seven which are page seven of
13 Exhibit 8 of the technical report.

14 A. I see them.

15 Q. And now I'm going back to page three of Exhibit 8.
16 Can you state, were photographs four through seven
17 relied on to establish a failure to have adequate erosion
18 controls in inactive areas? And I would refer you to
19 paragraph three of that page.

20 A. Yes.

21 Q. And were photos four through seven also relied on
22 to establish lack of linear sediment controls? And I'll now
23 refer you to paragraph page of that page.

24 A. Yes.

25 Q. And my last question is: Have you ever spoken to

1 Tamara O'Neal?

2 A. I may have but I don't recall.

3 MS. BERESFORD: Okay. That's it for my cross.

4 Thank you.

5 BOARD MEMBER MORALES: Any -- for the Prosecution,
6 any re-cross?

7 MS. BERESFORD: Before we move forward with our
8 direct presentation I want to have Scott Sandstrom, Ben
9 Anderson, Phil Dowley and Wayne Rosenbaum stand please. Oh,
10 Phil is not here? Okay. So I understand Phil isn't here.

11 So for you three gentlemen, can you confirm that
12 you took the oath earlier today.

13 MR. SANDSTROM: I have.

14 MR. ANDERSON: Yes.

15 MR. ROSENBAUM: Yes.

16 MS. BERESFORD: Okay.

17 BY MS. BERESFORD:

18 Q. And can you confirm for me that the information
19 stated in the declarations that you signed and were filed
20 with the Board on February 3rd are true and accurate and
21 correct?

22 A. (Mr. Sandstrom) Yes.

23 (Mr. Anderson) Yes.

24 (Mr. Rosenbaum) Yes.

25 MS. BERESFORD: Okay. Thank you.

1 And then I'm going to ask Mr. Rosenbaum to stand
2 again.

3 BY MS. BERESFORD:

4 Q. So for the declaration that you signed and was
5 filed on February 23rd, can you please state whether the
6 information in that declaration was true, accurate and
7 correct?

8 A. Yes, it was.

9 MS. BERESFORD: Okay. I'd like to call Scott
10 Sandstrom up please.

11 BY MS. BERESFORD:

12 Q. Can you please state your name and relationship to
13 San Altos?

14 A. Scott Charles Sandstrom, New Pointe Communities.
15 We were hired as a general contractor to build the homes,
16 the 73 homes on the site.

17 Q. I'm going to direct Mr. Sandstrom's attention to
18 the photograph, Exhibit 40.5 F -- sorry -- 40.F.5, which is
19 on the handout from the Prosecution page nine. Again, this
20 is a photograph taken September 15, 2015. And I believe
21 that the Prosecution relied on this photograph to say that
22 there was a sediment discharge on September 15.

23 Mr. Sandstrom, were you on the site on September
24 15 --

25 A. Yes.

1 Q. -- 2015?

2 A. Yes, I was.

3 Q. Did you meet with anyone at the time that you
4 believe this photograph was taken?

5 A. Yes, I did.

6 Q. And can you -- can you please describe for me
7 where you believe the sediment in the street is coming from?

8 A. I believe and I know that it came from our
9 neighbor to the southwest of us. That photo actually shows
10 our property to the right. Her property, Mrs. St. Augustine
11 (phonetic), to the left. I met the City representative
12 because we got a call. They considered that. We tried to
13 sandbag her home, just as being a good neighbor but that
14 sediment, as shown in the picture, that cross gutter and
15 gutters are going up Seville, no sediment and clear water.

16 And I met with a representative. I told them, I
17 said, "This is not from us. It's clearly from our
18 neighbor." As other photos in the evidence show, she has no
19 front yard or backyard landscaping. We tried to do our best
20 to control her sediment.

21 But that sediment in that photo was not from our
22 site.

23 MS. BERESFORD: Thank you very much. I think
24 we're now going to have Mr. Rosenbaum continue with our
25 primary presentation.

1 MR. ROSENBAUM: Can we get that presentation up?
2 It is, huh? They don't call me a (indiscernible) for
3 nothing.

4 MS. BERESFORD: I'm sorry, can I ask one more
5 procedural question?

6 BOARD MEMBER MORALES: Of course.

7 MS. BERESFORD: Is there separate time for closing
8 or is that within the 90 minutes?

9 BOARD MEMBER MORALES: It's within the 90 minutes
10 for both sides.

11 MR. ROSENBAUM: How much time do we have left?

12 MS. O'DONOVAN: Fifty minutes.

13 MR. ROSENBAUM: Oh, good. Tell me when we get to
14 like -- even when we get down to like 15.

15 MS. O'DONOVAN: Okay.

16 MR. ROSENBAUM: Yeah. Good afternoon, Mr.
17 Chairman, Members of the Board. My name is Wayne Rosenbaum.
18 I'm a partner with Oppen & Varco, and here representing San
19 Altos. My job in terms of this presentation is to try and
20 help you understand where our concerns are in terms of this
21 ACLC lies.

22 I think I've been at stormwater for about the last
23 18 years. I'm certainly not going to stand up here and
24 claim that every construction site is 100 percent compliant
25 100 percent of the time. You would laugh me out of the room

1 if I did. However, the purpose of an ACLC is to apply
2 justice and not necessarily send a message. And what I'm
3 going to show you, try not to bore you to death, is that for
4 whatever reasons this ACLC got carried away with itself.

5 Oh, not that one. Not that one. Yeah.

6 So our main issues, you know, the complaint
7 contains numerous alleged violations that are just plain
8 unsupported by evidence. We can argue whether evidence is
9 admissible or inadmissible, but there's got to be some
10 evidence. And we'll show you that in many cases there just
11 isn't any evidence. Many of the alleged violations are
12 based on some arbitrary and meritless interpretations of the
13 permit. You cannot make up the words in the permit that you
14 would like to have been there. They have to be there. And
15 in at least two cases here that's not the case.

16 The Prosecution, I don't know whether they ignored
17 or just weren't really -- had a different vision of what
18 firm, fair and consistent requires. But here the
19 Enforcement Policy, we believe, is inconsistent and
20 excessive.

21 And finally, and you've heard this over and over
22 but I've got to get it on the record again, there was --
23 there have been significant actual and attempted violations
24 of San Altos' due process. And when we start talking about
25 \$1 million, because that's where we're going, the defendant

1 is entitled to reasonable due process.

2 So how do we fix this problem? It's not
3 insurmountable. What we are asking the Board to consider is
4 a remand. The solution, you know, this solution has
5 numerous benefits. One, it provides the Board with
6 admissible evidence to support the proposed findings and
7 violations. If, in fact, there is evidence to support these
8 things, ask your staff to go back, get the evidence, present
9 it properly, do their job and they win, but do the job
10 right.

11 Second, it provides the Board with the substantial
12 evidence to support the findings if Staff has appropriately
13 provided a firm, fair and consistent application of the
14 policy. Why? Because you're going to have to, as you know,
15 have findings. Those findings, we believe, are going to
16 have to be supported by substantial evidence. And at least
17 in our view that -- there's not substantial evidence at this
18 time to -- to support findings that has been firm, fair and
19 consistent. And it provides an opportunity for the Board
20 and the public with the necessary legal arguments and
21 factual evidence to understand Staff's -- Staff's novel
22 interpretations.

23 You have just heard -- Mr. Melbourn said "actively
24 being used" to him means that when he comes onto the site
25 somebody's got to have a shovel in their hand. Well, if he

1 comes at 11:30, as he did in one case, and our guys are on
2 lunch break, is that actively being used? I don't know.
3 But I certainly know there's no guidance to tell the
4 regulated community what that phrase means. We just sort of
5 made it up.

6 The same thing appears to be true in terms of best
7 management practices when we talk about stuccoing houses.
8 We just sort of went out to the site and made up a rule.
9 It's not in the permit. It's not the CASQA Design Manual.
10 It's not something that we can look to and say I know what
11 I'm obligated to do, and I should be doing those things.
12 It's somebody kind of making it up as we go along. And
13 this, by remanding, it would give the Staff the opportunity
14 to say, Mr. Rosenbaum, you're wrong. There is a policy.
15 There is a writing. People who are out there in the field
16 should have known because, but we don't have that right now.

17 And finally, it provides -- would provide San
18 Altos with the due process protections that it's entitled to
19 under state and federal law. Okay.

20 So we got 146 alleged violations here. When we
21 have an alleged violation the complaint has to allege and
22 explain every element that's required to support the
23 violation. As an example, that this was an area of a site
24 that wasn't fully covered because it was inactive or because
25 it was -- because rain was imminent. Simply looking at a

1 picture and saying, well, you know, you didn't spray bonded
2 fiber matrix (phonetic) on that road doesn't answer all of
3 the elements of the violation. It simply says you didn't
4 spray -- it doesn't get you there. Okay. And the complaint
5 must provide all of the admissible evidence necessary to
6 support each element.

7 This ACLC, if you look at it, okay, and we're
8 going to go through these --

9 CHAIRMAN ABARBANEL: Excuse me, Mr. Rosenbaum. So
10 you are saying that 71 of the alleged violations occurred?

11 MR. ROSENBAUM: We are saying that there is at
12 least admissible evidence for 71 of the violations. We are
13 saying that at least for 36 of -- 65 of them there just
14 isn't any evidence. Now we have some concerns about some of
15 the others in terms of how the policy was -- was applied, et
16 cetera. But, yeah, and for at least 65 of them we are
17 saying --

18 CHAIRMAN ABARBANEL: The policy of identifying --

19 MR. ROSENBAUM: No. No.

20 CHAIRMAN ABARBANEL: -- violations or the policy
21 of --

22 MR. ROSENBAUM: Of how --

23 CHAIRMAN ABARBANEL: -- determining a penalty?

24 MR. ROSENBAUM: Determining the penalty once we
25 know -- once we can say here is a violation. And we do have

1 some concerns about how that was done, and we'd like to talk
2 to you about that.

3 CHAIRMAN ABARBANEL: So if you agree on 71 of the
4 violations and the penalty were determined to be zero
5 dollars you'd still be standing here arguing for your
6 client's constitutional rights?

7 MR. ROSENBAUM: Yes, sir, we would be. Because
8 regardless of whether -- well, let me rephrase that.

9 If you wanted to say to us that, you know, you've
10 got 71 violations and the price is zero, I don't think my
11 client would ask me to stand up here and make those
12 arguments. But, in fact, I really do believe this Regional
13 Board needs to think about those issues because -- and
14 certainly in this case. Because going forward, if we're
15 going to have a much more aggressive Enforcement Policy, and
16 I'm not saying that's a bad idea, but if we're going to have
17 a much more aggressive Enforcement Policy we're going to
18 have to be able to back that up. And when we get a little
19 further into this presentation I think I can show you why.
20 But we're going to need to be able to back that up with, you
21 know, admissible evidence that was fairly presented that
22 gave the defendant the opportunity. Okay?

