

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT R5-2013-0520

IN THE MATTER OF

HBT OF SADDLE RIDGE LLC
CASCADE CROSSING
NEVADA COUNTY

This Complaint is issued to HBT of Saddle Ridge LLC (hereafter Discharger) pursuant to Water Code 13385, which authorizes the imposition of Administrative Civil Liability, and Water Code section 13323, which authorizes the Executive Officer to issue this Complaint. This Complaint is based on evidence that the Discharger violated provisions of the National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-DWQ (NPDES No. CAS000002).

The Executive Officer of the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) alleges the following:

Background

1. HBT of Saddle Ridge LLC is the property owner and developer of the Cascade Crossing development (Site), located at 10400 Combie Road in Lake of the Pines, California. The 30.89 acre site is currently under construction, and when completed, will include 80 single-family homes, a 2-acre public park, and two storm water retention basins.
2. On 2 September 2009, the State Water Resources Control Board adopted the National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Order No. 2009-0009-DWQ (NPDES No. CAS000002) (General Permit). This Order became effective on 1 July 2010.
3. Among other items, the General Permit requires:
 - (a) the implementation of best management practices (BMPs), using best available technology economically achievable (BAT) and best conventional control technology (BCT) to reduce pollution from storm water runoff from construction sites (General Permit, Section V.A.2);
 - (b) that a State-certified Qualified SWPPP Developer (QSD) prepare a site specific Storm Water Pollution Prevention Plan (SWPPP) and identify the Risk Level prior to construction (General Permit, Sections XIV.A and VII); and
 - (c) that Risk Level 2 and 3 dischargers develop and implement a Rain Event Action Plan (REAP) designed to protect all exposed portions of a site within 48 hours prior to any likely precipitation event. A REAP must be developed when there is a forecast of 50% or greater probability of precipitation in the project area (General Permit, Attachment D, Section H.1).
4. On 7 September 2012, HBT of Saddle Ridge LLC applied for permit coverage under the General Permit for the Cascade Crossing construction site by filing an on-line Notice of Intent on the Water Board's SMARTS (Storm Water Multiple Application and Tracking System) data management system. HBT of Saddle Ridge LLC determined the project was a Risk Level 2 site based on Project Sediment Risk and Receiving Water Risk under the terms of the General Permit.

5. On 12 September 2012, HBT of Saddle Ridge LLC's Notice of Intent was approved and the Cascade Crossing construction site was assigned Waste Discharge Identification Number 5S29C364552. HBT of Saddle Ridge LLC is listed as the legally responsible person (LRP) for the Site, and is, therefore, responsible for complying with all elements of the General Permit. This Complaint is being issued to HBT of Saddle Ridge because of its status as the LRP for the Cascade Crossing site.
6. The Discharger completed a site-specific SWPPP for the Cascade Crossing site and uploaded the SWPPP to the SMARTS data management system on 7 September 2012. As listed in SMARTS, construction began on 17 September 2012. According to the updated SWPPP submitted to SMARTS, construction is scheduled to be completed on 15 December 2013.

Chronology

7. On 3 October 2012, Board staff conducted an inspection and observed that grading work had begun, a construction entrance was installed, and that sediment control BMPs were in place around the perimeter of the site. No violations or concerns were noted during this inspection.
8. On 22 October 2012, Board staff conducted an inspection following a minor precipitation event and observed that the disturbed areas near Ragsdale Creek had been covered with straw. Board staff also observed sediment control BMPs installed around the perimeter of the Site and some ponding on the dirt roadway. No discharge to the creek was observed. No violations were noted during this inspection.
9. On 28 November 2012, Board staff conducted an inspection following approximately three hours of precipitation which produced approximately a quarter of an inch of rain. Board staff observed minimal erosion controls consisting mainly of a sparse covering of straw on disturbed soils. Also, large puddles of turbid water had formed on both sides of the Ragsdale Creek crossing; however, no discharge was observed during the inspection. Board staff observed erosion in areas that had not been stabilized including the roadway northeast of the creek crossing. The on-site retention ponds were beginning to fill with storm water and a filtration bag treatment system had been installed by the Discharger in case the ponds reached capacity. At the time of the inspection, the filtration bag was not in use. Board staff was concerned that the erosion and sediment controls at the Site would not be adequate for an upcoming storm event that was forecast to produce six to eight inches of additional precipitation. Board staff contacted the Discharger and requested a meeting to discuss the site. Board staff met with the Discharger on 30 November 2012 at the site.
10. On 30 November 2012, Board staff conducted an inspection following approximately three inches of rain overnight. During the inspection, Board staff observed storm water from one of the retention basins being pumped through a filtration bag and discharged into Ragsdale Creek at a rate of approximately 450 gallons per minute. Board staff expressed concern that the bag was being used beyond capacity and the Discharger slowed the pumping rate to approximately 400 gallons per minute which appeared to increase effectiveness of the filtration. The partially treated water being discharged from the filter bag appeared clearer than the water in the retention ponds. Board staff also observed turbid discharge from one of the on-site storm water retention basins into Ragsdale Creek. Approximately half of the 30-acre site had been disturbed and ineffective erosion controls consisting mainly of a sparse covering of straw were the main erosion control BMPs in place. Also, the straw covering used for erosion control on the roads had washed away and storm water flows had created gullies along the roads in areas where

storm water flow had concentrated. Large amounts of sediment had been transported into the retention ponds, some of which was discharged from the Site into Ragsdale Creek.

