



Lahontan Regional Water Quality Control Board

May 18, 2021

WDID No. 6A09LT000084

Kevin Evans
Bijou Marketplace, LLC
199 S. Los Robles Ave. #840
Pasadena, CA 91101
kevans@halferty.com

**CERTIFIED MAIL
RETURN RECEIPT REQUESTED
7009 0820 0001 6630 4659**

OFFER TO SETTLE ADMINISTRATIVE CIVIL LIABILITY, BIJOU MARKETPLACE, LLC, SOUTH LAKE TAHOE COMMERCIAL PROJECT, EL DORADO COUNTY

This letter contains an offer from the California Regional Water Quality Control Board, Lahontan Region, (Lahontan Water Board) Prosecution Team to settle potential claims for administrative civil liability arising out of alleged violations by Bijou Marketplace, LLC of the *General Waste Discharge Requirements and National Pollutant Discharge Elimination System General Permit for Storm Water Discharges Associated with Construction Activity in the Lake Tahoe Hydrologic Unit, Order No. R6T-2016-0010, NPDES No. CAG616002* (General Permit) at Bijou Marketplace, LLC's South Lake Tahoe Commercial Project at Ski Run Boulevard and Lake Tahoe Boulevard in South Lake Tahoe (Project).

As the owner of the Project and the legally responsible party enrolled in the General Permit, Bijou Marketplace, LLC (Discharger) is responsible for complying with all elements of the General Permit and strictly liable for penalties associated with non-compliance. Hereafter, this letter will be referred to as the "Settlement Offer."

This Settlement Offer provides the Discharger with an opportunity to resolve the alleged violations through payment of \$58,773 (fifty-eight thousand seven hundred and seventy-three dollars). Please read this letter carefully and respond no later than June 18, 2021.

Description of Violations

On February 2, 2018 the Lahontan Water Board issued the Discharger a Notice of Violation (NOV) for discharging turbid storm water on September 8, 2017 and November 16, 2017 to a municipal separate storm sewer system (MS4) which discharges to Lake Tahoe at the Ski Run Marina. The NOV also identified additional violations for inadequate and improperly installed sediment and erosion control best management practices (BMPs) on the Project on November 16, 2017, and the discharge of sediment to Bijou Park Creek on November 29, 2017. Subsequently,

PETER C. PUMPHREY, CHAIR | MICHAEL R. PLAZIAK, EXECUTIVE OFFICER

additional violations were documented as described below and in the enclosed Penalty Calculation Methodology.

Additional information about the Project site conditions and violations are found in the enclosed NOV, the Discharger's response to the NOV, the November 16, 2017 and March 22, 2018 staff inspection reports, and the NCE (consultant) Sampling Reports dated September 8, 2017, November 17, 2017, November 29, 2017, March 21-23, 2018, and April 7, 2018 (Enclosures 3 through 12 to this Settlement Offer).

The Prosecution Team, comprised of staff from the Lahontan Water Board and State Water Resources Control Board (State Water Board), alleges that the Discharger violated the following sections of the General Permit:

- (1) Numeric effluent limitations (NELs) through the discharge of turbid storm water runoff or storm water runoff containing Total Phosphorus and/or Total Iron from the Project (Violations 1, 2, and 5 through 10, as described in Enclosure 1, the Penalty Calculation Methodology);
- (2) Erosion control provisions by failing to implement adequate erosion control BMPs on the Project from November 16, 2017 through November 25, 2017 (Violation 3, as described in Enclosure 1); and
- (3) A prohibition against discharges attributable to human activities by failing to prevent sediment discharge following pipe repair on November 29, 2017 (Violation 4, as described in Enclosure 1).

Statutory Liability

Pursuant to Section 13385, subdivision (c) of the California Water Code, the Discharger is liable for administrative civil liabilities of up to \$10,000 per violation for each day in which the violation occurs and \$10 per gallon discharged in excess of the first 1,000 gallons. For the violations described in Enclosure 1, the maximum potential liability is \$130,000.

The State Water Resources Control Board's *Water Quality Enforcement Policy* (Enforcement Policy) states that the minimum penalty is the economic benefit plus 10 percent. In addition, pursuant to Water Code section 13385 subdivisions (h) and (i), mandatory minimum penalties (MMPs) of \$3,000 must be assessed when a serious effluent limit violation occurs, or when four or more non-serious violations occur in a six-month period. For the violations described in Enclosure 1, the minimum penalty is \$9,467. This amount includes \$3,467 for economic benefit plus 10 percent, and \$6,000 for two serious violations (Violations 9 and 10), which carry MMPs of \$3,000 each.