23 CHAIRMAN ABARBANEL: Okay. Thank you.

24 MR. ROSENBAUM: Okay. So of those, 47 of the
25 alleged violations are based on no evidence at all. And

1 what we're talking about is a relaxed -- we can have a
2 relaxed evidentiary standard. And we recognize that in a
3 hearing of these types we have a relaxed evidentiary
4 standard. But we -- what we have here is what I would call
5 the red car percipient witness standard. I saw a red
6 Volkswagen on the parking lot on Monday. I saw a red
7 Porsche in the parking lot on Friday. Therefore Tuesday,
8 Wednesday and Thursday there must have been a red car in the
9 parking lot. And what we see happening here is the
10 Prosecution has -- I saw a stockpile that was uncovered over
11 here or somebody, because they weren't there, but somebody
12 saw an uncovered stockpile over here on Monday. Ten days
13 later the evidence says I saw a different stockpile --
14 different stockpile uncovered over here. Therefore there
15 must have been an uncovered stockpile in the intervening
16 days. That's the logic of -- of the complaint. Okay. And
17 that's not the kind of evidence which responsible persons
18 are accustomed to relying on in the conduct of serious
19 affairs.

20 CHAIRMAN ABARBANEL: So, Mr. Rosenbaum, there is a
21 mathematic theorem that says if at the beginning of an
22 interval a continuous curve is negative and at the other end
23 it's positive it went through zero.

24 So are you going to tell me that we should infer
25 the makes of the red cars on Tuesday, Wednesday and Thursday

1 as well?

2 MR. ROSENBAUM: I am -- I am suggesting, and maybe
3 my analogy isn't good, I am suggesting that evidence of a
4 stockpile over here, an identified stockpile over here on
5 Monday and evidence of a different stockpile over here a
6 week later constitutes evidence that there must have been an
7 uncovered stockpile in the interim.

8 CHAIRMAN ABARBANEL: I have to mull on that.

9 MR. ROSENBAUM: Okay. You know, we can argue
10 about how we're going to deal with what is admissible
11 hearsay and what isn't. Okay. Clearly hearsay evidence can
12 be maybe used to support the purpose of supplementing or
13 explaining. And we've heard Mr. Melbourn say -- respond to
14 the question, do you have any other evidence, and the answer
15 is, yes, I am not sure and we're not going to have time
16 today to, unfortunately, to be able to ask the magic
17 question, well, what was that other evidence? So -- but I
18 think if you look at the depositions and you look at the --
19 at the evidence that we have, other than the hearsay
20 evidence that has been presented, I don't see anything else
21 to support it in many cases.

22 And this is really unfortunate because what
23 happened was we have the Staff relying on city inspector
24 reports. But what they failed to do and could have done and
25 gotten the corroborating evidence is simply going out and

1 talk to the inspectors. They say they didn't. They could
2 have gone out and talked to the QSP for the site. They
3 didn't. They just looked at the reports and drew
4 conclusions. And again, I'm not sure that's the kind of
5 evidence -- that's the kind of information that can be used
6 to allow us to supplement or explain through hearsay. And
7 we can point to at least 14 of those alleged violations
8 which fall into that category.

9 BOARD MEMBER MORALES: How is that not subject to
10 the public records exception? Let's just say, for example,
11 it's a City inspection report.

12 MR. ROSENBAUM: Assuming it's a City inspection
13 report, there are first two questions. One, is it within
14 the scope and duty of that City employee?

15 BOARD MEMBER MORALES: I'm going to go with
16 probably if it was prepared by a City inspector.

17 MR. ROSENBAUM: Well, according to at least the
18 City inspector, his primary job was not to inspect for
19 stormwater. Second of all, and that's -- that's his
20 deposition.

21 Second of all the question is: Was he qualified
22 to -- is the information -- assuming it is admissible, the
23 next question is: Is it -- is it -- is it -- is it
24 qualified? Is it evidence that a reasonable person would
25 accept? And we're going to talk about expert versus, you

1 know, percipient witness. But in many cases we are asking a
2 City employee with no training and no qualifications to make
3 an -- to make an expert opinion.

4 BOARD MEMBER MORALES: So are you telling me that
5 if there is --

6 MR. ROSENBAUM: Yeah. May I?

7 BOARD MEMBER MORALES: Of course, you can --

8 MS. BERESFORD: I'm sorry. I wanted to directly
9 answer your question about why is it not a public record.

10 The first thing that he mentioned is, is it within
11 the scope and duty of the public employee? Many of the
12 reports are not done by public employees. They're by
13 private contractors, and that does not fall within the
14 exception.

15 The second issue is across the board the City
16 inspectors and the contractor said we were not inspecting
17 the site for the Construction Permit. So we're inspecting
18 the site for state ordinances. So it's not within their
19 scope and duty to inspect for the permit.

20 BOARD MEMBER MORALES: So are you telling me then
21 that if there is a report that says there was a stockpile or
22 I observed a stockpile, that stockpile was uncovered, it was
23 on such and such date, simple factual information, because
24 they are not a qualified QSP that that information cannot be
25 relied upon?

1 MS. BERESFORD: I think it comes to two things.

2 Number one: What definition of active are we applying? And
3 if we applied the permit definition of active --

4 BOARD MEMBER MORALES: Yeah. That's --

5 MS. BERESFORD: -- whether it's going to be
6 used --

7 BOARD MEMBER MORALES: That's a different
8 question. I'm just asking if factually there is a
9 statement, a blanket statement, there's a stockpile
10 uncovered on this day?

11 MS. BERESFORD: Right. Well, whether or not it
12 should be covered does depend on whether it should be active
13 or not.

14 BOARD MEMBER MORALES: Well, that's something that
15 the Prosecution Team decides; correct?

16 MS. BERESFORD: Well, no, because the City
17 timeline for active is ten days. The permit timeline --
18 timeline for active is 14 days. So you have many instances
19 where the City was making assumptions based on their permit
20 guidelines where it doesn't match up to the Construction
21 General Permit guidelines. They were inspecting for two
22 different things.

23 BOARD MEMBER MORALES: Okay. I hear you. But --

24 MS. BERESFORD: So it's the conclusions that you
25 draw from that fact.

1 BOARD MEMBER MORALES: But the conclusions that
2 are drawn from the fact, I think that's my point, are
3 conclusions that are drawn by the Prosecution Team. It
4 might be a different hypothetical if I said there was a City
5 inspection report that said a stockpile in an active
6 construction area was uncovered on such and such date, but
7 that was not my question. It's just purely about a factual
8 statement and what we can do with that. And I guess the
9 question is, really, do we have to -- is your argument we
10 have to completely throw that out because the City inspector
11 wasn't basically retained by, you know, Region 9 to do our
12 work for us. And they aren't a QSP.

13 MS. BERESFORD: I think that's a hugely important
14 question and something that is absolutely raised by this
15 issue. To what extent can they rely on inspections
16 performed by people not inspecting for the permit who are
17 not QSPs who are applying different standards? So -- and
18 I'll let Mr. Rosenbaum answer that further.

19 MR. ROSENBAUM: And I doubt -- don't think we
20 would disagree with you if the individual was acting as a
21 percipient witness, I saw a stockpile, the stockpile was not
22 covered, and that's the end of it, then that's percipient
23 evidence that I don't think we would be arguing about.

24 It's when that piece of information then gets
25 interpreted by someone who is neither qualified and who is

1 doing so based on a different standard, that becomes
2 problematic.

3 BOARD MEMBER MORALES: Is someone other than the
4 Prosecution Team making that interpretation?

5 MR. ROSENBAUM: Yes, that's what they're relying
6 on. They're relying on the reports of City inspectors and
7 contractors if -- to do -- to support their allegations.
8 It's not just the pictures, because as we're going to see,
9 the pictures is standing alone doesn't provide all of the
10 evidence to support the elements of the claim.

11 BOARD MEMBER MORALES: Do any of the reports
12 say -- the inspector's reports say this is what I observed
13 and it's a violation of, you know, everything that Region 9
14 wants us to do?

15 MR. ROSENBAUM: No. They said -- there are some
16 which conclude, here is a situation and it's a violation of
17 the City ordinance, okay?

18 BOARD MEMBER MORALES: Okay.

19 MR. ROSENBAUM: But the City ordinance and the
20 Construction Permit, A, are two different things and, B,
21 they have two different -- in some -- in many instances, as
22 an example, when -- when it's active or inactive have
23 different standards.

24 BOARD MEMBER MORALES: Understood. Then is
25 anybody -- is it your contention that the Prosecution is

1 saying because something was a violation of a City ordinance
2 we deem that it is a violation of our requirements?

3 MR. ROSENBAUM: Yeah. And, in fact, when you ask
4 Mr. Melbourn, do you have any other thing to rely on other
5 than this picture and he said, "Yes," now I don't want to
6 put words in his mouth, but the only other thing I can think
7 of that he was relying on was the City report.

8 BOARD MEMBER MORALES: Okay.

9 MR. ROSENBAUM: So --

10 BOARD MEMBER MORALES: Okay.

11 MR. ROSENBAUM: Okay. And these are curable.
12 These were curable then. These are curable now. All that
13 would be necessary would be for the Prosecution Team to
14 interview the people and ask the questions. Was the
15 stockpile active or inactive? How long was it active or
16 inactive. Is this road active or inactive? What did you
17 see? Sit down and subpoena the QSP for the site and ask him
18 the questions. We didn't do that. We looked at some
19 pictures and made some assumptions. And so we have numerous
20 alleged violations that are supported solely by statements
21 of Regional Board Staff who are relying on pictures without
22 a foundation, without the other -- the information necessary
23 to support it, to support the claim.

24 The other one that concerns -- yes, ma'am?

25 BOARD MEMBER OLSON: I'd like to go back to the

1 last slide, and I just have clarification. So you say at
2 least 14 of the alleged violations are supported solely by
3 hearsay evidence. So when you go back -- and is that part
4 of the -- that's part of the 71. So now you're going
5 through the different reasons that you reject some -- you
6 accept some of the violations and you reject other of the
7 violations?

8 MR. ROSENBAUM: Yeah. And we're going to get a
9 chart and you're going to be able to see how that all fits
10 together. But, yes, you are correct.

11 BOARD MEMBER OLSON: All right. Thank you.

12 CHAIRMAN ABARBANEL: May I ask a question of the
13 Prosecution Team at this point?

14 I don't think this counts against your time.

15 MR. ROSENBAUM: Thank you.

16 CHAIRMAN ABARBANEL: Okay.

17 BOARD MEMBER MORALES: It doesn't.

18 CHAIRMAN ABARBANEL: Okay. Is -- in the penalty
19 calculation is the penalty proportional to the number of
20 violations? We're talking about 136 alleged violations.
21 Suppose there were 13,600, would the penalty be 100 times
22 more?

23 MR. MELBOURN: Could you rephrase that?

24 CHAIRMAN ABARBANEL: Suppose there were 100 times
25 the number of violations that are identified and alleged.

1 MR. MELBOURN: Types of violations or --

2 CHAIRMAN ABARBANEL: Total.

3 MR. MELBOURN: -- total violations?

4 CHAIRMAN ABARBANEL: Just total violations under
5 whatever -- just whatever criteria you used. Is the penalty
6 proportional to the number of violations, or if it's not
7 proportional, what's the function?

8 MR. BOYERS: That's a very difficult question to
9 answer without specific facts as to how it got ten times --

10 CHAIRMAN ABARBANEL: It's hard enough to ask.

11 MR. BOYERS: -- ten times bigger because --
12 because the Enforcement Policy has a number of very specific
13 multipliers which we use. And as we talk about and as they
14 argue there are -- there are ways to collapse when certain
15 violations last a long period of time if certain findings
16 can be made.