11. Based on the 28 November 2012 and 30 November 2012 inspections, Board staff identified that the Site did not have effective erosion or sediment control BMPs which led to the discharge of turbid storm water from the site. The inadequate BMPs are a violation of Attachment D, Provision E.3 of the General Permit which requires Risk Level 2 dischargers to implement appropriate erosion control BMPs. The observed discharge violated section V.A.2, Narrative Effluent Limitations, of the General Permit, which requires implementation of Best Conventional Pollutant Control Technologies (BCT) to reduce or eliminate conventional pollutants, including turbidity, from storm water runoff.
12. According to an email sent by the Discharger to Board staff, the Discharger installed and started operating an active treatment system (ATS) on 4 December 2012 to filter storm water prior to discharge and to prevent overtopping of the retention ponds.
13. On 20 December 2012, Board staff issued a Notice of Violation (NOV) to the Discharger for the General Permit violations observed on 28 November 2012 and 30 November 2012. The NOV required a response by 3 January 2013.
14. On 24 December 2012, Board staff conducted an inspection following a storm event which produced approximately three inches of precipitation. Board staff observed the active treatment system in operation. At the time of the inspection, the treatment system was discharging approximately 600 gallons per minute with a turbidity of less than 10 NTU. This discharge met the turbidity requirements of the General Permit for active treatment systems. In addition, erosion control BMPs had been installed for all disturbed soil areas. The erosion control BMPs consisted of hydro-seeding disturbed soils and rock lining ditches along future roads which lead to the retention basins.
15. On 26 December, the Discharger requested an extension to respond to the NOV. Board staff granted the extension to 11 January 2013.
16. On 11 January 2013, the Discharger submitted a response to the NOV describing site stabilization work completed to comply with the General Permit. This letter included a narrative explanation of how erosion and sediment control BMPs were installed between 30 November 2012 and 14 December 2012, an updated SWPPP map, copies of weekly, pre-storm, post-storm, and REAP reports, and photographs of the completed work. Water Board staff reviewed the violation response letter and determined that as of 5 December 2012, when the rain event ended, the Discharger was in compliance with General Permit requirements for erosion controls.
17. According to the Discharger, approximately 193,500 gallons of turbid storm water discharged from the retention basin for approximately three hours and 45 minutes on 30 November 2012 until the pump supplying the filter bags was able to lower the retention pond volume enough to stop the overflow. According to sample results submitted by the Discharger, the turbidity of this discharge was greater than 1,000 NTU.

The Discharger also stated that approximately 37,500 gallons of turbid storm water discharged from the retention pond for approximately one hour and fifteen minutes on 2 December 2012. According to sample results submitted by the Discharger, the turbidity of this discharge was approximately 750 NTU.

According to Discharger's calculations, in total, approximately 231,000 gallons of turbid storm water overflowed and discharged from the retention basin between 30 November 2012 and 2 December 2012. Board staff reviewed the calculations and agrees that the estimated discharge volume from the retention pond is reasonable.

Using information submitted by the Discharger, Water Board staff calculated that approximately four million gallons of storm water was partially treated prior to discharge using the filtration bags between 30 November 2012 and 4 December 2012. According to sample results submitted by the Discharger, turbidity concentrations of the effluent of the filtration bags were measured as 249 NTU and 125 NTU on 1 December 2012 and 2 December 2012, respectively. This is similar to the turbidity in Ragsdale Creek during this time period.

Violations at the Cascade Crossing Construction Site

18. General Permit Section V.A.2, Effluent Standards, Narrative Effluent Limitations, states, in part: *2. Dischargers shall minimize or prevent pollutants in storm water discharges and authorized non-storm water discharges through the use of controls, structures, and management practices that achieve BAT for toxic and non-conventional pollutants and BCT for conventional pollutants.*

Violation 1: The Discharger is alleged to have violated this requirement of the General Permit by discharging 231,000 gallons to Ragsdale Creek for a period of two days (30 November 2012 and 2 December 2012).

19. General Permit Attachment D, Provision E.3. Sediment Controls, states in part: *Additional Risk Level 2 Requirement: Risk Level 2 dischargers shall implement appropriate erosion control BMPs (runoff control and soil stabilization) in conjunction with sediment control BMPs for areas under active construction.*

Violation 2: The Discharger is alleged to have violated this requirement of the General Permit for a period of six days prior to installation of the ATS (28 November 2012 through 3 December 2012) for failure to implement appropriate erosion control BMPs for areas under active construction.

Violation 3: The Discharger is alleged to have violated this requirement of the General Permit for a period of two days following installation of the ATS (4 December 2012 through 5 December 2012) for failure to implement appropriate erosion control BMPs for areas under active construction.

Surface Water Beneficial Uses

20. The *Water Quality Control Plan for the Sacramento River and San Joaquin River Basins, Fourth Edition* (hereafter Basin Plan) designates beneficial uses, establishes water quality objectives, contains implementation plans and policies for protecting waters of the basin, and incorporates by reference plans and policies adopted by the State Water Resources Control Board.
21. Surface water drainage from the Cascade Crossings construction site flows to Ragsdale Creek which flows to Wolf Creek, tributary to the Bear River.
22. The beneficial uses of the Bear River as stated in the Basin Plan are: municipal and domestic supply; agricultural supply, including stock watering; hydropower generation; water contact recreation, including canoeing and rafting; non-contact water recreation, including aesthetic

enjoyment; commercial and sport fishing; aquaculture; warm migration of aquatic organisms; cold migration of aquatic organisms; warm spawning, reproduction, and/or early development; cold spawning, reproduction, and /or early development warm freshwater habitat; cold freshwater habitat; and wildlife habitat.

