



San Diego Regional Water Quality Control Board

TO (via email only):

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FROM: Celeste Cantú, Chair
California Regional Water Quality Control Board, San Diego Region

DATE: July 31, 2023

**SUBJECT: ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO. R9-2023-0013:
ORDER ON EVIDENTIARY OBJECTIONS**

This order transmits the San Diego Water Board Chair's (San Diego Water Board or Board) rulings on the Prosecution Team's Prehearing Rebuttal Evidence Submittal and Objections to the Respondents' Prehearing Evidence. The San Diego Water Board has considered the July 5, 2023, submissions from the parties and the previously submitted prehearing evidence. The Respondents have not submitted any evidentiary objections as of the date of this order.

1. BACKGROUND

On November 10, 2022, the Prosecution Team issued Administrative Civil Liability Complaint No. R9-2023-0013 (ACLC No. R9-2023-0013) to Quality Investors 1 2016, LLC and David G. Epstein (collectively, the Respondents) for failure to comply with State Water Resources Control Board Order No. 2009-0009-DWQ, NPDES No. CAS000002 (as amended), *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities* (Construction General Permit). On November 25, 2022, David G. Epstein, on behalf of David G. Epstein and Quality Investors 1 2016 LCC, submitted a Waiver Form, waiving the 90-day hearing requirement. On March 17, 2023, the San Diego Water Board issued its Order on Comments to the Tentative Hearing Procedure and issued the Final Hearing Procedure for ACLC No. R9-2023-0013.

CELESTE CANTÚ, CHAIR | DAVID GIBSON, EXECUTIVE OFFICER

On April 10, 2023, the Prosecution Team timely submitted its prehearing evidence and argument. The Respondents' prehearing evidence and argument were due on May 10, 2023. However, on May 10, the Respondents requested an extension to submit their prehearing evidence and argument. On May 10, the San Diego Water Board granted the Respondents' request for an extension to submit their prehearing evidence until May 31, 2023, rescheduled the hearing date, and admonished the Respondents for the untimely request. Consistent with the Board's ruling, on May 22, 2023, the Board issued the Revised Hearing Procedure which modified the deadline for parties' evidentiary submissions and rescheduled the hearing date to September 13, 2023.

On May 31, 2023, the Respondents untimely submitted their prehearing evidence and argument after the 5:00 p.m. deadline via an external FTP site that was not accessible by Board staff. At the direction of the Advisory Team, the Respondents uploaded their evidence to the Board's FTP site on June 1, 2023. However, the Respondents' submission included a blank, incomplete exhibit list in violation of the Hearing Procedure. (Revised Hearing Procedure, § VII.A.1.) Further, the Respondents represented that the exhibits were not sorted chronologically and included duplicate files. The Respondents requested a further extension of time to organize the exhibits, remove duplicate exhibits, and complete the exhibit list.

On June 7, 2023, the Respondents provided the modified exhibit list and organized evidence with duplicates removed. The Respondents noted that, while 350 files were initially uploaded, only 73 files were uploaded on June 7, 2023. On June 16, 2023, the Board issued its ruling on the Respondents' late evidence and exhibit list submittal and admitted the Respondents' evidence and exhibit list as received on June 7, 2023.

On June 21, 2023, the San Diego Water Board noticed several discrepancies between the Respondents' uploaded files and the exhibit list. It appears the Respondents intended to upload some exhibits but failed to do so. The Board drew these conclusions because the exhibit list described some evidence, but no corresponding evidence was uploaded. The Board allowed the Respondents additional time to upload the missing exhibits. The Prosecution Team requested additional time to review the Respondents' pending additional evidence. On June 21, 2023, the San Diego Water Board issued the Second Revised Hearing Procedure with a revised deadline of July 5 for the parties to submit rebuttal evidence, objections to prehearing evidence, and requests for additional hearing time. On June 22, 2023, the Respondents informed the Board that it did not intend to upload any of the missing exhibits and would rely on the exhibits uploaded on June 7, 2023.

On July 5, 2023, the Respondents timely submitted their Prehearing Rebuttal Evidence. The Board notes that the Respondents' Prehearing Rebuttal Evidence consisted of several paragraphs of argument and did not contain any rebuttal evidence, nor any evidentiary objections to the Prosecution Team's prehearing evidence. Also on July 5, the Prosecution Team timely submitted its Prehearing Rebuttal Evidence and Objections to the Respondents' Prehearing Evidence. On July 19, 2023, the Prosecution Team timely submitted its Proposed Findings of Fact and Conclusions of Law and noted that it had no objections rebuttal evidence because the Respondents did

not submit any rebuttal evidence. The Respondents did not submit any objections to the Prosecution Team's prehearing rebuttal evidence and did not submit Proposed Findings of Fact and Conclusions of Law.¹

This order addresses the Prosecution Team's Objections to the Respondents' Prehearing Evidence submitted on July 5, 2023.