17 So I think the answer to your question is not
18 necessarily, although given the facts it may be. And I
19 don't know if that's a terrific answer or a horrible answer.
20 I will -- I will --

21 CHAIRMAN ABARBANEL: Let's just consider it
22 correct, okay, because I don't know. What I'm trying to get
23 at --

24 MR. BOYERS: Oh, sorry. David Boyers for the
25 record.

1 CHAIRMAN ABARBANEL: Right. What I'm trying to
2 get at is does it really matter whether there are 71
3 violations or 136 violations? I don't know why he's arguing
4 about that. If the penalty, which I think is at the core of
5 his argument, is, in fact, predicated on the number of
6 violations, maybe it matters. But maybe only the first 22
7 violations matter, and after that you saturated. By state
8 law you can't charge them \$1 million a day for whatever.

9 MR. BOYERS: Right.

10 CHAIRMAN ABARBANEL: I think that's above the
11 limit. You see what I'm saying? I mean, suppose they had
12 700 million violations --

13 MR. BOYERS: Yeah.

14 CHAIRMAN ABARBANEL: -- would they have the same
15 penalty?

16 MR. BOYERS: And, you know, so I'll answer that by
17 saying ultimately you may decide at the end of the day that
18 it doesn't matter, and that if there's only 71 violations
19 the penalty is appropriate. And there are a number of other
20 factors that you could choose --

21 CHAIRMAN ABARBANEL: That's where I'm --

22 MR. BOYERS: -- you could choose to adjust.

23 CHAIRMAN ABARBANEL: That's why I'm trying to --

24 MR. BOYERS: You could say we think the
25 culpability in this case is a 1.4, and you could adjust that

1 and you could go through the methodology and the penalty
2 could come out to be whatever it is; right? And the penalty
3 methodology gives you a lot of flexibility as to how you
4 look at the facts and interpret the multipliers and decide
5 what the -- what the penalty at the end of the day is the
6 appropriate deterrent, given the conduct and given the
7 message that you as a Board want to send to that regulated
8 community.

9 CHAIRMAN ABARBANEL: And understanding that there
10 is a formula with --

11 MR. BOYERS: Uh-huh.

12 CHAIRMAN ABARBANEL: -- you know, bracketed
13 constraints. We are familiar with the formula.

14 MR. ROSENBAUM: I'm going to see if I can move it
15 along because I know we have limited time. Okay.

16 Reliance on lay testimony. Look, the permit makes
17 it real clear that a site has to have a qualified stormwater
18 practitioner. And what I've given you here is the roles and
19 responsibilities of the QSP. And our concern here, and
20 we're going to see that in some of the other more recent
21 ACLCs, Regional Board Staff has recognized the importance
22 and the reason you rely on the -- on the QSP because they're
23 the experts. And in several of these other ACLCs who did
24 they rely on for their evidence? The QSP. Did this site
25 have a QSP they could have relied on? Yes, they did. They

1 chose instead to use lay testimony from unqualified people
2 and tried to leverage that up as being expert testimony.

3 BOARD MEMBER WARREN: Frank, is the QSP here
4 today?

5 MR. ROSENBAUM: No. Again, should -- I would have
6 thought the Prosecution Team would have subpoenaed them.
7 Okay.

8 In this case the Prosecution Team never discussed
9 the situation with the QSP. They didn't serve -- didn't
10 resolve that issue. And as a result, 25 of these alleged
11 violations are supported solely on the testimony of people,
12 as we've already discussed, who really weren't qualified to
13 reach the opinion they had reached and were basing that
14 opinion on a different standard of review. Okay.

15 The other -- one of our other major concerns is
16 this concept of reinterpreting what the permit says. This
17 idea of active versus inactive versus actively being used.
18 We do not disagree that this Regional Board could have the
19 authority to say in a policy or whatever actively being used
20 means that when Mr. Melbourn comes to the site, somebody
21 better have a shovel in their hand. It didn't do that. But
22 until that happens or until some notice is given to the
23 regulated community that this the new standard that we're
24 going to apply it's like, you know, enforcement action. We
25 didn't -- you -- it's not appropriate to enforce a rule that

1 has not been made available and clear to those people
2 against whom it's going to be enforced. Okay.

3 And we've talked about active versus inactive, and
4 I'm going to move on because we don't have time to really
5 get into it. But again, our concern here is not only do we
6 have a different Water Board definition of actively being
7 used, but we have a different definition of active versus
8 the inactive from Lemon Grove. And these all seem to be
9 conflated in terms of how the evidence is presented.

10 Why is -- why is it a problem?

11 Well, as I mentioned before, it is a problem for
12 the regulated community because, A, now we were subject to
13 an undefined -- this is the first time we've heard the
14 shove-in-the-hand rule, but we are now -- we are subject to
15 an undefined rule for Board enforcement purposes.

16 But, two, we are subject now to citizens' suit
17 based on an undefined rule. Actively being used is
18 different from active, but we'll go and let a federal judge
19 figure out what that means. Okay.

20 And third, it creates huge major due process
21 concerns. If you want to make a rule you know how to make a
22 rule. Do the rule thing and avoid all of these issues. We
23 can do that. But an ACLC is not the place to make rules.
24 Okay. And the Regional Board really has to reject this
25 because at least 39 of these alleged violations are based on

1 this concept of it wasn't actively being used, so we need to
2 deal with that.

3 The other piece of that which is not in this
4 slide, so I'll take a moment to talk about, is the concept
5 of stuccoing a house and what the appropriate BMPs are.
6 You've heard the comment from mister -- from Frank that we
7 should put plastic. And he says, well, look, see, I put
8 plastic under the mixer, I put plastic over there. You
9 can't put plastic under the scaffolds. OSHA frowns on that.
10 It's a very bad idea. It's a slip-and-fall hazard.

11 And so what -- what San Altos did was to work with
12 the City, and we can document this, that said, okay, A, you
13 never stucco when rain is imminent anyway and, B, we'll pick
14 up the dry stucco within 24 hours after it hits the ground.
15 That seemed to be an adequate BMP, at least for the City,
16 although since we don't have some new rule, and by the way
17 there's nothing in the CASQA manual about this, there's
18 nothing in the permit about this, so that we -- we felt we
19 had a reasonable solution.

20 Firm, fair and consistent. Again, I can -- we can
21 talk about this forever, but I think the most important is
22 this statement in the policy that the legislature and the
23 public expect Regional Boards to fully and consistently
24 implement for maximum enforcement impact and address and
25 correct and deter water quality violations. But this

1 Regional Board has been given huge power of enforcement.
2 But if it's not perceived to be fair and consistent you're
3 undermining your own credibility with the regulated
4 community, and I don't think we want to go there.

5 And so when we look at fair -- firm, fair and
6 consistent means, there's a part of it that says is that
7 really what the people and the legislature of this state
8 thought they meant?

9 BOARD MEMBER MORALES: With respect to that, I
10 mean, I could see you arguing on your client's behalf, you
11 know, be firm, fair and, you know, consistent. But on
12 behalf of like say other builders, how is this any different
13 than if San Altos' neighboring builders weren't paying their
14 Workers Compensation Insurance or taxes to the state who are
15 at a competitive advantage and they could, you know,
16 presumably make a higher profit margin or underbid jobs?
17 You know, if we didn't enforce these types of actions then
18 there might be an argument by other regulated companies that
19 we weren't being fair to them, because by failing to enforce
20 we're putting San Altos at a competitive advantage.

21 MR. ROSENBAUM: We agree that -- that a defendant
22 should not get economic benefit. But if you go to the
23 ACLC's analysis, their analysis I believe says that the
24 economic development is a fraction of the proposed penalty.
25 So if we're saying, you know, fair playing field, whatever,

1 the number that would be required to achieve a fair, you
2 know, a fair playing field is a fraction of what we're
3 saying we should impose as being suggested as the proposed
4 penalty here.

5 BOARD MEMBER MORALES: Okay.

6 MR. ROSENBAUM: And they -- the Prosecution did
7 that analysis, we didn't, so -- okay.

8 BOARD MEMBER MORALES: I had one other question.
9 Because, you know, one of the things we're supposed to
10 consider is the economic effect it has, one way or another;
11 correct?

12 MR. ROSENBAUM: Uh-huh.

13 BOARD MEMBER MORALES: Does San Altos or the
14 parent, the -- yeah, I don't know if it's the general
15 manager of the -- of the LLC, the parent company, does San
16 Altos or the parent have a CGL policy to which, you know,
17 this is applicable, or are they additional insureds on any
18 subcontractor policies? Because I think that goes directly
19 to two things. One, the economic impact on the company.
20 And two, there was a declaration that stated what the -- how
21 the profit was reduced to 3.7, I believe, percent. And I
22 don't know that that took into account if there is any
23 applicable insurance, whether there would be coverage.

24 MR. ROSENBAUM: And I want to be kind of -- a
25 little bit careful here if I can, Mr. Morales. But I think

1 the appropriate answer is that there has been no insurance
2 company who has accepted any tender on this particular issue
3 or claim. And I -- if I may, I don't think I want to go too
4 much further on that -- on that issue right now.

5 In terms of what the -- the impact is, the
6 social --

7 BOARD MEMBER MORALES: Well, and in fact, that
8 wasn't my question. I -- the question was whether there
9 were CGL policies, either directly held by the companies or
10 whether the companies were named additional insureds on sub
11 policies?

12 MR. ROSENBAUM: Yeah. But almost -- the -- those
13 policies all carry pollution exclusions.

14 BOARD MEMBER MORALES: Okay.

15 MR. ROSENBAUM: Okay. The -- when -- the other
16 piece of this, and I'll take -- I got to be real short, is
17 really when we talk about what the impact is, when we start
18 talking about these kinds of penalties in underserved
19 communities that really need the kind of housing that's
20 necessary, you can't -- you know, people are going --
21 developers are not going to take this -- take on an
22 additional risk burden for enforcement that's viewed to be
23 maybe more than is necessary or appropriate and, two, that
24 is undefined. I don't think a whole bunch of folks would
25 like to go and build houses with very marginal profit

1 margins to start with, because we're building middle -- you
2 know, we're building workforce housing, and then risk the
3 fact, well, wait a minute, how -- how much exposure do I
4 have from actively being used or stucco hitting the ground
5 when I don't know the rules? Okay.

6 BOARD MEMBER MORALES: Why is it any different
7 than if these homes were built in La Jolla? I understand --

8 MR. ROSENBAUM: Because --

9 BOARD MEMBER MORALES: -- the profit margin --

10 MR. ROSENBAUM: -- I got a lot --

11 BOARD MEMBER MORALES: -- would be higher. But
12 the land costs are higher. You can sell them for more.

13 MR. ROSENBAUM: I got a lot -- typically when --
14 that's why when you look at the housing stock in this -- in
15 this region, we're building two things, we're building
16 McMansions and we're building apartments.

17 BOARD MEMBER MORALES: So I hope you're not
18 arguing that it's more okay for developers to discharge
19 and --

20 MR. ROSENBAUM: No, we're not arguing that. We're
21 simply saying that when you are trying to fill a need, a
22 niche where the profit margins are very narrow to start
23 with, and then the rules change on you in the middle of the
24 game and you're all of a sudden looking at the highest
25 construction stormwater penalty I'm aware of that this

1 Regional Board has ever proposed by a significant factor,
2 you start saying, wait a minute, do I -- you know, if I go
3 build in La Jolla at least I got a lot more, you know,
4 cushion.

5 Consistency, two pieces to it. It must be
6 consistent with the policy and it -- the policy itself
7 should be consistently applied. Okay.