Proposed Settlement Offer

The Lahontan Water Board's Prosecution Team proposes to resolve Violations 1 through 10 with this Settlement Offer of \$58,773. This Settlement Offer was determined based on an assessment of the violations subject to MMPs and an assessment of the factors for non-MMP violations as set forth in Water Code section 13385, subdivision (e) using the penalty methodology set forth in the Enforcement Policy. Enclosure 1, the "Penalty Calculation Methodology" describes in detail how the penalty amount was calculated. The Prosecution Team believes that the proposed resolution of the alleged violations is fair and reasonable, fulfills the Lahontan Water Board's enforcement objectives, and is in the best interest of the public.

Should the Discharger choose *not* to accept this Settlement Offer, please be advised that the Lahontan Water Board Prosecution Team reserves the right to seek a higher liability amount, up to the maximum allowed by statute, either through issuance of a formal administrative civil liability complaint or by referring the matter to the Attorney General's Office. The Lahontan Water Board Prosecution Team also reserves the right to conduct additional investigation, including issuance of investigative orders and/or subpoenas to determine the number of gallons discharged and whether additional violations occurred. Any additional violations and gallons of discharge subjecting the Discharger to liability may be included in a formal enforcement action. The Discharger can avoid the risks inherent in a formal enforcement action and settle the alleged violations by accepting this Settlement Offer. Please note that the Settlement Offer does not address liability for any violation other than Violations 1-10 as described in the enclosed Penalty Calculation Methodology.

Options for Responding to the Settlement Offer**Option A: Accept the Offer**

If the Discharger chooses to accept this Settlement Offer, then the enclosed *Acceptance of Settlement Offer and Waiver of Right to Hearing (Acceptance and Waiver)* shall be completed and submitted no later than **June 18, 2021** to the following address:

Lahontan Regional Water Quality Control Board
Attention: Scott C. Ferguson
2501 Lake Tahoe Boulevard
South Lake Tahoe, CA 96150

Important! - Upon receipt of the *Acceptance and Waiver*, this settlement will be publicly noticed for a 30-day comment period as required by federal regulations. If no substantive comments are received within the 30 days, the Prosecution Team will ask the Lahontan Water Board's Executive Officer to formally endorse the *Acceptance and Waiver* as an order of the Lahontan Water Board. An invoice will then be mailed to the Discharger requiring payment of the \$58,773 administrative civil liability within 30 days of the date of the invoice.

If, however, substantive comments are received in opposition to this settlement and/or the Executive Officer declines to accept the settlement, then the Settlement Offer may be withdrawn. In this case, the Discharger will be notified and the Discharger's waiver pursuant to the *Acceptance and Waiver* will also be treated as withdrawn. The unresolved violations will be addressed in a formal enforcement action. An administrative civil liability complaint may be issued, and the matter may be set for a hearing.


Option B: Contest the Alleged Violations

If the Discharger wishes to contest the violations or the methodology used to calculate the proposed liability, it must submit a written response identifying the basis for the challenge, including any evidence to support its claims. The Discharger's response must be received by the Lahontan Water Board no later than **June 18, 2021**. The Lahontan Water Board Prosecution Team will evaluate the Discharger's basis for a challenge and may seek clarifying information or schedule an in-person meeting. The Prosecution Team will inform the Discharger whether a reduction in the settlement amount is warranted, or whether the original settlement amount is appropriate. The Discharger will be provided a final opportunity to accept the revised/original settlement amount before proceeding to formal enforcement.

Option C: Reject Offer

If the Discharger chooses to reject this Settlement Offer and/or does not complete and return the *Acceptance and Waiver*, the Discharger should expect that the Prosecution Team will conduct further investigation of the violations, issue an administrative civil liability complaint, and schedule a hearing. The Discharger will receive notice of any deadlines associated with that action. As previously stated, in such an action, the liability amount sought and/or imposed may exceed the liability amount set forth in this Settlement Offer.

If you have any questions about this settlement offer, please contact me at (530) 542-5432 or scott.ferguson@waterboards.ca.gov, or Ben Letton, Assistant Executive Officer, at (53) 542-5436 or ben.letton@waterboards.ca.gov.



