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3 **UNITED STATES DISTRICT COURT**
4 **NORTHERN DISTRICT OF CALIFORNIA**
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6 **CALIFORNIANS FOR ALTERNATIVES TO**
7 **TOXICS,**

8 Plaintiff,

9 vs.

10 **KERNEN CONSTRUCTION CO., ET AL.,**

11 Defendants.

CASE NO. 20-cv-01348-YGR

ORDER GRANTING DISCOVERY
RE: REMEDIES

Re: Dkt. No. 30

12 Plaintiff Californians for Alternatives to Toxics brings the instant action for violations of
13 the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (the “Clean Water Act” or the
14 “CWA”) and the State of California’s General Industrial Permit for storm water discharges (the
15 “General Permit”) since November 14, 2017. Defendants Kernen Construction Co., Bedrock
16 Investments LLC, Scott Farley, and Kurt Kernen have admitted liability on all causes of action.
17 At issue is what, if any, discovery is needed for the Court to assess civil penalties.

18 33 U.S.C. § 1319(d) provides, in relevant part, that “[a]ny person who violates . . . any
19 permit condition or limitation . . . shall be subject to a civil penalty not to exceed \$25,000¹ per day
20 for each violation.” In calculating appropriate penalties, courts apply either a top-down or bottom-
21 up approach. The top-down approach requires the Court to first calculate the maximum penalty,
22 and then, if necessary, to adjust that penalty downward in consideration of six statutory factors:
23 (1) the seriousness of the violation, (2) any economic benefit that resulted from the violation, (3)
24 any history of violations by the party to be penalized, (4) that party’s good faith efforts to comply
25 with the applicable requirements, (5) the economic effect of the penalty on the violator, and (6)
26 “such other matters as justice may require.” 33 U.S.C. § 1319(d). The bottom-up approach
27 requires the Court first to calculate the economic benefit realized by the defendant as a result of its

28 ¹ The maximum penalty amount has been increased to \$55,800 as adjusted for inflation.

1 non-compliance, and then adjust that amount upward or downward based on the same six factors.
2 Because the bottom-up approach would require significant discovery to determine the full extent
3 of defendants' economic benefit, if any, from non-compliance, the Court finds the top-down
4 approach to be the best method for calculating penalties in this case.

5 As to the six statutory factors, the Court has read and considered the arguments raised in
6 the briefs and at the hearing regarding the appropriate amount of penalties to be awarded in this
7 case. In exercising its considerable discretion to award penalties in this case, the Court intends to
8 do a complete analysis of the factors. In the meantime, the Court is persuaded that some discovery
9 is warranted to aid the Court in performing said analysis. At the same time, the Court is mindful
10 of the burden discovery places on defendants and defendants' efforts to come into compliance
11 with their obligations regarding storm water discharge. As such, the Court finds it appropriate to
12 cabin discovery to the issues most critical to the analysis on penalties.


13 Accordingly, the Court hereby **ORDERS** that the parties shall engage in discovery regarding
14 the amount of civil penalties to be awarded in this case, with such discovery limited to topics
15 relevant to the six relevant statutory factors. The Court also **SETS** a compliance deadline for **9:01**
16 **a.m. on Friday, November 6, 2020. Five (5) business days** prior to said date, the parties shall
17 file a joint statement updating the Court on the status of (i) the discovery process, and (ii) the
18 process of defendant being certified as a "no discharge" operation. If compliance is complete, the
19 compliance deadline will be taken off calendar.

20 Further, the Court hereby **STAYS** the case it relates to injunctive relief, which will be
21 addressed as necessary following a decision on penalties.

22 This Order terminates Docket Number 30.

23 **IT IS SO ORDERED.**

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25 Dated: September 9, 2020


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

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