8 So what do we mean by consistently with the
9 policy? Well, I'm not going to beat up firm and fair. But
10 consistent says, you know, we're going to rely on evidence
11 based on direct observations from qualified inspection
12 sources to support alleged violations, treating the evidence
13 equally. And as an example, here we have, I don't know, 12,
14 14 days alleged concrete waste violations, whereas in the
15 Jacobs Center site the QSP sites the facility for exactly
16 the same thing but it doesn't get into the complaint.

17 Now if we're going to be consistent we need to be
18 consistent. You can later on say, well, maybe I used my
19 prosecutorial discretion for X-Y-Z reason, but what we saw
20 in evaluating these -- these other more recent ACLCs was a
21 lack of consistency in terms of the evidence being used, and
22 then the -- which evidence was going to be applied, and then
23 how that evidence was applied. And that's problematic
24 because I think we need to have findings that say, hey,
25 look, we chose, and we're going to see it in a second, we

1 chose these penalty multipliers because it's appropriate
2 with the policy and consistent across the Board. Okay.

3 Again, I'm going to move forward.

4 One of the issues that -- that we have sort of
5 talked about, and the Prosecution sort of talked about, was
6 this concept of what's the methodology we're going to use to
7 count the violations. And I think Chairman Abarbanel was
8 kind of looking at this issue. How many times should we
9 count the same violation? How many violations should we
10 count? What does the policy require be considered in
11 choosing a methodology, and is the chosen methodology
12 consistent with treatment for other people?

13 And there are three ways of counting the
14 violations. We can count every infraction, that's what was
15 done in San Altos, for -- on every day separately. We can
16 combine multiple violations resulting from the same
17 incident, which is what we saw in Encinitas. And we can
18 combine violations that continue for more than one day,
19 which we only have one day of violations for some of these
20 folks. But I got to tell you, I'm really amazed that that
21 site only violated on one day. It must have been really
22 pretty magnificent that they were in full compliance on
23 Monday, they violated on Wednesday -- Tuesday, but by
24 Wednesday were in full compliance again.

25 What are the advantages and disadvantages of each

1 of these alternatives? Clearly the advantage for the Board
2 of counting every day is it results in a higher number of
3 violations which has the highest potential for penalties.
4 The disadvantage is that each of those violations must be
5 separately pled and proven, and we're not sure that that's
6 happened here, we don't believe it's happened here, but
7 that's -- that's the disadvantage. In the example of
8 Scripps Mesa, each violation was separately pled and proven
9 with admissible evidence where an expert was required, an
10 expert was provided.

11 Maybe you combine multiple violations, you know,
12 you could, which focuses on behavior. And the -- and the
13 policy allows you to do this. It focuses on behavior rather
14 than penalties and produces, we think, fairer results, to
15 look at the same infraction and say, well, that's an infract
16 because you should have covered the area, and because it
17 might have caused run-on, and because it might have caused
18 runoff, all based on the same factual violation seems less
19 to be -- you can count it that way. But is that the best
20 and appropriate way to do it?

21 The other advantage, of course, is that now you
22 can -- you can apply the evidence cumulatively to a bundle
23 of infractions and reducing the cost of investigation.
24 Disadvantage? Yeah. It lowers the number of infractions
25 and therefore may lower the total penalties, okay, because

1 remember it's the count times the dollars per count. Okay.

2 We can combine violations counting more than one
3 day. And there are two places in the policy that talk about
4 multiple days. One of them, as the Prosecution Team points
5 out, clearly says it's got to be for more than 30 days. The
6 other section says nothing. It just says you can combine
7 multiple days. And so I'm not sure why we're relying on one
8 provision over the other provision, but I'm sure the
9 findings will explain that as to why we've done it that way.

10 Advantage? Again, it focuses on behavior rather
11 than penalties. It solves evidentiary issues regarding
12 proof of daily occurrences, you know, my red car issue.
13 Okay. Disadvantages? Again, it may reduce the number of --
14 it will reduce the number of infractions which may lower the
15 penalties.

16 We're not sure why the violations were counted
17 differently in San Altos. But clearly they were -- they are
18 distinguishable from Encinitas, and they are distinguishable
19 from Scripps Mesa, again, either in terms of how they were
20 counted or the evidence that was relied on to count them.

21 The ACLC, we think, applies two of the penalty
22 factors inappropriately. First is this concept of the
23 culpability factor, and the second is the cleanup and
24 cooperation factor.

25 On the issue, excuse me, on the issue of

1 culpability the test is what a reasonable and prudent person
2 would have done or not done under similar circumstances
3 based on prevailing industry standards, see Policy page 17.

4 The policy allows for an adjustment between 0.5 and 1.5.
5 The Prosecution has applied 1.3 across the board. We think
6 that's inappropriate in areas where there has not been a
7 clear rule set that says this is what the -- you know,
8 this -- doing this is a violation. And so in those
9 situations we think the more appropriate multiplier, if
10 you're going to include those -- those as penalties at all,
11 if you're going to say it's okay that you didn't have a
12 rule, just sort of made up it out of whole cloth, if you're
13 going to go that way we think that the -- the culpability
14 multiplier has to reflect what a reasonable and prudent
15 person would have done in light of the fact that there were
16 no standards set.

17 Cleanup and cooperation. Again, we have a
18 multiplier that runs between 0.75 and 1.5, and the test is
19 how quickly did the discharger acknowledge the deficiency
20 and come back into compliance, rather than disputing it?

21 In this case across the Board we're at -- and that
22 slide is wrong, I believe we're at 1.1. And what we've seen
23 is of the 130 -- 130 non-discharge violations alleged, 53 of
24 these were in the Notice of Violation issued in December.
25 By January 1st San Altos had corrected those concerns, filed

1 the corrective action report, and Staff then came out and
2 assessed the facility. Now it wasn't until March. We
3 don't -- we're not quite sure why they waited until March.
4 But they came out in March and said, both in their
5 depositions and in their reports, hey, these guys have
6 pretty well cleaned up their act. Are they perfect? No.
7 As I said, I don't think I'll ever see a site that's
8 perfect, but they pretty well cleaned up their act. Well,
9 we believe under those kinds of situations the multiplier
10 should be significantly less.

11 Finally, this issue of lack of due process. That
12 didn't have to happen in the first place. This was, for
13 whatever reason, a highly expedited process, probably the
14 fastest ACLC I have ever seen either come to settlement,
15 much less come to hearing. Okay. And we understand the
16 desire to send a message to the regulated community that El
17 Nino is coming and by golly we got to do something about it.
18 But that doesn't excuse excoriating the due process rights
19 of the defendant, and that's what happened here.

20 Because if you look at the four factors that we
21 look at when we say did this guy get adequate due process,
22 okay, we look at the private interest, we look at the risk
23 of erroneous deprivation, we look at the dignity interests,
24 and we look at the impact on government. What of a
25 government interest? Well, okay, when you start looking at

1 about -- getting close to \$1 million, because now we have
2 additional prosecutorial costs, of penalties, I think that's
3 a significant private interest. Okay.

4 When you set up a schedule and -- that where,
5 first of all, there's no -- there was no evidence of
6 continuing violations. It wasn't a situation where, by
7 golly, we've got to get this to the Regional Board because
8 these continue to be bad -- they continue to be violators.
9 In fact, there's absolutely no evidence of that. In fact,
10 the site has been -- was inspected this week again by the
11 City of Lemon Grove prior to this hearing and they said it
12 was pretty good, in fact. So it's not an issue of, boy, we
13 got to get there. So we really scheduled -- the schedule
14 has been driven on a rain event, send a message.

15 And absent of showing that good cause and a lack
16 of prejudice, surprise evidence has to be excluded. And
17 whatever you want to call it, at the eleventh hour to throw
18 hundreds of pages of new evidence into the hopper is
19 surprise evidence. Yes, the Advisory Team would say, no,
20 that's rebuttal or it's something else or, well, maybe
21 because you guys had it along with thousands and thousands
22 and thousands of pages of other discovery documents that you
23 get when you -- when you do a subpoena duces tecum that you
24 should have been aware of those pictures. You should have
25 been prepared to depose the Prosecution Team on pictures

1 that you had that they never used. That's not how things
2 generally work.

3 BOARD MEMBER MORALES: What standard would you
4 have us apply for what constitutes surprise evidence?

5 MR. ROSENBAUM: The standard we would have you --
6 to have you apply is to ask the question whether it creates
7 prejudice? And prejudice is created whenever the defendant
8 doesn't have an adequate opportunity to explore that
9 evidence and to take discovery on that new evidence. And
10 again, this could have been cured. We suggested a cure.
11 Put off this hearing for 30 or 60 days. Let us take
12 discovery on this new evidence that you think you need to
13 make your case. We weren't given that extra 30 or 60 days.
14 We weren't given that extra 30 to 60 days. We were denied
15 out of hand.

16 So the question is: What's prejudice? Prejudice
17 is, hey, you know, is this evidence that we had a fair shot
18 at analyzing and building a defense for --

19 BOARD MEMBER MORALES: So --

20 MR. ROSENBAUM: -- and we did not.

21 BOARD MEMBER MORALES: So it's a subjective
22 decision?

23 MR. ROSENBAUM: I don't think -- no, I don't think
24 it's particularly subjective.

25 BOARD MEMBER MORALES: That's why I asked for a

1 standard and you said, well, there's prejudice. But --

2 MR. ROSENBAUM: Okay.

3 BOARD MEMBER MORALES: -- I mean --

4 MR. ROSENBAUM: Okay. If we were to establish a
5 standard I think the standard is -- would be simply if this
6 evidence is going to be used as part of the prosecution and
7 the defense does not have an adequate opportunity to take
8 discovery on that evidence, it is prejudicial. And I would
9 go further, although I have no legal -- I have no legal
10 citation to base it, I would go further to say at that point
11 the burden shifts to the Prosecution to demonstrate why it
12 isn't prejudicial, and that never happened. The Prosecution
13 was never even required to say, well, this evidence is
14 associated with this alleged violation. They just did a
15 data dump. Okay.

16 MS. BERESFORD: We need to wrap it up.

17 MR. ROSENBAUM: Yeah, we got to wrap it up.

18 Anyway, there deficient hearing procedures.
19 Again, when these issues all came forward we said, okay,
20 let's have a prehearing conference. We don't have time for
21 a prehearing conference. We've got to get to the hearing.
22 So a lot of the issues that could have maybe have been
23 resolved in our request for a prehearing conference were
24 denied out of hand. Okay.

25 Even today, and we're not objecting to the Board,

1 this was not the -- your standard, but even today to limit
2 this hearing in the way it has been limited when we are
3 talking about \$1 million and the impact on our client seems
4 to us to be prejudicial or abuse of process.

5 BOARD MEMBER MORALES: Are you talking about
6 the -- and again I'll remind you that any questions that we
7 ask do not count against your time.

8 So are you talking specifically about the 90
9 minutes per -- per side for --

10 MR. ROSENBAUM: Yes.

11 BOARD MEMBER MORALES: -- for presentation?

12 MR. ROSENBAUM: Yes. We --

13 BOARD MEMBER MORALES: I've heard -- and I've
14 heard you both say that there are issues that you won't be
15 able to address. So I believe you've addressed most of
16 them, but what outstanding issues do you feel that as a
17 result of the 90 minutes you have not been able or that you
18 haven't already talked about? Let me put it that way. And
19 if you could, as to each one maybe give me an offer of proof
20 as to how much more time would have assisted?