2. GENERAL PRINCIPLES AND RULES APPLICABLE TO ADMINISTRATIVE HEARINGS

Technical rules of evidence do not apply to this proceeding. Any relevant evidence is admissible as long as it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs (the "responsible persons" standard.) (Gov. Code, § 11513, subd. (c); Cal. Code Regs., tit. 23, § 648, subd. (d).) "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action. (Evid. Code, § 210.)

Relevance and the "responsible persons" (reliability) standard are two separate tests. (See *Mast v. State Bd. of Optometry* (1956) 139 Cal.App.2d 78, 85.) Most courts apply the "responsible persons" standard liberally. (Asimow, et al., *Cal. Practice Guide: Administrative Law*, ¶19:19 (Ch. 9-B) (The Rutter Group 2020).) Section 11513 does not require authentication of a writing. (*Evans v. Gordon* (2019) 41 Cal.App.5th 1094, 1103-1104.) Evidence may be inadmissible under the "responsible persons" standard where the evidence is so completely lacking in foundation that reasonable persons would not rely on the evidence. (*Ashford v. Culver City Unified School Dist.* (2005) 130 Cal.App.4th 344, 349-350, disapproved of on other grounds by *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499.)

3. RULING ON THE PROSECUTION TEAM'S EVIDENTIARY OBJECTIONS

2.1. Respondents' Exhibits Lack Foundation.

The Respondents completed their prehearing evidence submission on June 7, 2023. On June 16, 2023, the Board admitted the Respondents' evidence and exhibit list as received on June 7, 2023. The Prosecution Team objects to Respondents' Defense Exhibits 8-28, 30-35, 37-49, 51-56, and 58-73 on the basis that the exhibits are unreliable due to a lack of foundation. In particular, the Prosecution Team notes that the Respondents' photographic and video evidence lack "information explaining *who* took the photographs and/or video, *why* the photographs and/or video are relevant, and most importantly, *when* the photographs and/or video were taken." (Emphasis in original.) Stated differently, the Prosecution Team alleges that the Respondents' evidence "is so

¹ The Second Revised Hearing Procedure provided the Respondents the opportunity to submit Proposed Findings of Fact and Conclusions of Law. (Section VII.D and Important Deadlines.) The Respondents were not required to submit Proposed Findings of Fact and Conclusions of Law.

completely lacking in foundation that reasonable persons would not rely on the evidence.” (*Ashford v. Culver City Unified School Dist.*, *supra*, at pp. 349–350.)

Regarding photographic and video evidence,

It is well settled that the testimony of a person who was present at the time a film was made that it accurately depicts what it purports to show is a legally sufficient foundation for its admission into evidence. [Citations.].” (*People v. Bowley* (1963) 59 Cal.2d 855, 859.) “A photograph or video recording is typically authenticated by showing it is a fair and accurate representation of the scene depicted. [Citations.] This foundation may, but need not be, supplied by the person taking the photograph or by a person who witnessed the event being recorded. [Citations.] It may be supplied by other witness testimony, circumstantial evidence, content and location. [Citations.] Authentication also may be established ‘by any other means provided by law’ ([Evid. Code] § 1400), including a statutory presumption. (Cal. Law Revision Com. com., *supra*, foll. § 1400, p. 440 [“The requisite preliminary showing may also be supplied by a presumption.”].)

(*People v. Goldsmith* (2014) 59 Cal.4th 258, 267–268.)

The foundation for these exhibits have not been established prior to the hearing. Thus, these exhibits, standing alone, do not satisfy the “responsible persons” standard. On the other hand, nothing in the Hearing Procedure required the Respondents to provide foundational testimony before the hearing. The Board notes that the Respondents’ witness list included several “Non-Defense Witnesses” and descriptions regarding these witnesses’ testimony. Specifically, the Respondents’ witness list includes Michael Gonzales, City of Oceanside Public Works Inspector, and Danielle Jones, City of Oceanside Code Enforcement Officer II, and describes their testimony to include “the authenticity of site inspections, photographs, videos, and citations.” The Respondents purport to provide such testimony at the hearing. Thus, the San Diego Water Board presumes that the Respondents will provide testimony regarding the foundation for its photographic and video evidence at the hearing.