Scott C. Ferguson, P.E.
Supervising Water Resources Control Engineer

Enclosures:

1. Acceptance of Settlement Offer and Waiver of Right to a Hearing
 2. Penalty Calculation Methodology
 3. NCE September 8, 2017 Sampling Report
 4. NCE November 17, 2017 Sampling Report
- (Enclosures continued next page)

Enclosures continued:

5. Lahontan Water Board Inspection Report for November 16, 2017
6. Halferty November 24, 2017 email w/attachments
7. NCE November 29, 2017 Sampling Report
8. Lahontan Water Board February 2, 2018 NOV
9. Halferty March 5, 2018 Response to NOV
10. NCE March 21-23, 2018 Sampling Report
11. Lahontan Water Board Inspection Report for March 22, 2018
12. NCE April 7, 2018 Sampling Report
13. Economic Benefit Analysis

cc: Jason Burke, City of South Lake Tahoe
Lahontan Water Board Members
Michael R. Plaziak, Executive Officer, Lahontan Water Board
Cathe Pool, Senior WRCE, Lahontan Water Board
Elizabeth Beryt, Office of Chief Counsel, State Water Board
David Boyers, Office of Enforcement, State Water Board
Wendy Wyels, Office of Enforcement, State Water Board
Ben Letton, Lahontan Water Board

ENCLOSURE 1

this *Acceptance and Waiver* will be published as required by law for public comment.

If no comments are received within the notice period that cause the Prosecution Team to reconsider the Settlement Offer, then the Prosecution Team will present this *Acceptance and Waiver* to the Lahontan Water Board's Executive Officer for formal endorsement on behalf of the Lahontan Water Board.

The Discharger understands that if significant comments are received in opposition to the settlement, then the offer may be withdrawn by the Prosecution Team. If the Settlement Offer is withdrawn, then the Discharger will be notified and the Discharger's waiver pursuant to the *Acceptance and Waiver* will also be treated as withdrawn. The unresolved violation(s) will be addressed in a formal enforcement action. An administrative civil liability complaint may be issued, and the matter may be set for a hearing.

The Discharger understands that once this *Acceptance and Waiver* is formally endorsed and an Order Number is inserted, then the full payment is a condition of this *Acceptance and Waiver*. An invoice will be sent upon endorsement, and full payment will be due within 30 days of the date of the invoice.

I hereby affirm that I am duly authorized to act on behalf of and to bind the Discharger in the making and giving of this *Acceptance and Waiver*.

Bijou Marketplace, LLC

By: _____

Title: _____

Date: _____

IT IS SO ORDERED, pursuant to California Water Code section 13385.

By: _____
Michael R. Plaziak, PG, Executive Officer

Date: _____

ENCLOSURE 2

ORDER NO. []

**PENALTY CALCULATION METHODOLOGY
FOR
BIJOU MARKETPLACE, LLC
EL DORADO COUNTY**

The State Water Resources Control Board's *Water Quality Enforcement Policy* (Enforcement Policy) establishes a methodology for determining administrative civil liability for discretionary penalties by addressing the factors that are required to be considered under California Water Code (Water Code) section 13385, subdivision (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: https://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2017/040417_9_final%20adopted%20policy.pdf .

Some violations alleged in this document are subject to mandatory minimum penalties (MMPs), as opposed to discretionary penalties. Water Code section 13385, subdivisions (h) and (i) require MMPs of \$3,000 per violation to be assessed for numeric effluent limit violations (NELs). Subdivision (h) requires that MMPs be assessed by the Water Boards for each serious violation. A serious violation is any waste discharge that exceeds the effluent limitation for a Group 1 pollutant by more than 40 percent, or a Group 2 pollutant by more than 20 percent (Group 1 and 2 pollutants are those listed in Appendix A of Section 123.45 of Title 40 of the Code of Federal Regulations). Subdivision (i) requires that MMPs be assessed for any non-serious or chronic violations that occur four or more times in any period of six months, with no penalty assessed for the first three violations. Chronic violations include violations of waste discharge effluent limitations for pollutants that are not a Group I or Group II pollutant.

Violations 1 through 10, detailed below, are alleged violations of provisions in the *General Waste Discharge Requirements and National Pollutant Discharge Elimination System General Permit For Storm Water Discharges Associated with Construction Activity In The Lake Tahoe Hydrologic Unit, Counties Of Alpine, Placer, and El Dorado, Order No. R6T-2016-0010, NPDES No. CAG616002* (General Permit). Violations 1, 2 and 5 through 10 are subject to either Mandatory Minimum Penalties (MMPs) or discretionary penalties. Violations 3 and 4 are subject to discretionary penalty only.