21 MR. ROSENBAUM: Let me give you at least one
22 example, and maybe Linda can give you a few others. But the
23 one that jumps out at me is when the decision said not only
24 does all this evidence come in, but if you've got a problem
25 with it you can cross-examine during your 90 minutes. I've

1 got my co-counsel here beating me over the heard going to
2 faster, go faster, go faster. To have done a proper cross-
3 examination without having done any discovery, you know,
4 without having been able to take depositions of the
5 prosecutorial team as to why this picture, what -- what's it
6 for, what's it, you know, assumed to mean, we should have
7 had at least the opportunity at this hearing, if not before,
8 and I believe it should have been cured before, but if not
9 at the -- if not before, to have explored those issues. And
10 it's not going to happen in 90 minutes.

11 BOARD MEMBER MORALES: I believe she asked her
12 questions.

13 MR. ROSENBAUM: We asked the limited number of
14 questions where we felt we -- the most critical questions in
15 order to conserve the limited amount of time we had.

16 MS. BERESFORD: Maybe I can quickly address this.
17 I think there are -- there are two very specific examples,
18 just to give you an idea. Out of the 53 photos in their
19 presentation, 37 of those photos were of the brand new
20 evidence, and we did not know before today what they were
21 for.

22 A very specific example with respect to, I think
23 it's violation number ten, it's the allegation of discharges
24 to the storm drain, the photograph that was used in the
25 complaint is not the photograph that was used to support the

1 violation because the photograph, as explored in discovery,
2 that storm drain was not connected to the system. So we
3 asked today, well, where is this storm drain? We still
4 don't know who took that photograph. We still -- we had no
5 opportunity to explore, when was that connected? How does
6 that work? We had to spend our time figuring out who was on
7 the site on December 17? Who was on the site on April 1?
8 If we had known what those photographs were going to be used
9 for we -- and had the opportunity to talk about them when we
10 took the deposition of the witnesses, then we could have
11 explored all of that.

12 Those are just two very limited examples. But to
13 say that 37 of the 53 photos were the new photos, there's no
14 way, when we don't know what they're for, there's no way for
15 us to respond to that.

16 Now you asked for a specific time. We would like
17 to reserve ten minutes for rebuttal. I would like to ask
18 for 20 minutes to talk about some very specific evidence
19 which I think is important. And I don't know how much
20 longer --

21 MR. ROSENBAUM: What have we got left?

22 MS. O'DONOVAN: Thirty minutes.

23 BOARD MEMBER MORALES: So you have your 20 and
24 your 10.

25 MS. BERESFORD: I'm sorry, what's our total time

1 left?

2 MS. O'DONOVAN: Thirty minutes.

3 MS. BERESFORD: Oh, okay. All right. So it's
4 hard for me to gauge when there's conversation back and
5 forth, so --

6 BOARD MEMBER MORALES: Yeah. So then --

7 MS. BERESFORD: Okay.

8 BOARD MEMBER MORALES: -- it doesn't -- it doesn't
9 seem then that, based on your own numbers here --

10 MS. BERESFORD: We still say we would have liked
11 to have an opportunity to have a much more thorough hearing.
12 I don't think we're going to concede that 90 minutes is
13 sufficient. But will try to wrap it up and do what we can
14 with the time.

15 BOARD MEMBER MORALES: That's fine.

16 CHAIRMAN ABARBANEL: I have a question for Wayne.

17 BOARD MEMBER MORALES: Yes.

18 MR. ROSENBAUM: And once again --

19 CHAIRMAN ABARBANEL: Mr. Rosenbaum, I have a
20 question.

21 MR. ROSENBAUM: Sure.

22 CHAIRMAN ABARBANEL: It's on our --

23 MR. ROSENBAUM: On your nickel.

24 CHAIRMAN ABARBANEL: You -- I don't want to
25 pretend to use a legal word in its full bloom of meaning,

1 but you more or less stipulated that 71 of these allegations
2 were correct.

3 MR. ROSENBAUM: We have -- no. I think you go a
4 little far -- too far. We have --

5 CHAIRMAN ABARBANEL: That's why I was worried
6 about using the word stipulated.

7 MR. ROSENBAUM: We have stipulated that at least
8 for 71 there's admissible evidence to support them.

9 CHAIRMAN ABARBANEL: Okay.

10 MR. ROSENBAUM: Okay.

11 CHAIRMAN ABARBANEL: Would you --

12 MR. ROSENBAUM: Whether or not we --

13 CHAIRMAN ABARBANEL: -- give us, the Prosecution
14 Team, the Board, a list of those 71, and tell us over what
15 period of time they occurred?

16 MR. ROSENBAUM: Somewhere in this presentation, if
17 I can find -- yes, we can provide you with -- our apologies.
18 The chart came out of the presentation for time purposes.
19 But we can provide you with that chart over what time, where
20 they were, how they cluster. One of the ones we certainly
21 believe does not exist is the September 15th.

22 CHAIRMAN ABARBANEL: Well, you don't have to
23 give --

24 MR. ROSENBAUM: Yeah.

25 CHAIRMAN ABARBANEL: -- a list at the moment.

1 But --

2 MR. ROSENBAUM: Yes. We --

3 CHAIRMAN ABARBANEL: -- if you, in fact, want us
4 to concentrate on your focus, why should we bother with the
5 71? We'll think about the 65 and let you discuss them and
6 have the Prosecution Team respond.

7 MR. ROSENBAUM: We can certainly do that through
8 supplemental briefing, and that's up to --

9 CHAIRMAN ABARBANEL: I don't know the formal
10 structure. But if you can do that, if the 71 occasions
11 occurred over the period December 2014 through the fall of
12 2015, that covers the entire period that is being discussed
13 here; correct?

14 MR. ROSENBAUM: We believe that it would cover the
15 period from December '14 to roughly May '15.

16 CHAIRMAN ABARBANEL: Okay.

17 MR. ROSENBAUM: And again, I'm kind of thinking
18 out -- off the top of my head, but that -- that, I think, is
19 pretty accurate.

20 CHAIRMAN ABARBANEL: So --

21 MR. ROSENBAUM: And, yes, we could --

22 CHAIRMAN ABARBANEL: -- if the 71 were all that
23 this Board considered, which is not a decision of the Board,
24 I'm hypothesizing --

25 MR. ROSENBAUM: Uh-huh.

1 CHAIRMAN ABARBANEL: -- and we went to the, I
2 don't know what you call the computational rules --

3 BOARD MEMBER MORALES: The formula.

4 CHAIRMAN ABARBANEL: -- the formula and we decided
5 that the penalty should be \$3.7 million, you would agree
6 that that was then fair?

7 MR. ROSENBAUM: No. We would certainly agree that
8 the -- you had identified admissible violations. If we --
9 and by the way, in our briefing we have gone through that
10 analysis, I had forgotten this part and, yeah, we came up
11 with a number. We said, look, if you get down to the ones
12 that they can prove, and if you apply reasonable factors as
13 the policy provides, here's the magic number.

14 BOARD MEMBER MORALES: Yeah. And I believe it was
15 roughly 240-some-odd thousand.

16 MR. ROSENBAUM: No, it was closer to, I believe --

17 BOARD MEMBER MORALES: That's right, I believe.

18 MR. ROSENBAUM: Yeah.

19 BOARD MEMBER MORALES: That's right.

20 MR. ROSENBAUM: Right. And --

21 CHAIRMAN ABARBANEL: That's okay. We know how to
22 do the calculation.

23 MR. ROSENBAUM: Right. So the -- but, yes. And
24 we think that's a reasonable, you know, starting place, but,
25 yes.

1 Have I answered your question for you?

2 CHAIRMAN ABARBANEL: More or less, yes.

3 MR. ROSENBAUM: Okay.

4 CHAIRMAN ABARBANEL: Thank you.

5 MR. ROSENBAUM: Okay. I'm not going to beat this
6 up anymore.

7 But I think the other piece that is important is
8 that when we -- when we continue to balance this burden and
9 we look at the -- what the -- the additional procedural
10 protections really have a minimal burden on this Board. The
11 burden on the Prosecution to cure the infirmities is really
12 very low. They could agree to postpone the hearing. Well,
13 that's -- it's too late to do that one. They could withdraw
14 the surprise evidence and proceed from there. They could
15 withdraw the complaint and re-file. They could amend their
16 complaint. Any of these are relatively painless, low
17 cost -- and by the way, we get to pay for the Prosecution's
18 time anyway -- low cost alternatives to cure the problem.

19 The burden on the -- on the Regional Board to cure
20 the infirmities is low. You know, the project is in full
21 compliance with the permit. Nobody's alleging that there
22 are terrible things going on. There are no allegations that
23 delay would affect water quality. And frankly, the message
24 has been sent.

25 So isn't it better to stop, take a deep breath,

1 cure these infirmities then proceed forward? We're -- we
2 are concerned that the Board's ability to have findings
3 supported by substantial evidence which would meet the
4 standard required of a mandamus action, I think we're better
5 off slowing down and rethinking this thing.

6 Finally, enforcing the complaint, really, reliance
7 on insufficient and inappropriate surprise evidence is
8 arbitrary, capricious, and I think will be found to be in
9 derogation of law. Subjecting San Altos to proceeds in
10 violation of due process rights, same problems. Alleging
11 violations for new and improperly devised rules and
12 interpretations, same problems.

13 So if the complaint is too -- too defective to be
14 enforced, then what can we do? We can remand this back and
15 cure the infirmities. And I think in curing those
16 infirmities we believe there's a reasonable possibility of
17 settlement. Because from the very beginning our issues have
18 not been that we are perfect. Our issues have been what's
19 firm, fair and consistent, and in conformity with law?

20 And on that I will say thank you and move on to my
21 Co-Counsel.

22 BOARD MEMBER MORALES: Okay.

23 MR. ROSENBAUM: Thanks so much.

24 BOARD MEMBER MORALES: And I think at this point
25 we'll take a ten-minute break. And then as soon as that

1 break is over we'll take up right where we're leaving off
2 right now. Okay. So everybody back just after -- let's say
3 12 after.

4 (Off the record at 3:06 p.m.)

5 (On the record at 3:15 p.m.)

6 BOARD MEMBER MORALES: Okay. Let's go ahead and
7 get started. Thank you all for getting back within the ten
8 minutes.

9 Okay. Counsel?

10 MS. BERESFORD: Can I just clarify our total time
11 left?

12 MS. O'DONOVAN: Twenty-seven minutes.

13 MS. BERESFORD: Can I ask for an additional five
14 minutes?

15 BOARD MEMBER MORALES: Let's get to the end of
16 your 27 minutes and see if you need them; how's that?

17 MS. BERESFORD: Well, what I don't want to happen
18 is that I get to the end of this presentation and there's no
19 time for rebuttal. So can you please inform me when there's
20 only ten minutes left and I will try to be as speedy as
21 possible?

22 BOARD MEMBER MORALES: Thank you.

23 MS. BERESFORD: I know you will have heard some of
24 these things previously, but it is important for us to get
25 some of these on the record.

1 We do renew our objections to all the new evidence
2 that was submitted on February 4, I believe.

3 Second, I want to remind the Board that relevant
4 evidence is admissible. And in this hearing relevant
5 evidence is the sort of evidence on which responsible
6 persons are accustomed to rely in the conduct of serious
7 affairs.

8 So the first objection we want to renew is that
9 the City inspection reports and the Dmax inspection reports
10 should either be excluded or discounted on the fact that
11 they were not inspecting for the permit. There's multiple
12 testimony in the depositions, we've cited it in our brief
13 that they were not inspecting for that purpose.