Calculation of Penalties Under Water Code Section 13385

23. Water Code section 13385 states, in relevant part:

(a) Any person who violates any of the following shall be liable civilly in accordance with this section:

(2) A waste discharge requirement ... issued pursuant to this chapter... (5) Any requirements of Section 301, 302, 306, 307, 308, 318, 401, or 405 of the Clean Water Act, as amended.

24. The General Permit was adopted by the State Water Board on 2 September 2009, pursuant to Clean Water Act sections 201, 208(b), 302, 303(b), 304, 306, 307, 402, and 403. Section IV(A)(1) of the General Permit, states in part:

Any permit noncompliance constitutes a violation of the Clean Water Act (CWA) and the Porter-Cologne Water Quality Control Act and is grounds for enforcement action and/or removal from General Permit coverage.

25. The Discharger's failure to implement the elements of the General Permit described above violated the General Permit and therefore, violated the Clean Water Act and the Porter-Cologne Water Quality Control Act. Water Code section 13385 authorizes the imposition of administrative civil liability for such violations.

26. Water Code section 13385 states, in relevant part:

(c) Civil liability may be imposed administratively by the state board or a regional board pursuant to Article 2.5 (commencing with Section 13323) of Chapter 5 in an amount not to exceed the sum of both of the following:

(1) Ten thousand dollars (\$10,000) for each day in which the violation occurs.

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

(e) ...At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

27. **Maximum Civil Liability under Water Code Section 13385:** Pursuant to Water Code section 13385(c), each violation of the General Permit identified above is subject to penalties not to exceed \$10,000 per day and \$10 per gallon of discharge exceeding 1,000 gallons.

- The Discharger failed to comply with Sediment Control Provision E.3 from 28 November 2012 through 5 December 2012, a period of eight days. Therefore, the maximum penalty for these violations is \$10,000 X 8 days, or \$80,000.

- A total of 193,500 gallons of turbid water discharged from the retention basin on 30 November 2012 in violation of Section V.A.2. The maximum penalty for this discharge is (193,500 – 1,000) gallons X \$10 per gallon plus 1 day X \$10,000 per day, or \$1,935,000.
- A total of 37,500 gallons of turbid water discharged from the retention basin on 2 December 2012 in violation of Section V.A.2. The maximum penalty for this discharge is (37,500 – 1,000) gallons X \$10 per gallon plus 1 day X \$10,000 per day, or \$375,000.

The maximum liability for these violations is **two million three hundred ninety thousand dollars (\$2,390,000)**.

28. **Minimum Civil Liability Under Water Code Section 13385:** Pursuant to Water Code section 13385(e), at a minimum, civil liability must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation. The violations of the General Permit were due to failure to implement appropriate erosion and sediment control BMPs as listed in the site specific SWPPP. Board staff estimates the cost to stabilize construction sites ranges from \$2,000 to \$5,000 per acre depending on the slope and soil type. The economic benefit received by the Discharger by not installing and maintaining appropriate erosion and sediment control BMPs at this site is estimated to be \$4,000 per acre, based on the slope and soil type of disturbed areas. Also, the roadways had been graded and were concentrating flows, necessitating additional BMP protection. Based on information submitted by the Discharger as part of the Notice of Violation response, Board staff calculated that approximately 15 acres of disturbed area was not adequately protected with BMPs. Therefore, the cost to stabilize this construction site is estimated to be \$60,000. The economic benefit incurred by the Discharger is the failure to spend \$60,000 for a period of eight days; the value can be calculated as the interest on a loan to complete the work. Using the US EPA's BEN model, the economic benefit gained by non-compliance is calculated to be approximately **sixty one dollars (\$61)**, which becomes the minimum civil liability which must be assessed pursuant to section 13385.

Proposed Administrative Civil Liability

29. Pursuant to Water Code section 13385(e), in determining the amount of any civil liability imposed under Water Code section 13385(c), the Board is required to take into account the nature, circumstances, extent, and gravity of the violations, whether the discharges are susceptible to cleanup or abatement, the degree of toxicity of the discharges, and, with respect to the violator, the ability to pay, the effect on its ability to continue its business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic benefit or savings, if any, resulting from the violations, and other matters that justice may require.
30. On 17 November 2010, the State Water Board adopted Resolution No. 2009-0083 amending the Water Quality Enforcement Policy (Enforcement Policy). The Enforcement Policy was approved by the Office of Administrative Law and became effective on 20 May 2010. The Enforcement Policy establishes a methodology for assessing administrative civil liability. The use of this methodology addresses the factors that are required to be considered when imposing a civil liability as outlined in Water Code section 13385(e).
31. This administrative civil liability was derived from the use of the penalty methodology in the Enforcement Policy, as explained in detail in Attachment A. The proposed civil liability takes into account such factors as the Discharger's culpability, history of violations, ability to pay and continue in business, and other factors as justice may require.

32. As described above, the maximum penalty for the violations is \$2,390,000. The Enforcement Policy requires that the minimum liability imposed be at least 10% higher than the estimated economic benefit of \$61, so that liabilities are not construed as the cost of doing business and that the assessed liability provides a meaningful deterrent to future violations. In this case, the economic benefit amount, plus 10%, is \$67. Based on consideration of the above facts and after applying the penalty methodology and allowing for staff costs pursuant to the Enforcement Policy, the Executive Officer of the Central Valley Water Board proposes that civil liability be imposed administratively on the Discharger in the amount of **\$124,557**. The specific factors considered in this penalty are detailed in Attachment A.