For ease in reading the remainder of this document, a summary of the ten violations follows:

Violation Number	Violation and Date
1	Storm water runoff exceeding turbidity effluent limitation on September 8, 2017
2	Storm water runoff exceeding turbidity effluent limitation on November 16, 2017
3	Insufficient and improperly installed BMPs on November 16, 2017
4	Violation of prohibition of discharge attributable to human activities of any waste or deleterious material to surface waters on November 29, 2017
5	Storm water runoff exceeding Total Phosphorus effluent limitation on March 22, 2018
6	Storm water runoff exceeding turbidity effluent limitation on March 23, 2018
7	Storm water runoff exceeding Total Iron effluent limitation on March 23, 2018
8	Storm water runoff exceeding turbidity effluent limitation on April 7, 2018
9	Storm water runoff exceeding Total Iron effluent limitation on April 7, 2018
10	Storm water runoff exceeding Total Phosphorus effluent limitation on April 7, 2018

Violation 1 – Storm water runoff exceeding turbidity effluent limitation on September 8, 2017

Enclosure 3, the NCE Sampling Report for September 8, 2017, documents that on September 8, 2017 storm water runoff from the Project was discharging to the southeast inlet. Turbidity was measured three times over a five-minute period, with measurements of 150 Nephelometric Turbidity Units (NTU), 105 NTU, and 80.5 NTU. Section X, Compliance Determination of the General Permit states that concentrations/measurements shall be averaged when multiple sample data are collected. Therefore, the average storm water runoff turbidity was 111.8 NTU. The storm water flowed into a storm drain that discharges to the City of South Lake Tahoe's municipal separate storm sewer system (MS4).

The Prosecution Team alleges that the discharge of turbid storm water on September 8, 2017 is a violation of the General Permit, section IV - Effluent Limitations, subsection A, because the measured value exceeds the numeric effluent limit (NEL) for turbidity of 20 NTU. Storm water effluent turbidity measured on September 8, 2017 averaged 111.8 NTU. Turbidity is not a Group 1 or Group 2 pollutant; therefore, turbidity effluent violations of the General Permit do not meet the definition of a “serious” violation under Water Code section 13385, subdivision (h). Because this is the first chronic violation in a 6-month period, this violation is not subject to MMPs.

Violation 1 9/8/2017 Effluent Limitation (Turbidity, Chronic) **\$0.00**

Violation 2 – Storm water runoff exceeding turbidity effluent limitation on November 16, 2017

Enclosure 4, the NCE Sampling Report dated November 17, 2017, documents that on November 16, 2017 storm water runoff from the Project was sampled multiple times throughout the day at three locations (North Excavation to 24-inch existing pipe, Runoff onto Highway 50, and Ski Run Entrance). The average turbidity from seven measurements was 176.3 NTU. The above-referenced locations discharge to a 24-inch pipe containing Bijou Park Creek that flows through the Project site, the Caltrans MS4 on Highway 50, and the City’s MS4 on Ski Run Boulevard, respectively.

The Prosecution Team alleges that this discharge of turbid storm water is a violation of the General Permit, section IV - Effluent Limitations, subsection A because the average of 176.3 NTU exceeds the NEL for turbidity of 20 NTU. This chronic violation is the second violation within a 6-month period and is therefore not subject to a mandatory minimum penalty. However, the Prosecution Team finds that Violation 2 is significant and has therefore elected to assess discretionary penalties. The table below describes the factors applicable to a discretionary penalty for Violation 2.

PENALTY FACTOR	VALUE	DISCUSSION
Degree of toxicity	2	The degree of toxicity of the discharge poses a moderate risk when the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of threat to potential receptors. Turbid discharges pose a moderate risk because turbidity can cloud the receiving water, adversely affecting Lake Tahoe’s famed lake clarity as well as reducing the amount of sunlight reaching aquatic plants. Turbid discharges can also clog fish gills and smother aquatic habitat and spawning areas. In addition, turbid discharges can also transport other materials such as nutrients, metals, and oils and grease, which can negatively impact aquatic life and aquatic habitat.