14 And it is important, especially when so many
15 violations, close to \$350,000 of penalties are based on
16 whether an area was active or inactive. When the people
17 doing those inspections are applying a different timeline
18 that's important and those people even admitted that they
19 did not talk to site representatives about whether certain
20 areas were active or inactive.

21 This affects Exhibits Number 2 through 7, 9, 10,
22 12 through 17, and 21 through 26 of the Technical Report.
23 And Violations 1, 2, 4, 5, 6, 7, 8, 9, 10 and 11. That's a
24 lot of exhibits and violations relying on people that were
25 not inspecting for the permit.

1 We also ask that you exclude inspections and
2 documents done by Mr. Harper and Mr. Firsht as they were not
3 qualified to inspect for the permit. They're both
4 engineers. Mr. Harper is a city inspector and Mr. Firsht
5 was the former city engineer.

6 Mr. Harper testified that he had no formal
7 training. He had two trainings on stormwater in
8 approximately five years that lasted maybe an hour or two.
9 Mr. Firsht testified that he had maybe two trainings that
10 lasted about 30 minutes.

11 And then Mr. Harper further testified that he was
12 not familiar with the permit. I said, "So we're here today
13 to talk about the Construction General Permit. Are you
14 familiar with that document?" And he said, "No."
15 We don't believe that responsible persons can rely on
16 evidence for violations of a permit based on inspections
17 when somebody says, "I don't even know what that permit is.
18 I'm not familiar with it."

19 This applies to Exhibits Number 2 through 7, 9, 14
20 and 15, and affects violations 1, 2, 4, 6 and 10. Again, we
21 think these are a lot of exhibits and violations based on
22 people who said we have no stormwater training and we're not
23 familiar with the permit." And indeed, I believe that this
24 is the only ACL complaint that has ever relied on people to
25 do inspections that are not qualified stormwater

1 professionals. Excluding Water Board staff who I don't --
2 and I'm not saying they're not qualified, but I don't
3 believe that they're QSPs either.

4 I would like to talk about Violation 13, which is
5 the concrete waste to the ground.

6 BOARD MEMBER WARREN: Counsel, before you move on
7 to the next point, I've listened to the arguments today, but
8 where I'm stuck is I believe those arguments to weight and
9 not admissibility. So I believe I heard for the first time,
10 either exclude or discount, but it's -- does the Party have
11 a position on this, because truly we've all been up here, it
12 goes to weight, I think. And could you address that point?

13 MS. BERESFORD: Sure. I appreciate the question. I think
14 for purposes of the record, we want to preserve the argument
15 that they should be excluded for that purpose. But if you
16 go back there and decide not to exclude them, then I think
17 you ought to consider the weight of that evidence. Does
18 that answer your question?

19 BOARD MEMBER WARREN: It answers part of it, but
20 do you want to now, for the record, argue why your argument
21 -- explain to all of us, why in fact, your arguments go to
22 admissibility and not to weight? Because everything I've
23 heard today seems to go to weight, so do you want to take
24 one last swing at that?

25 MS. BERESFORD: Well, sure. I mean, admissibility

1 -- and again, we're working with a pretty amorphous
2 standard on what's relevant, right? I mean, relevant
3 evidence under California Government Code Section 11513,
4 which is how you determine what evidence is relevant and can
5 be admissible is, is it the sort of evidence on which
6 responsible persons are accustomed to rely in the conduct of
7 serious affairs.

8 They've asked for almost a million dollars in
9 penalties. We think that's a pretty serious affair. We
10 don't think that responsible persons, in considering that,
11 would rely on reports when the issue is, "Did you violate
12 this permit?" We don't think that responsible persons would
13 rely on an inspection by somebody who said, "I'm not
14 familiar with that permit."

15 So I'm saying it doesn't meet the standard of
16 relevancy under Government Code Section 11513. Because I
17 don't see how a report done by somebody who says, "I'm not
18 familiar with the permit," can be used to establish a
19 violation of the permit.

20 Does that answer your question?

21 BOARD MEMBER WARREN: Yes, thank you.

22 I have a procedural question. If I'd like to hear the
23 responses now, do we have time for that, or later? Forgive
24 me, this is my first ACL.

25 BOARD MEMBER MORALES: I would say let's wait,

1 because my guess is there may be a response to that as part
2 of the Prosecution Team's close. If not we'll ask the
3 question.

4 BOARD MEMBER WARREN: Okay. Thank you

5 MS. BERESFORD: So then I'd like to talk about Violation 13,
6 which is the cementitious waste to the ground. Those were
7 based on inspections of March 18, March 24, and April 1.
8 But it alleges continuous violations through that whole
9 time. And one thing that we've seen as a theme throughout
10 this ACL is that they're alleging continuous violations, but
11 there's not evidence of that.

12 If you look at the pictures of the spill on March
13 18 and the spill on March 24, they're totally different.
14 And no one in deposition -- Mr. Harper who was there on
15 March 24th said, "Well, I don't know when the March 18 one
16 was cleaned up. And I don't know when the March 24 one
17 happened." So what we do is March 18 happened and somebody
18 cleaned it up, we suspect, that same day. We know that
19 March 24 happened and we suspect it was cleaned up, we think
20 that same day.

21 We don't think that can be used as a continual
22 violation. Continuing violation should be something like,
23 "We saw this spill on March 18th and it was still there on
24 March 24." That's not what happened here.

25 And the same thing happened with April 1, there

1 was a different spill on April 1. So the evidence presumes
2 March 24 was cleaned up, April 1 happened. No one knows
3 when April 1 happened, but that's not evidence of a
4 continuing violation. And I'd like to renew my objection to
5 the April 1 Report, that's by Ms. O'Neal who was not here to
6 authenticate it. And we don't think it falls under the
7 hearsay section.

8 I'd like to talk about Violation Number 1, which
9 is the discharge to creek and specifically, on December 17.

10 And that was the report by Brian Nemerow. They introduced
11 two new photographs today and that was part of the reason
12 why it was so important to ask "Who took those photographs?"
13 And I don't believe Mr. Nakatani answered that he was either
14 onsite or took those photographs.

15 And it's important, because when we asked Mr.
16 Nemerow who was onsite, whose report says, "I did not see a
17 discharge that day." He says, "I saw them power washing in
18 the road and I think that's probably, because maybe there
19 was a discharge." And we asked him, "Well, could they have
20 been power washing to prevent the discharge?" And he said,
21 "I don't know." And we asked him, "Well, could the sediment
22 in the street have been from the un-vegetated areas across
23 the street?" And he said, "I don't know."

24 So then they have photographs today by somebody
25 who is not here to answer additional questions. And say,

1 "Well, does this change your testimony?" We think is not
2 sufficient evidence of a discharge.

3 With respect to Violation Number 2, a failure to
4 implement material stockpile BMPs on ten days. We have the
5 same issue of are there continuing violations? And
6 specifically, I want to talk about the allegations of
7 December 4 through 8.

8 In a report on December 4 of stockpiles, which if
9 you look at the pictures, the stockpiles are partially
10 covered. You have a report on December 8th of a totally
11 separate stockpile, not covered. But they're two different
12 things, there's no evidence that there was one stockpile
13 that was there the whole time that wasn't covered.
14 It was raining on December 4, they attempted to cover the
15 stockpiles. It was not raining on December 8. The question
16 is a) does it even have to be covered, because b) it was
17 potentially active. Nobody asked them, "What are you doing
18 with this stockpile?" Mr. Harper's testimony was, "No, I
19 didn't ask them what they were doing with it." They could
20 have been using it to implement BMPs. We don't have that
21 evidence. The Prosecution has not submitted that evidence.

22 So we don't think that's sufficient evidence of a
23 continuing violation on those days.

24 With respect to Violations 4, failing to implement
25 erosion control BMPs in inactive areas and 6, failure to

1 implement erosion control BMPs in active areas, those were
2 alleged for 22 days. Eighteen of the days were the same
3 exact days, four days were different.

4 But if you're going to focus on, "Well, you don't
5 have sufficient BMPs in active areas and inactive areas,"
6 presumably you would think there would be evidence of well
7 was it active or was it inactive? There's no such evidence
8 in this case. Many of the days have no inspection reports
9 at all. And no one talked to anyone at the site. No one
10 knows what they were doing on those days, so we don't know
11 if they were active or inactive. But you shouldn't be able
12 to tag them for both.

13 And secondly, a lot of the evidence was based on
14 Mr. Melbourn going back and looking at photographs and
15 figures that were taken in December 2014, January 2015.
16 In October 2015, a whole year later, Mr. Melbourn looks at
17 photographs taken a year ago relying on information he
18 learned in a brief conversation on March 27. He attempts to
19 go back and say, "Well, I know then that this area was
20 active or this area was inactive, because I think I remember
21 in March they told me they were doing this or they were
22 doing that."

23 We think that's based on a lot of assumption. And
24 if you're going to allege 22 days, a total of 44 days, and
25 charge penalties for every single one of those days of

1 violations of inactive or active, you should have evidence
2 of whether it is or not. Talk to somebody, get a schedule,
3 find out. That did not happen. It was based on assumption
4 of what somebody thought they learned in a brief
5 conversation.

6 Violations 4, 5, 6, 7, 8 and 9 are all non-
7 discharge violations. They're insufficient BMPs, lack of
8 perimeter or sediment control, those types of things. And
9 the Water Board seeks penalties for essentially the same
10 conduct on many of the same days. We go through this in
11 great detail in our brief, but I did one example in cross-
12 examination of three photos on Exhibit 8. The exact
13 evidence was used for two separate violations.
14 And we think this violates the Enforcement Policy.
15 That the Board should not impose duplicative penalties for
16 multiple violations that are not substantially different or
17 are based on the same facts on the same days.

18 I believe we provided a chart in our papers that
19 showed how many days that they were alleged lack of
20 perimeter control, lack of linear sediment control, sediment
21 to the street, which was all based on the same incident.
22 And there should not be multiple penalties for that.
23 Finally, I want to talk about Violation 11, which is failure
24 to protect the stockpile for nine days. And this was from
25 January 6 to January 14. Again, there are no inspections

1 for January 7 to January 13.

2 And in the January 6 report, by Mr. Nakatami,
3 which is Exhibit 25 he notes that there was a wood scrap
4 pile that should be covered. But in his deposition he
5 reported those as being active. And in our interpretation
6 of active therefore they don't need to be covered.

7 And then on January 14 there was a different
8 stockpile. But he did not talk to anybody about whether
9 that stockpile was active or inactive, so again you have
10 this assumption that you have one stockpile over here. Over
11 here you have a totally separate stockpile. There's no
12 evidence that there was something ongoing in the middle.
13 And I would also like to raise -- I don't have the
14 Prosecution's page -- they introduced a new photo, again
15 today, to prove this point which we had never seen before
16 and didn't know what they were going to rely on it for. But
17 we actually believe that those were not the stockpiles that
18 were the subject of this allegation.

19 Mr. Nagatani's reports talk about stockpile that
20 were too close to a drain area. And we believe that those
21 are potentially those stockpiles, but it's extremely
22 difficult to evaluate. And I say that, because there's not
23 a wood scrap pile here and that's the one that was noted in
24 the January 6 inspection.

25 So without the benefit of knowing who took this

1 photograph, and did it really match the inspection report,
2 and does it match what they said originally is the evidence
3 that they were going to rely on? We don't think that's
4 sufficient evidence of a continuing violation.