Regulatory Considerations

33. Notwithstanding the issuance of this Complaint, the Central Valley Water Board retains the authority to assess additional penalties for violations of the requirements of the General Permit for which penalties have not yet been assessed or for violations that may subsequently occur.
34. An administrative civil liability may be imposed pursuant to the procedures described in Water Code section 13323. An administrative civil liability complaint alleges the act or failure to act that constitutes a violation of law, the provision of law authorizing administrative civil liability to be imposed, and the proposed administrative civil liability.
35. Issuance of this Administrative Civil Liability Complaint to enforce Water Code Division 7, Chapter 5.5 is exempt from the provisions of the California Environmental Quality Act (Pub. Resources Code § 21000 et seq.), in accordance with California Code of Regulations, title 14, section 15321(a)(2).

HBT OF SADDLE RIDGE LLC IS HEREBY GIVEN NOTICE THAT:

1. The Executive Officer of the Central Valley Water Board proposes an administrative civil liability in the amount of **one hundred twenty-four thousand five hundred fifty-seven dollars (\$124,557)**. The amount of the proposed liability is based upon a review of the factors cited in Water Code section 13385, as well as the State Water Resources Control Board's 2010 Water Quality Enforcement Policy, and includes consideration of the economic benefit or savings resulting from the violations.
2. A hearing on this matter will be conducted at the Central Valley Water Board meeting scheduled on **30/31 May 2013**, unless one of the following options occurs by **29 March 2013**:
 - a) The Discharger waives the hearing by completing the attached form (checking off the box next to Option #1) and returning it to the Central Valley Water Board, along with payment for the proposed civil liability of one hundred twenty-four thousand five hundred fifty-seven dollars (\$124,557); or
 - b) The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests to engage in settlement discussions by checking off the box next to Option #2 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed; or

- c) The Central Valley Water Board agrees to postpone any necessary hearing after the Discharger requests a delay by checking off the box next to Option #3 on the attached form, and returns it to the Board along with a letter describing the issues to be discussed.
3. If a hearing is held, the Central Valley Water Board will consider whether to affirm, reject, or modify the proposed Administrative Civil Liability, or whether to refer the matter to the Attorney General for recovery of judicial civil liability.

Original Signed By Andrew Altevogt for

PAMELA C. CREEDON, Executive Officer

4 March 2013

Date

Waiver Form
Attachment A: Specific Factors Considered for Civil Liability

MAF/SER/WSW: 27-Feb-13

**WAIVER FORM
FOR ADMINISTRATIVE CIVIL LIABILITY COMPLAINT**

By signing this waiver, I affirm and acknowledge the following:

I am duly authorized to represent HBT of Saddle Ridge LLC (hereafter Discharger) in connection with Administrative Civil Liability Complaint R5-2013-0520 (hereafter Complaint). I am informed that California Water Code section 13323, subdivision (b), states that, "a hearing before the regional board shall be conducted within 90 days after the party has been served. The person who has been issued a complaint may waive the right to a hearing."

(OPTION 1: Check here if the Discharger waives the hearing requirement and will pay in full.)

- a. I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board.
- b. I certify that the Discharger will remit payment for the proposed civil liability in the full amount of **one hundred twenty-four thousand five hundred fifty-seven dollars (\$124,557)** by check that references "ACL Complaint R5-2013-0520" made payable to the *State Water Pollution Cleanup and Abatement Account*. Payment must be received by the Central Valley Water Board by **29 March 2013**.
- c. I understand the payment of the above amount constitutes a proposed settlement of the Complaint, and that any settlement will not become final until after a 30-day public notice and comment period. Should the Central Valley Water Board receive significant new information or comments during this comment period, the Central Valley Water Board's Executive Officer may withdraw the complaint, return payment, and issue a new complaint. I also understand that approval of the settlement will result in the Discharger having waived the right to contest the allegations in the Complaint and the imposition of civil liability.
- d. I understand that payment of the above amount is not a substitute for compliance with applicable laws and that continuing violations of the type alleged in the Complaint may subject the Discharger to further enforcement, including additional civil liability.

(OPTION 2: Check here if the Discharger waives the 90-day hearing requirement in order to engage in settlement discussions.) I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the Complaint, but I reserve the ability to request a hearing in the future. I certify that the Discharger will promptly engage the Central Valley Water Board Prosecution Team in settlement discussions to attempt to resolve the outstanding violation(s). By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing so that the Discharger and the Prosecution Team can discuss settlement. It remains within the discretion of the Central Valley Water Board to agree to delay the hearing. Any proposed settlement is subject to the conditions described above under "Option 1."

(OPTION 3: Check here if the Discharger waives the 90-day hearing requirement in order to extend the hearing date and/or hearing deadlines. Attach a separate sheet with the amount of additional time requested and the rationale.) I hereby waive any right the Discharger may have to a hearing before the Central Valley Water Board within 90 days after service of the Complaint. By checking this box, the Discharger requests that the Central Valley Water Board delay the hearing and/or hearing deadlines so that the Discharger may have additional time to prepare for the hearing. It remains within the discretion of the Central Valley Water Board to approve the extension.