On June 16, 2023, the San Diego Water Board admitted the Respondents’ evidence as received on June 7, 2023. The Prosecution Team urges the San Diego Water Board to not admit the evidence unless proper foundation is provided through testimony at the hearing. The Board will modify this previous ruling in response to the Prosecution Team’s objections—Respondents’ Defense Exhibits 8-28, 30-35, 37-49, 51-56, and 58-73 are provisionally admitted pending the Respondents’ establishing sufficient foundation for the exhibits during the hearing. The San Diego Water Board may make a final ruling on the Prosecution Team’s evidentiary objections.

2.2. Respondents’ Exhibits are Cumulative.

The Prosecution Team objects to Respondents’ Defense Exhibits 58, 60, and 69 as cumulative because they may be duplicative of other exhibits. The San Diego Water Board has reviewed the Respondents’ submitted prehearing evidence and agrees with

the Prosecution Team's analysis. Respondents' Defense Exhibits 58, 60, and 69 are duplicative of other photographic evidence and thus cumulative. The Prosecution Team's objection to Respondents' Defense Exhibits 58, 60, and 69 as cumulative is sustained and those exhibits shall be stricken.

2.3. Hearing Time Limits for Each Party.

On March 17, 2023, the San Diego Water Board issued its Order on Comments to the Tentative Hearing Procedure and issued the Final Hearing Procedures. The order on the Tentative Hearing Procedure notes that the Prosecution Team requested each party have a combined total of 45 minutes to present evidence (including examination of witnesses), cross-examine witnesses, and provide a closing statement. The Respondents requested a combined total of 90 to 120 minutes to present their case. Having considered the parties' comments, the nature and number of violations, days of violations, evidence to be presented, the Board found that a combined total of 90 minutes for each party is sufficient. The Final Hearing Procedures reflected the Board's ruling and states: "Each Party will have a combined total of 90 minutes to present evidence (including examining witnesses), cross-examine witnesses, and provide a closing statement." The Revised Hearing Procedure and Second Revised Hearing Procedure contained a typographical error which reduced the hearing time limit to 60 minutes. The Hearing Procedures should have specified 90 minutes for each party to present their case. The San Diego Water Board will issue revise the Hearing Procedure to reflect the appropriate 90-minute hearing time limit for each party.

The Second Revised Hearing Procedure required the parties to submit Requests for Additional Hearing Time by July 5, 2023. (See section IX.E and Important Deadlines.) The Second Revised Hearing Procedure states that "[a]dditional time may be provided at the discretion of the Presiding Officer upon a showing that additional time is necessary." (*Ibid.*)

The Prosecution Team notes that the Respondents' witness list includes approximately five hours of testimony. However, the Respondents did not submit a Request for Additional Hearing Time, as required by the Second Revised Hearing Procedure.

The March 17, 2023, order on the Tentative Hearing Procedure directed the parties "to comply with the schedule of Important Deadlines in the Final Hearing Procedure." The Tentative Hearing Procedure, Final Hearing Procedure, Revised Hearing Procedure, and Second Revised Hearing Procedure contain the same language in section IX.E regarding submitting Requests for Additional Hearing Time.

The Respondents were explicitly reminded multiple times of the opportunity to submit a Request for Additional Hearing Time. In an email to the parties on June 16, 2023, the Board stated, "any requests for additional hearing time are due on June 30, 2023." On June 21, 2023, the Board issued the Second Revised Hearing Procedure which extended the time to submit Requests for Additional Hearing Time to July 5, 2023. In its email conveying the Second Revised Hearing Procedures, the Board specifically drew attention to the new deadline and stated, "By [July] 5, 2023, the parties shall submit

their prehearing rebuttal evidence, objections to prehearing evidence, and requests for additional hearing time.” After each reminder, the Respondents did not object nor note any concern in meeting the deadline to submit Requests for Additional Hearing Time.

Further, the Respondents’ witness list is not equivalent to a Request for Additional Hearing Time. Even if the Board were to generously construe the witness list as such a request, it lacks any showing of why additional time is necessary. The San Diego Water Board declines to revise the hearing time limits on its own motion as well. (Second Revised Hearing Procedure, section VIII.A.) Without a Request for Additional Hearing Time to consider, the hearing time limit for each party shall remain 90 minutes. Each party will have a combined total of 90 minutes to present evidence (including examining witnesses), cross-examine witnesses, and provide a closing statement.

The parties are encouraged to enter into stipulations regarding the foundation or reliability of evidence to narrow the scope of testimony that may otherwise be presented at the hearing.

4. CONCLUSION

The rulings set forth above are the final rulings of the San Diego Water Board, except where this order states that additional information is needed to rule on an objection.

cc (via email only):

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Jody Ebsen, San Diego Water Board

Vincent Vu, State Water Board

Alex Sauerwein, State Water Board