5 The last thing we want to put on record is that
6 we object to the recovery attorney fees and costs. I'm not
7 sure what the statutory provision is. I know that in the
8 papers that were submitted today, the fees and costs are
9 increasing. But we feel strongly that if the Board comes
10 out and wants to seek penalties of over \$800,000 the
11 Defendant ought to have the right to conduct a little bit of
12 investigation, without being subject to all of those
13 additional costs. So just for purposes of the record we
14 object to that.

15 And so I think what we're asking here today, in
16 addition to all of the issues relating to the fairness and
17 the fact that there's no question they're taking a very
18 different approach to how they're doing these violations.
19 And you asked the question of, "Well, does it matter if it's
20 71 or it's 136?" Of course it matters, because they're
21 counting all 136 and they're seeking penalties for every
22 single 136. So it does matter how you apply the formulas.
23 It does matter if you combine days. It does matter if
24 you're counting multiple violations on the same day.

25 But when you really look at all of the facts, we

1 actually think that overwhelmingly there is a lack of
2 evidence for all the allegations. We've conceded there's
3 evidence for some of the allegations, but certainly not all.
4 And we do ask you to look at that.

5 There's a significant number of days where there
6 are no inspections, a significant number of days where the
7 Prosecution relies on inspections done by people who a) said
8 they had no training, b) were not familiar with the permit,
9 c) were not inspecting for the permit and d) admittedly
10 didn't ask people, "Well, which areas are active or
11 inactive?" We think all those issues are hugely important.
12 And there's a significant number of penalties based on
13 either identical or similar conduct. So we ask you to
14 please take a very hard look. We know it's complicated and
15 there's a lot of information. There's a lot of new issues
16 being raised, and a lot of evidence. But we ask you to
17 please look closely at that evidence.

18 We don't think if they're going to take a new
19 direction as they are, now is the time to say, "If you're
20 going to do this, fine. But you need to find out is the
21 site active or inactive? Who is doing the inspection and
22 are they qualified?"

23 Hopefully we still have -

24 MS. O'DONOVAN: Twelve minutes

25 MS. BERESFORD: Okay. Great, thank you very much

1 BOARD MEMBER MORALES: Thank you, Counsel.

2 Prosecution? Would the Prosecution like to cross-
3 examine any of San Altos's witnesses?

4 MS. DRABANDT: No, thank you.

5 BOARD MEMBER MORALES: Okay. Then at that point
6 we are now to the portion of the proceeding where we will
7 take comments or non-evidentiary policy statements from
8 interested persons.

9 Do we have any comment cards?

10 BOARD MEMBER WARREN: We do. We have two.

11 Mr. McSweeney, you're up first. You have three
12 minutes.

13 MR. MCSWEENEY: Pardon me? Thank you. I'm Michael
14 McSweeney, Public Policy Adviser and NTR-7 (phonetic) owner.
15 That was meant for Mr. Morales.

16 As the water guy at the BIA I'm tasked with
17 helping our members who have questions regarding permit
18 compliance, direction, or just to calm their nerves.
19 Remember, I'm neither an engineer or an attorney.
20 It's not uncommon for me to field calls or emails on
21 something like this. "Can we do this? Is this allowed?
22 I've heard that the City said... and it conflicts with what
23 the permit says. My guy told me this was okay, but the City
24 won't give me a clear answer. And I got a violation notice
25 and I did what they told me."

1 So based on what we're hearing at the BIA, there
2 appears to be a new standard of actively being used with
3 regard to stockpiles and roads. And what's important to our
4 industry is this is different from the active-inactive
5 standard, which is also known as the 14-day rule.
6 The BIA asked one of our experts questions and got back an
7 unclear response. My boss had written a gentleman named
8 Marvin Sashi, (phonetic) who is well-respected. A number of
9 folks used him, he's a BIA member. And he asked, "What is
10 your opinion of what's the standard, the norm?"
11 And what he got back was an answer that was basically, "I
12 apologize for not being able to provide you with a single
13 specific answer to your query regarding specific BMPs
14 utilized for areas under construction with exposed soils.
15 In many cases the appropriate compliance strategy could well
16 be based on the vague and somewhat subjective of term best
17 professional judgement."
18 And so I guess what I'm here to ask or to advocate
19 for is a clear standard, because if there is a new standard
20 it needs to be defined. Is it a half-day? Is it a day? Is
21 it a week? Our members can't comply with a standard if they
22 don't know what the standard is. If there is a new
23 standard, when will the new standard be published so we know
24 what our members need to comply with?
25 I hope you know that we've invested a lot of money

1 in your vision. We're trying to do everything we can to
2 ensure that people, to the maximum extent practical, know
3 what they're supposed to do and do what they're supposed to
4 do. I can't say we're doing it yet, but we are working on a
5 training program for all levels. We've talked to Dave about
6 this, to where the worker bees, the mid-level guys, the
7 manager guys, the developer, everybody gets a different type
8 of training. So they know not only what they're supposed to
9 do, but the why behind it.

10 And as a lay person, the permit, the construction
11 permit, the industrial general permit, they're complex
12 documents and they're intimidating to the average person.
13 Not to Wayne and his folks, because they live with this
14 stuff. BIA, IEA, other organizations are working diligently
15 to ensure our members are up to speed on what the
16 requirements are.

17 Thank you. I went over a few seconds.

18 BOARD MEMBER MORALES: You might want to look for
19 a different expert.

20 BOARD MEMBER WARREN: We have one more.

21 Mr. Shardlow?

22 MR. SHARDLOW: Thank you, Board Members, my name's
23 Jonathan Shardlow. I represent a subcontractor who was at
24 the site, Cal-West General Engineer. I've had the pleasure
25 in the past to represent and advise environmental

1 organizations, municipalities, and the regulated community.
2 And I believe my comments are really just made on behalf of
3 the regulated community here and not just Cal-West.
4 I didn't come to speak today, but I feel pretty compelled to
5 have to come up here and speak with you. There's been
6 comments about, "Hey, what are we supposed to be telling the
7 regulated community? Everyone wants to know what kind of
8 message are we going to send?" And I think the Board has
9 some decisions to make about what kind of message they want
10 to send. And is this the type of evidence that the Board is
11 going to take part in and take at full value in assessing a
12 penalty of \$860,000?

13 And you know, I mean if -- I mean here we have the
14 Prosecution Team relying on an inspector who prepared a city
15 report, which was prepared by a third-party consultant,
16 which was prepared by a colleague of his, which is neither a
17 QSP or a QSD, and who was there not to inspect on the
18 General Permit.

19 So what happened, and I think one of the questions
20 was, "Well, what could you do more in 90 minutes? What
21 could you come up with? What were you not able to present?"
22 Well, in five minutes of cross-examining witnesses the
23 person that came up and authenticated the documents wasn't
24 even on the site that day.

25 So you literally have -- you have hearsay, which

1 is allowed if it's reasonable, but here we have four or five
2 levels of hearsay. That's just what the fact is. And so I
3 think the Board has a decision to make if that's what
4 they're looking for, if that's the kind of standards that
5 you guys are going to take part in and decide whether that's
6 enough to make a decision on each of these violations.
7 So I think there was a comment made about due process and
8 whether someone would be sitting here today if fine was zero
9 dollars. And due process law is pretty clear that the more
10 of the penalty, the more due process that is provided. And
11 I really hope that at the end of the day, that the Board is
12 not blind to the due process violations that have occurred.
13 I mean, having the word "active" being used for the first
14 time, not even used in -- you know, not from deposition
15 evidence. Just, "Oh, you know, I'm using active. It's
16 different than what the word active is in the permit. But
17 this is what I think it is." This is the first time the
18 regulated community knows that that's what the word "active"
19 means or doesn't mean.

20 And so I think there definitely needs to be some
21 more guidelines. And relying on that type of evidence, I
22 just think is wholly improper.

23 And I think what happened with the surprise
24 evidence, and you asked what is surprise evidence, I think
25 what happened here was surprise evidence 101. Someone said,

1 "I'm not answering that, because of attorney-client
2 privilege." And then came up here and spoke to you and
3 said, "Well, this is why I think these are the unusual
4 circumstances here."

5 So I'm over my time. Thank you.

6 CHAIRMAN ABARBANEL: So may I ask you a question?

7 MR. SHARDLOW: Yes.

8 CHAIRMAN ABARBANEL: Do you think the San Altos-
9 Lemon Grove, LLC in building the project that we heard
10 about, violated any of the water quality standards of the
11 State of California?

12 MR. SHARDLOW: I think that's a pretty broad
13 question. I have read the depositions. I have listened to
14 the testimony. It appears that there might have been some
15 BMPs that failed, but I think the evidence shows that there
16 were BMPs, there was a plan, there does appear to be some
17 maintenance issues.

18 But I think let's explore what those issues are?
19 Who's culpable? Why did it happen? Why was there that
20 missing sandbag? Why can't someone say, "Did you take that
21 picture? Oh, you took it? And did you look around for the
22 other sandbag? Was that sandbag gone for one day, two days,
23 three days? Did someone take it and try to use it for their
24 house?" I mean, these are the types of questions that
25 someone should be able to ask, the regulated community

1 should be able to ask before there's an \$860,000 penalty.

2 CHAIRMAN ABARBANEL: Actually, I think it's 880,
3 but the 20 you can discuss with Wayne here.

4 MR. SHARDLOW: Well, I'm not here on behalf of Wayne. I'd
5 say I'm adverse -- I think we're adverse to their position
6 at this point. But I feel pretty compelled to speak.

7 BOARD MEMBER MORALES: (Indiscernible.)

8 CHAIRMAN ABARBANEL: (Indiscernible) said I am
9 neither an engineer nor a lawyer, so I can ask that
10 question.

11 MR. SHARDLOW: Well, I'm a lawyer. I hope you
12 won't take it against me.

13 CHAIRMAN ABARBANEL: No, not at all.

14 MR. SHARDLOW: Thank you.

15 BOARD MEMBER MORALES: Okay. We're now at point
16 in the proceedings where we'll have our closing statements.
17 And San Altos?

18 MR. ROSENBAUM: It's been a long day.

19 MS. BERESFORD: I'm sorry, before we start I want
20 to be sure I'm just be clear for record.

21 BOARD MEMBER MORALES: Of course.

22 MS. BERESFORD: I'm usually so loud I usually
23 don't have to come to the microphone. I just want to
24 clarify, are both PowerPoints that were presented today
25 going to be included in the record? And do we need to

1 clarify that everything submitted so far will be in the
2 record?

3 MS. HAGAN: Everything submitted so far is in the
4 record subject to the objections being finally ruled upon in
5 a final order.

6 BOARD MEMBER MORALES: Actually, that reminds me
7 of one thing. With respect, it's my understanding that the
8 depositions in their entirety are made part of the record
9 and included; correct?

10 MR. ROSENBAUM: Yeah, that's correct.

11 BOARD MEMBER MORALES: Are both sides fine with
12 that and no objections? Okay, thank you.

13 MR. ROSENBAUM: And one first last clarification,
14 that record also includes all of the correspondence and
15 decisions etcetera with the Advisory Team? Thank you

16 CLOSING STATEMENT BY MS. BERESFORD

17 Well folks, it's been a long day. It's been a long and
18 winding road that got us here. And I'm going to keep our
19 closing comments very brief.