(Print Name and Title)

(Signature)

(Date)

**ATTACHMENT A to ACL Complaint R5-2013-0520:
Specific Factors Considered for Civil Liability
Cascade Crossing, Nevada County**

The State Water Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability by addressing the factors that are required to be considered under California Water Code (CWC) section 13385(e). Each factor of the nine-step approach is discussed below, as is the basis for assessing the corresponding score. The Enforcement Policy can be found at:

http://www.waterboards.ca.gov/water_issues/programs/enforcement/docs/enf_policy_final111709.pdf.

Violation #1: Discharges of turbid water from the retention basins on 30 November 2012 and 2 December 2012.

Step 1 – Potential for Harm for Discharge Violations

The “potential harm to beneficial uses” factor considers the harm to beneficial uses that may result from exposure to the pollutants in the discharge, while evaluating the nature, circumstances, extent, and gravity of the violation(s). A three-factor scoring system is used for each violation or group of violations: (1) the potential to harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) whether the discharge is susceptible to cleanup or abatement.

Factor 1: Harm or Potential Harm to Beneficial Uses

A score between 0 and 5 is assigned based on a determination of whether the harm or potential for harm to beneficial uses is negligible (0) to major (5). In this case the potential harm to beneficial uses was determined to be **moderate** (i.e. a score of 3), which is defined as a “moderate threat to beneficial uses (i.e., impacts are observed or reasonably expected and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects)”. Temporary erosion controls such as straw and tack or bonded fiber matrix cover disturbed soils and protect soil particles from detaching. This helps lock the soil particles in place and reduces turbidity in storm water runoff. Discharges of sediment to surface waters can cloud the receiving water, thereby reducing the amount of sunlight reaching aquatic plants, clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease. The discharge of sediment negatively impacts aquatic organisms; however, the discharges took place during a time of high flow in Ragsdale Creek, and therefore were expected to attenuate without appreciable effects. In addition, Ragsdale Creek was also turbid due to upstream discharges.

Ragsdale Creek flows to Wolf Creek, tributary to Bear River. The beneficial uses for Bear River include municipal and domestic supply; agricultural supply, including stock watering; hydropower generation; water contact recreation, including canoeing and rafting; non-contact water recreation, including aesthetic enjoyment; commercial and sport fishing; aquaculture; warm migration of aquatic organisms; cold migration of aquatic organisms; warm spawning, reproduction, and/or early development; cold spawning, reproduction, and /or early development warm freshwater habitat; cold freshwater habitat; and wildlife habitat.

Factor 2: The Physical, Chemical, Biological, or Thermal Characteristics of the Discharge

A score between 0 and 4 is assigned based on a determination of the risk or threat of the discharged material. In this case, a score of **2** was assigned. A score of 2 means that the chemical and/or physical characteristics of the discharged material poses moderate risk or threat to potential receptors (i.e. chemical and/or physical characteristics of the discharged material have some level of toxicity or

pose a moderate level of concern regarding receptor protection). Discharges of sediment can cloud the receiving water, which reduces the amount of sunlight reaching aquatic plants, clog fish gills, smother aquatic habitat and spawning areas, and impede navigation. Sediment can also transport other materials such as nutrients, metals, and oils and grease.

Factor 3: Susceptibility to Cleanup or Abatement

A score of 0 is assigned for this factor if 50% or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned if less than 50% of the discharge is susceptible to cleanup or abatement. This factor is evaluated regardless of whether the discharge was actually cleaned up or abated by the discharger. In this case, sediment discharged into Ragsdale Creek was dispersed by storm water over a long distance and cleanup or abatement would not be possible. Therefore, a factor of 1 is assigned.

Final Score – “Potential for Harm”

The scores of the three factors are added to provide a Potential for Harm score for each violation or group of violations. In this case, a final score of 6 was calculated. The total score is then used in Step 2 below.

Step 2 – Assessment for Discharge Violations

This step addresses penalties based on both a per-gallon and a per-day basis for discharge violations.

Per Gallon Assessments for Discharge Violations

When there is a discharge, the Central Valley Water Board is to determine the initial liability amount on a per gallon basis using the Potential for Harm score from Step 1 and the extent of Deviation from Requirement of the violation. The Potential for Harm score from Step 1 is 6 and the extent of Deviation from Requirements is considered **Major** because the requirement was rendered ineffective based on the lack of effective erosion control BMPs which caused large amounts of eroded sediment to be transported to the retention pond and a portion of this sediment eventually discharged to Ragsdale Creek. Table 1 of the Enforcement Policy (p. 14) is used to determine a “per gallon factor” based on the total score from Step 1 and the level of Deviation from Requirement. For this particular case, the factor is 0.22. This value is multiplied by the volume of discharge and the per gallon civil liability, as described below.

A total of 231,000 gallons was discharged over two days. The maximum civil liability allowed under Water Code section 13385 is \$10 per gallon for discharges. Because of the volume of the discharge, it is considered a “high volume discharge” under the Enforcement Policy. For high volume discharges, the Enforcement Policy allows a civil liability value of either \$2 per gallon (for sewage) or \$1 per gallon (for recycled water) instead of the maximum civil liability of \$10 per gallon allowed under Water Code section 13385. In this case, it is appropriate to use the \$2 per gallon value in calculating the liability because of the high volume.