PENALTY FACTOR	VALUE	DISCUSSION
Actual harm or potential for harm to beneficial uses	3	<p>The harm or potential harm to beneficial uses are considered moderate if potential impacts are observed or reasonably expected, but harm or potential harm to beneficial uses is moderate and likely to attenuate without appreciable medium or long-term acute or chronic effects. The site conditions on November 16, 2017 caused turbid storm water runoff to discharge from the Project site at several locations including to the Caltrans and City of South Lake Tahoe (City) MS4s and to the Bijou Park Creek flowing through the site. These conveyances direct storm water flow to Lake Tahoe, an Outstanding National Resource Water (ONRW) under federal policy and afforded the highest protections due to its extraordinary clarity and purity. The Lake Tahoe Total Maximum Daily Load (TMDL) identifies Lake Tahoe as impaired by fine sediment, phosphorus, and nitrogen, causing it to be listed on the Clean Water Act section 303(d) list of impaired water bodies due to loading by these pollutants, and identifies the need to reduce these pollutants to protect lake clarity. The turbid discharges likely caused moderate harm to beneficial uses because the MS4 systems and Bijou Park Creek discharge directly to Lake Tahoe at the Ski Run Marina, and therefore can have direct adverse impact on lake clarity and beneficial uses. The beneficial uses of Lake Tahoe are numerous, including but not limited to, contact and non-contact water recreation, municipal and domestic supply, cold freshwater habitat, spawning, and migration.</p>
Susceptibility to cleanup or abatement	1	<p>A score of 1 is appropriate if less than 50 percent of the discharge is susceptible to cleanup or abatement, or if 50 percent or more of the discharge is susceptible to cleanup or abatement, but the discharger failed to cleanup 50 percent or more of the discharge within a reasonable time. The turbid storm water discharge was not subject to cleanup or abatement due to the short distance between the project site and Lake Tahoe and the lack of access to the MS4 systems. Once discharged to Lake Tahoe, the turbid storm water discharge would have quickly dispersed over a significant distance, further impeding cleanup or abatement of 50 percent or more of the discharge.</p>

PENALTY FACTOR	VALUE	DISCUSSION
Potential for harm score	6	The potential for harm score is calculated by adding the scores for degree of toxicity; actual harm or potential for harm to beneficial uses; and susceptibility to cleanup or abatement. Here that results in a score of 6 (2+3+1).
Deviation from requirement and per day factor	0.28	A major Deviation from Requirement is appropriate when the requirement was rendered ineffective in its essential functions. Here, the Deviation from Requirement is major because the Discharger disregarded the General Permit's requirement to implement appropriate Best Management Practices (BMPs) necessary to maintain storm water discharges of less than 20 NTU. The turbid discharges measured on November 16, 2017 substantially exceeded this amount (average turbidity was 176 NTU) and therefore the requirement was rendered ineffective in its essential function of ensuring a discharge of less than 20 NTU. Based on a major Deviation from Requirement and a Potential for Harm score of 6, a per day factor of 0.28 was determined from Table 2 of the Enforcement Policy.
Volume discharged	n/a	A proposed liability based on the volume discharged is not included; however, the Prosecution Team reserves the right to require the Discharger to produce an estimate of the volume of the discharge and to propose liability on a per gallon basis should this matter proceed to hearing.
Adjustment for high volume discharges	n/a	A proposed liability based on the volume discharged is not included; however, the Prosecution Team reserves the right to propose liability on a per gallon basis should this matter proceed to hearing.
Days of discharge	1	This violation is subject to one day of discharge.
Initial Liability for Violation 2	\$2,800	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day (\$10,000/day).
Adjustments for Discharger Conduct		
Culpability	1.1	A discharger's degree of culpability prior to the violation is determined by what a reasonable and prudent person would have done or not done under similar circumstances.

PENALTY FACTOR	VALUE	DISCUSSION
		The Discharger had a site-specific SWPPP prepared by a Qualified SWPPP Developer and obtained coverage under the General Permit. A reasonably prudent person would know the requirements of a permit he or she enrolled in and what was required after having a SWPPP prepared. Therefore, the Discharger's failure to implement effective BMPs to control turbidity was at least somewhat negligent.
History of Violations	1	There is no known history of violations.
Cleanup and Cooperation	1.1	Adjustments to lower the multiplier should be made where there is exceptional cleanup and cooperation compared to what can reasonably be expected, as well as a higher multiplier where there is not. Although there were turbid discharges on November 16, 2017, the Discharger subsequently took steps to address deficiencies and improve BMPs. However, it took more than a week to bring Project BMPs into compliance; therefore, a score of 1.1 is appropriate.
Total Base Liability for Violation 2	\$3,388	The base liability is calculated as the initial liability multiplied by each of the three factors, above.