20 We've come before you today to ask you to use those powers,
21 which were granted to you by the Legislature, which are
22 enormous powers to enforce the permits that are issued by
23 this Regional Board and the State Board. And to make sure
24 that in your use of those powers, that you are doing so in
25 the way that the public and the Legislature expected, that

1 is truly firm, fair, and consistent.
2 And that doesn't mean that we are standing before you saying
3 that this site was 100 percent compliant 100 percent of the
4 time. We are saying that if this Board is going to maintain
5 the high respect that it is given throughout the region, it
6 needs to assure itself that in adopting or not adopting or
7 partially adopting or remanding this ACLC, that you are
8 comfortable that you have the supporting findings of fact
9 and law. That some attorney or some individual who had
10 nothing to do with this case can say, "Yeah, this Regional
11 Board did it right. It was firm, fair and consistent. It
12 wasn't a rush to judgment to send a message. It wasn't an
13 assumption of violations based on, in some cases, a total
14 lack of evidence." It was an appropriate application of the
15 penalty factors knowing the facts, that you can be
16 comfortable with. And the region that you represent will be
17 comfortable with.

18 And I will leave it to your discretion and your conscience
19 to make sure that that happens. Thank you.

20 BOARD MEMBER MORALES: Thank you.

21 Now we'll hear from, last but not least, the Prosecution,
22 closing.

23 CLOSING STATEMENT BY PROSECUTION TEAM

24 MS. DRABANDT: Good afternoon again, Laura Drabandt. I have
25 couple of points I wanted to highlight and then I'll be

1 turning the microphone over to Mr. Jimmy Smith.

2 I just wanted to clarify a couple of things. You're
3 probably wondering well where is Brian Nemerow? He was
4 subpoenaed. He did -- somebody signed to accept that
5 subpoena, I have the receipt if you want to see it, but he's
6 not here today. If you still have some questions about
7 authenticating December 17th, 2014 and April 1st, 2015
8 matters we can always continue the hearing and bring him
9 back.

10 We can also continue the hearing and have Mr. Tad Nakatani
11 review his reports and come back and testify to those. Keep
12 in mind the citation was by Ms. Tamara O'Neal. Mr. Nakatani
13 was the one on site. And I ask if you do look through the
14 transcript of this, look at Mr. Nakatani's words in
15 determining your ruling. Not
16 Ms. Beresford's or anyone else's, it's Mr. Nakatani who
17 testified. Please look at his words.

18 Secondly, I want to address what we kind of call bridging
19 the gap of violations. It's pretty common at Regional Board
20 matters and the law supports it, as we stated in our brief.

21

22 In Violations 5 and 7, the Prosecution alleged consecutive
23 days of violation between site inspections. And the Board
24 may reasonably infer the violations continued through those
25 days since they were observed on the first day, and again on

1 the last consecutive day. And what works in our favor in
2 this case, is we're talking short gaps of time.
3 But the conduct continued. And that's kind of a running
4 theme we have here in this case, is that the conduct
5 continued. And there were continuous violations of all
6 sorts of types against the permit. And after numerous
7 warnings, citations, NOV, emails, calls, we're still looking
8 at violations from December 2014 through September 2015. It
9 shows that pattern of conduct. It's very consistent. There
10 were continuous violations. There were more violations
11 piling up.

12 Another specific point I wanted to make was from the
13 testimony from Mr. Sandstrom. He testified to Exhibit 40,
14 which was a photo from September 15th, 2015 and the time
15 stamp on it was 1402. And he talked about the neighbors.
16 The neighbor has runoff coming on to the site.

17 Well, you also heard from Mr. Frank Melbourn that it's a
18 violation of the permit to not control run-on, onto the
19 site. So again, I ask you to look at Mr. Melbourn's
20 testimony and his words as he explained how the violation
21 occurred.

22 I wanted to point out that you did not hear from the site's
23 QSP or QSD, Qualified Stormwater Pollution Prevention Plan -
24 - I had it right before the hearing, I swear -- QSP and QSD
25 Developer. You did not hear from them. You did hear from

1 Mr. Nakatani and Mr. Quenzer, and you can look at their
2 qualifications as QSDs and QSPs that's contained in the
3 evidence.
4 You also did not hear an ability to pay argument today.
5 Keep that in mind, especially if you're considering the
6 financials behind it. Our Economic Benefit Analysis that's
7 contained in the methodology is conservative, it's precise.
8 I would say it does not reflect the actual cost of business,
9 but again no ability to pay argument today.
10 I wanted to emphasize that the alleged violations were based
11 on Frank Melbourn's and Wayne Chiu's education, experience,
12 their site visits, reviewing reports, their own reports,
13 photos, their own photos, their best professional judgment.
14 They are doing their jobs. This is what they get paid to
15 do.
16 There were multiple violations of permit on the same day of
17 violation. I wanted to explain that the allegations are
18 conservative, as you heard from Melbourn. He showed you one
19 day of violation, which was alleged as one discharge, one
20 day of violation. But he showed you two violations. There
21 were two discharges that day. I think that's the perfect
22 example of our use of prosecutorial discretion. We didn't
23 allege everything under the sun. What we have presented to
24 you is the ones with the best evidence, the most reasonable
25 ones. And we ask that you look at that and consider that

1 when you review the complaint and the Technical Analysis.
2 Each case is different in nature. We can't choose what
3 facts we get and we can't choose our witnesses, but we look
4 at the whole picture and present to you a recommendation, a
5 proposal. It's the Board who's going to make the final
6 order. It's the Board who looks at consistency from their
7 consistency.
8 We've done our best effort. Staff has done an incredible
9 job presenting that to you for your opinion, for your
10 ruling.
11 And so therefore we respectfully request that this Board
12 consider all the evidence before it. And that it impose --
13 that it finds the violations true, alleged in the complaint,
14 and it imposes the penalties requested.

15 Mr. Smith?

16 ASST. EXECUTIVE DIRECTOR SMITH: Good afternoon.
17 My name is Jimmy Smith and I am the Assistant Executive
18 Officer here at the San Diego Water Board. That means I am
19 typically the head of Prosecution, not all the time but most
20 of the time. And I have take the oath.

21 So I'm not going to talk about authentication or
22 I'm not going to make legal arguments here before you today.
23 I don't have a PowerPoint. And perhaps most importantly, I
24 will be brief at this late hour of the day. But I do want
25 to pull us back and gain a little higher level perspective

1 on why this case is so important.

2 Here at the San Diego Water Board we employee a
3 process called a Compliance Oversight Group, or the COG, of
4 which I sit and attend. During this process we review new
5 cases that come before us for potentially higher level
6 enforcement. And as you can imagine, we get a lot of cases.

7 We get a lot of complaints that come to us. Our
8 inspectors, the cities send us information all the time
9 about sites that need potential enforcement. And we have to
10 screen those and select the most egregious violations of
11 permits to go after on a higher level. So automatically
12 through that process we are going after cases that warrant a
13 higher level enforcement. And the San Altos case is one of
14 those.

15 So why is that, you might ask?

16 One hundred and thirty-six days of violations in
17 thirteen categories, that's a long time. Multiple days of
18 sediment discharge, sediment that can absolutely smother and
19 kill beneficial uses, the beneficial uses we are here to
20 protect. Perhaps most alarmingly -- most alarming is the
21 conduct of the dischargers themselves. The City was out
22 there inspecting them, gave them eight notices of violation,
23 a stop work order even which is a pretty major action, a
24 very expensive action, too, for the developer.

25 We got involved. We issued a Notice of Violation,

1 multiple inspections, we talked to them. Perhaps most
2 egregious, too, is the fact that their very own plan
3 developed by their professional was often ignored, and yet
4 this site was still not in compliance.

5 So you're seeing this liability assessment because
6 it is appropriate for the nature of the numerous and
7 continued violations.

8 There's a second point I want to make, too, and
9 that's about the partnership rules here at play today. In
10 this region we have probably over 1,200 construction sites,
11 an additional 800 Industrial Stormwater permittee holders
12 and, of course, 38 co-permittees that Laura's Staff of six
13 people have six people have to oversee and inspect. That's
14 a lot. So we have to rely on those City inspectors, who
15 there's a lot more of them and they're out there a lot more
16 frequently. And their reports are absolutely admissible.
17 Their inspections are multiple at times, so they're looking
18 for many things. But a photo is a photo. A fact of
19 statement is a fact of statement. And we need to work with
20 the City on those.

21 They came in. We got involved. We did our
22 inspections multiple times. We're talking to the discharger
23 onsite, notifying them of their noncompliance. And yet the
24 complaints and the noncompliance continue.

25 Today your role comes into play on this matter.

1 Today you can move this case forward to appropriately fine
2 San Altos for their numerous continued and egregious
3 violations that directly and negatively impacted water
4 quality. There were six documented sediment discharges, six
5 discharges that directly killed and wiped out an ecosystem.

6 San Altos, too, had a role in determining the
7 complaint before you today. Their actions, when put through
8 the penalty calculator and Enforcement Policy in a fair and
9 consistent manner, dictated the ultimate penalty. And I was
10 a little surprised today that in close to 90 minutes of
11 presentation and over 40 slides I saw no evidence pointing
12 to their compliance with the permit. In fact, they didn't
13 even bring their own professional expert to provide expert
14 testimony that they were in compliance. That to me is very
15 telling.

16 The penalty before you is well supported and one
17 that is appropriate and just. I recommend that you move
18 this forward. Thank you.

19 BOARD MEMBER MORALES: Thank you.

20 MS. BERESFORD: I just want to make one more
21 statement for the record. San Altos was not served with
22 copies of the subpoenas that were served on the witnesses,
23 so we were not aware that they were trying to bring any
24 witnesses here today. So I want to register that as another
25 due process violation, that we can not prepare given that we

1 didn't know who the prosecution was intending to subpoena
2 today.

3 BOARD MEMBER MORALES: Okay. Thank you. It's
4 noted for the record.

5 At this time I would like to thank San Altos and
6 the Prosecution Team both for excellent presentations, very
7 thorough. We are -- and the public for hanging in there
8 until this late in the afternoon.

9 So for now we are going to adjourn into closed
10 session.

11 BOARD MEMBER WARREN: Close the public hearing?

12 BOARD MEMBER MORALES: Sorry?

13 BOARD MEMBER WARREN: Close the public hearing?

14 BOARD MEMBER MORALES: Yes. We're going to close
15 the public hearing, adjourn into closed session. And
16 there's really no reason for anyone to stay around. We're
17 taking the matters under submission and there will be -- the
18 evidentiary objections, as well as the complaint itself, and
19 we will go forward from there. There is not going to be any
20 other business when we come back from closed session, other
21 than to like adjourn the meeting finally. So --

22 MR. ROSENBAUM: Mr. Morales, if we may, without
23 you -- putting you in a box, do we have any sense -- does
24 the Board have any sense of when they might come to some
25 decision or --

1 BOARD MEMBER MORALES: No.

2 MR. ROSENBAUM: Got it. Thanks.

3 (Whereupon the Board adjourned into closed session

4 at 3:59 p.m.)

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CERTIFICATE OF REPORTER

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were reported by me, a certified electronic court reporter and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 18th day of March, 2016.

A handwritten signature in cursive script, reading "Martha L. Nelson", written in dark ink.

MARTHA L. NELSON

CERTIFICATE OF TRANSCRIBER

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were transcribed by me, a certified transcriber and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.



MARTHA L. NELSON, CERT**367

March 18, 2016