Water Code section 13385(c)(2) states that the civil liability amount is to be based on the number of gallons discharged but not cleaned up, over 1,000 gallons for each spill event. As shown in the table below, there were two spill events. The first occurred on 30 November 2012 and was 193,500 gallons. The second took place on 2 December 2012 and was 37,500 gallons. The Per Gallon Assessment is calculated as (factor from Table 1) x (spill volume-1,000) x (\$2 per gallon).

Per Day Assessments for Discharge Violations

When there is a discharge, the Central Valley Water Board is to determine the initial liability amount on a per day basis using the same Potential for Harm score from Step 1 and the same Extent of Deviation from Requirements used in the per-gallon analysis. The Potential for Harm score from Step 1 is **6** and the Extent of Deviation from Requirements is considered to be **Major**. Therefore the “per day” factor is **0.22** (as determined from Table 2 in the Enforcement Policy). The Per Day Assessment is calculated as (factor from Table 2) x (number of days) x \$10,000 per day.

Violation #1 – Initial Liability Amount

The initial liability amount for the discharge violations are as follows:

Per Gallon Liability:

1. 30 November 2012: $\$2 \times (193,500 - 1,000) \times 0.22 = \$84,700$
2. 2 December 2012: $\$2 \times (37,500 - 1,000) \times 0.22 = \$16,060$

Per Day Liability:

3. 30 November 2012: $\$10,000 \times 0.22 \times 1 \text{ day} = \$2,200$
4. 2 December 2012: $\$10,000 \times 0.22 \times 1 \text{ day} = \$2,200$

Total Initial Liability = **\$105,160**

Step 3 – Per Day Assessment for Non-Discharge Violations

In this case, this factor does not apply because Violation #1 is related to a discharge and the liability was determined in Step 2.

Step 4 – Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator’s culpability, efforts to cleanup or cooperate with regulatory authority, and the violator’s compliance history.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.1** because of the Discharger’s failure to implement appropriate BMPs prior to a forecasted multi-day storm event. This failure to implement BMPs led to the discharges of turbid water which could have been avoided had appropriate BMPs been in place prior to the forecasted storm event. The Discharger did not anticipate what a reasonable person would have and did not implement appropriate measures to avoid the violations.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **0.75** because of the cooperation exhibited by the Discharger to return into compliance. Immediately upon recognizing that the pond was overflowing, the Discharger worked over the weekend and took actions to minimize the potential for harm by partially treating the water in the retention ponds using a filtration

bag, and then operating the filtration bag for 24-hours per day for four days until an active treatment system was installed and operational.

History of Violations

This factor is to be used when there is a history of repeat violations. A minimum multiplier of 1.1 is to be used, and is to be increased as necessary. In this case, a multiplier of **1** was used because there have been no previous discharge violations other than the alleged violations currently at issue in this Complaint.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 2.

<u>Violation #1 – Total Base Liability Amount</u>
Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability
$\$105,160 \times 1.1 \times 0.75 \times 1 = \$86,757$
Total Base Liability = \$86,757

Violation #2: Failure to Implement Appropriate BMPs Prior to Installation of the Active Treatment System

The General Permit requires Risk Level 2 dischargers to implement appropriate erosion and sediment control BMPs. The Cascade Crossing site is Risk Level 2.

Board staff considered the Discharger to be in violation of the erosion control BMP requirements only on the days when rain occurred at the site because the General Permit distinguishes between active and inactive construction areas. Active construction areas are defined in the General Permit as: “areas undergoing land surface disturbance. This includes construction activity during the preliminary stage, mass grading stage, streets and utilities stage and the vertical construction stage.” Active areas must have appropriate erosion and sediment controls installed prior to rainfall but not between rain events. The General Permit defines inactive areas of construction as “areas of construction activity that have been disturbed and are not scheduled to be re-disturbed for at least 14 days.” Inactive areas must have effective soil cover during the entire period of inactivity, regardless of rainfall.

For the Cascade Crossing site, Board staff understands that the Discharger was conducting mass grading and utility installation activities, and returned to work as soon as possible following the rain events. Therefore, staff considered the requirements for installation of erosion control BMPs at active construction areas, rather than inactive areas, when determining the violations in this case.

During the 28 November 2012 through 5 December 2012 storm event, inadequate erosion control BMPs caused sediment to be mobilized into the retention basins. Violation #2 is for the period of 28 November 2012 through 3 December 2012, the period during the storm event prior to the installation of the Active Treatment System which occurred on 4 December 2012, when the Discharger failed to have inadequate erosion and sediment control BMPs installed at the site.

Step 1 – Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2 – Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3 – Per Day Assessment for Non-Discharge Violations

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm: The characteristics of the violation present either a minor, moderate, or major potential for harm or threat to beneficial uses. In this case, a lack of appropriate BMPs has the potential to impact beneficial uses. During the 28 November through 3 December 2012 period prior to installation of the active treatment system, the Discharger partially mitigated the potential for harm by pumping stormwater through a filter bag. The filter bag treatment lowered the turbidity of the stormwater from > 1000 NTU to between 125 NTU and 249 NTU, reducing the potential for harm. The portion of the stormwater that was not captured or partially treated represents a small portion of the total discharge and had the potential to impact beneficial uses. Therefore, the potential for harm to beneficial uses is determined to be **Moderate**, which is defined as “The characteristics of the violation present a substantial threat to beneficial uses and/or the circumstances of the violation indicate a substantial potential for harm. Most incidents would be considered to present a moderate potential for harm.”

Deviation from Requirement: The violation represents either a minor, moderate, or major deviation from the applicable requirements. The implementation of the filtration bags partially mitigated the potential for harm and brought the Discharger closer to the intent of the Order requirements. Due to the size of the forecast storm event, failure to implement adequate erosion controls, and implementation of the filtration bag, the deviation from applicable requirements is determined to be **Moderate**, which is defined as “The intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and the effectiveness of the requirement is only partially achieved.”

Using Table 3 in the Enforcement Policy, the Per Day Factor of **0.35** is assigned. This value is to be multiplied by the days of violation and the maximum per day penalty, as shown below.

Violation #2 - Initial Liability Amount

The initial liability amounts for the violations calculated on a per-day basis, are as follows:

28 November 2012 through 3 December 2012 = 6 days x \$10,000 X 0.35 = \$21,000

Total Initial Liability = **\$21,000**

Step 4 – Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator’s culpability, efforts to cleanup or cooperate with regulatory authority, and the violator’s compliance history.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.1** because of the Discharger's failure to implement appropriate BMPs prior to a forecasted multi-day storm event. This failure to implement BMPs led to the discharges of turbid water which could have been avoided had appropriate BMPs been in place prior to the forecasted storm event. The Discharger did not anticipate what a reasonable person would have and did not implement appropriate measures to avoid the violations.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **0.75** because of the cooperation exhibited by the Discharger to return into compliance. Immediately upon recognizing that the pond was overflowing, the Discharger worked over the weekend and took actions to minimize the potential for harm by partially treating the water in the retention ponds using a filtration bag, and then operating the filtration bag for 24-hours per day for four days until an active treatment system was installed and operational.

History of Violations

The same History of Violations factor as Violation #1 of **1.0** was used.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 3.

Violation #2 - Total Base Liability Amount

Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$21,000 \times 1.1 \times 0.75 \times 1.0 = 17,325$$

Total Base Liability = **\$17,325**

Violation #3: Failure to Implement Appropriate BMPs Following Installation of the Active Treatment System until the end of the Storm Event

The General Order requires Risk Level 2 dischargers to implement appropriate erosion and sediment control BMPs. During the 28 November 2012 through 5 December 2012 storm event, inadequate erosion control BMPs caused sediment to be mobilized into the retention basins.

Violation 3 is for the period of 4 December 2012 through 5 December 2012, the period during the storm event after installation of the Active Treatment System, when the Discharger failed to have appropriate erosion control BMPs installed. Again, Board staff considered the requirements for installation of erosion control BMPs at active construction areas in determining these violations.

Step 1 – Potential for Harm for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 2 – Assessment for Discharge Violations

This step is not applicable because the violation is a not a discharge violation.

Step 3 – Per Day Assessment for Non-Discharge Violations

The “per day” factor is calculated for each non-discharge violation or group of violations considering the 1) potential for harm and 2) the extent of the deviation from the applicable requirements.

Potential for Harm: The characteristics of the violation present either a minor, moderate, or major potential for harm or threat to beneficial uses. In this case, the lack of appropriate BMPs has the potential to impact beneficial uses. Following installation of the Active Treatment System on 4 December 2012, the Discharger substantially mitigated the potential for harm during the 4 December 2012 through 5 December 2012 period by operating the Active Treatment System. However, operating the Active Treatment System does not negate the requirement to implement appropriate BMPs. Therefore, the potential for harm to beneficial uses for failing to have appropriate BMPs in place after installation of the Active Treatment System is determined to be **Minor**.

Deviation from Requirement: The violation represents either a minor, moderate, or major deviation from the applicable requirements. Operation of the Active Treatment System partially mitigated the lack of appropriate erosion control BMPs; therefore, the deviation from applicable requirements to install an effective combination of erosion and sediment control BMPs is determined to be **Minor**.

Using Table 3 in the Enforcement Policy, the Per Day Factor of **0.15** is assigned. This value is to be multiplied by the days of violation and the maximum per day penalty, as shown below.

Violation #3 - Initial Liability Amount

The initial liability amounts for the violations calculated on a per-day basis, are as follows:

4 December 2012 through 5 December 2012 = 2 days x 10,000 X 0.15 = \$3,000

Total Initial Liability = **\$3,000**

Step 4 – Adjustment Factors

There are three additional factors to be considered for modification of the amount of initial liability: the violator’s culpability, efforts to cleanup or cooperate with regulatory authority, and the violator’s compliance history.

Culpability

Higher liabilities should result from intentional or negligent violations as opposed to accidental violations. A multiplier between 0.5 and 1.5 is to be used, with a higher multiplier for negligent behavior. The Discharger was given a multiplier value of **1.1** because of the Discharger’s failure to implement appropriate BMPs prior to a forecasted multi-day storm event. The installation of the Active Treatment System does not negate the requirement to install BMPs prior to a storm event. The Discharger did not anticipate what a reasonable person would have and did not implement appropriate measures to avoid the violations.

Cleanup and Cooperation

This factor reflects the extent to which a discharger voluntarily cooperated in returning to compliance and correcting environmental damage. A multiplier between 0.75 and 1.5 is to be used, with a higher multiplier when there is a lack of cooperation. The Discharger was given a multiplier value of **0.75** because of the cooperation exhibited by the Discharger to return into compliance. Immediately upon recognizing that the pond was overflowing, the Discharger worked over the weekend and took actions to minimize the potential for harm by partially treating the water in the retention ponds using a filtration bag, and then operating the filtration bag for 24-hours per day for four days until an active treatment system was installed and operational.

History of Violations

The same History of Violations factor as Violation #1 of **1.0** was used.

Step 5 - Determination of Total Base Liability Amount

The Total Base Liability is determined by applying the adjustment factors from Step 4 to the Total Initial Liability Amount determined in Step 3.

Violation #3 - Total Base Liability Amount

Total Initial Liability x Culpability Multiplier x Cleanup and Cooperation Multiplier x History of Violations Multiplier = Total Base Liability

$$\$3,000 \times 1.1 \times 0.75 \times 1.0 = \$2,475$$

Total Base Liability = **\$2,475**

COMBINED TOTAL BASE LIABILITY AND FACTORS APPLIED TO ALL VIOLATIONS

The combined Total Base Liability Amount for the three violations is **\$106,557** (\$86,757 + \$17,325 + \$2,475).

The following factors apply to the combined Total Base Liability Amounts for all of the violations discussed above.

STEP 6 – Ability to Pay and Continue in Business

The ability to pay and to continue in business factor must be considered when assessing administrative civil liabilities. HBT at Saddle Creek LLC is the property owner and developer for the Cascade Crossing housing development. When completed, this community will have 84 single-family homes ranging between 2,000 and 2,800 square feet. HBT at Saddle Creek LLC is one of many property developers in the Homes By Towne brand of Zilber Ltd. that specializes in residential real estate development in California, Arizona, Texas, and Wisconsin. Given this information, the discharger has the ability to pay the combined Total Base Liability Amount.

STEP 7 – Other Factors as Justice May Require

The costs of investigation and enforcement are “other factors as justice may require”, and should be added to the liability amount. The Central Valley Water Board has incurred \$18,000 in staff costs associated with the investigation and enforcement of the violations alleged herein. This represents approximately 120 hours of staff time devoted to investigating and drafting the complaint at \$150 an

hour. In accordance with the Enforcement Policy, this amount is added to the Combined Total Base Liability Amount.

STEP 8 – Economic Benefit

Pursuant to CWC section 13385(e), civil liability, at a minimum, must be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.

The violations of the General Permit were due to failure to implement appropriate erosion and sediment control BMPs as listed in the site specific SWPPP. The California Stormwater Quality Association (CASQA) estimates installation and maintenance of straw mulch at \$1,823 to \$4,802 (July 2007 data), and this is generally dependent on the slope and soil type. The economic benefit received by the Discharger by not fully installing erosion control BMPs is estimated by Board staff to be \$3,000 per acre. In addition, the roadways had been graded and were concentrating flows, necessitating additional BMP protection, estimated by Board staff to be \$1,000 per acre. The total economic benefit received by the Discharger for not installing and maintaining appropriate erosion and sediment control BMPs is estimated by Board staff to be \$4,000 per acre, based on the slope and soil type of disturbed areas. Based on information submitted by the Discharger as part of the Notice of Violation response, Board staff calculated that approximately 15 acres of disturbed area was not adequately protected with BMPs. Therefore, the cost to stabilize this construction site is estimated to be \$60,000. The economic benefit is the savings incurred by the Discharger in not spending \$60,000 prior to the 28 November 2012 storm event. However, the site was stabilized by 14 December 2012. Therefore, the economic benefit can be calculated as the interest saved by not spending \$60,000 for a period of 17 days. Water Board Senior Economist staff used the US EPA's BEN model to determine the economic benefit, as required by the Enforcement Policy. The estimated value is \$61.

The Enforcement Policy states (p. 21) that the total liability shall be at least 10% higher than the economic benefit, "so that liabilities are not construed as the cost of doing business and the assessed liability provides a meaningful deterrent to future violations." The economic benefit plus 10% is \$69.

STEP 9 – Maximum and Minimum Liability Amounts

a) Minimum Liability Amount: Economic Benefit plus 10%: **\$69**

Discussion: The Enforcement Policy requires that the minimum liability amount imposed not be below the economic benefit plus ten percent. As discussed above, the Central Valley Water Board Prosecution Team's estimate of the Discharger's economic benefit obtained from the violations cited in this Complaint is \$61. Therefore, the minimum liability amount pursuant to the Enforcement Policy is \$69.

b) Total Maximum Liability Amount: **\$2,390,000**

- i. Maximum per gallon liability amount for Violation #1, 30 November 2012: $(193,500 - 1,000) \text{ gallons} \times \$10/\text{gallon} = \$1,925,000$
- ii. Maximum per gallon liability amount for Violation #1, 2 December 2012: $(37,500 - 1,000) \text{ gallons} \times \$10/\text{gallon} = \$365,000$
- iii. Maximum per day liability amount for Violation #1: $(2 \text{ days} \times \$10,000/\text{day}) = \$20,000$
- iv. Maximum per day liability amount for Violation #2: $(6 \text{ days} \times \$10,000/\text{day}) = \$60,000$
- v. Maximum per day liability amount for Violation #3: $(2 \text{ days} \times \$10,000/\text{day}) = \$20,000$

Discussion: The maximum administrative liability amount is the maximum amount allowed by CWC section 13385. Without the benefit of the alternative approach for calculating liability for

multiday violations under the Enforcement Policy, the Discharger could be assessed up to \$2,390,000 in administrative civil liabilities for the alleged violations.

The proposed liability falls within these maximum and minimum liability amounts.

STEP 10 – Final Liability Amount

Based on the foregoing analysis, and consistent with the Enforcement Policy, the final liability amount proposed for the alleged violations is **\$124,557**.