Violation 2 11/16/2017 Chronic Effluent Discharge (Turbidity) **\$3,388**

Violation 3 – Insufficient and improperly installed BMPs on November 16, 2017

Enclosure 5 documents a November 16, 2017 Lahontan Water Board staff inspection of the Bijou Marketplace, LLC Project. Water Board staff found that insufficient BMPs were installed at the Project, and that some of the BMPs that were in place were improperly installed. As described in Enclosure 4 and Violation 2 (above), the lack of proper BMPs resulted in the discharge of turbid storm water. The Prosecution Team alleges that insufficient and improperly installed BMPs are a violation of Section VIII (Best Management Practices) of the General Permit which states "Dischargers shall minimize or prevent pollutants in storm water discharges through the use of controls, structures, and management practices..."

Section VIII.D (Inspection, Maintenance, and Repair) of the General Permit states in part "Dischargers shall conduct maintenance or repair of failed or inadequate BMPs within 72 hours of identification by a QSP or other trained personnel, or before the next predicted rain event, whichever is sooner." Therefore, the Discharger should have

corrected the deficiencies by November 20, 2017. However, Enclosure 6, the Discharger's BMP schedule, documents numerous remaining deficient BMPs on this date. The Discharger did not propose to bring the BMPs into compliance until

November 25, 2017. The Prosecution Team finds that Violation 3 is significant and has therefore elected to assess discretionary penalties for this violation, as described in the table below.

PENALTY FACTOR	VALUE	DISCUSSION
Potential for harm	Moderate	<p>A moderate potential for harm exists when the characteristics of the violation have substantially impaired the Water Board's ability to perform their statutory and regulatory functions, present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm. Most non-discharge violations should be considered to present a moderate potential for harm. Due to insufficient and/or improperly installed BMPs on November 16, 2017, significant unprotected disturbed soil areas and other conditions were observed on the Project during inspection. BMPs were inadequate to maintain storm water effluent levels below NELs, as turbid storm water runoff was observed at several locations discharging from the Project Site. The turbid storm water runoff discharged to the Caltrans and City MS4s and to Bijou Park Creek. These conveyances direct storm water runoff and Bijou Park Creek flow to Lake Tahoe at the Ski Run Marina. Lake Tahoe has been designated an Outstanding National Resource Water (ONRW) and afforded the highest protections due to its extraordinary clarity, purity, and deep blue color. The beneficial uses of Lake Tahoe include, but are not limited to, contact and non-contact water recreation, municipal and domestic supply, cold freshwater habitat, spawning, and migration. The Lake Tahoe Total Maximum Daily Load (TMDL) identifies Lake Tahoe as impaired by fine sediment, phosphorus and nitrogen, causing it to be listed on the Clean Water Act section 303(d) list of impaired water bodies due to significant loading by these pollutants, and identifies the need to reduce these pollutants to protect lake clarity. The inadequate BMPs led to numerous turbid discharges containing fine sediment and likely nutrients as well. These pollutants are known to have adverse impacts on the lake's famed clarity as detailed in the TMDL, and result in moderate or higher potential for harm to Lake Tahoe's water quality and its beneficial uses. The</p>

PENALTY FACTOR	VALUE	DISCUSSION
		Prosecution Team reserves the right to adjust this violation to major if this matter proceeds to hearing.
Deviation from requirement	Major	A major Deviation from Requirement occurs when a requirement is rendered ineffective in its essential functions. Here, the Deviation from Requirement is major because the requirement to provide sediment and erosion controls sufficient to prevent discharges from the site was rendered ineffective when multiple discharges of sediment from the Project site occurred.
Per day factor	0.55	Based upon a major Deviation from Requirement and a moderate Potential for Harm, a per day factor of 0.55 was determined from Table 3 in the Enforcement Policy. The middle value was chosen but the Prosecution Team reserves the right to increase the factor if this matter proceeds to hearing.
Days of violation	7	The violation occurred for seven days, on November 16, 2017 (the date of inspection), and from November 20 to November 25, 2017 (elapsed time beyond 72 hours specified in the permit for bringing deficient BMPs into compliance). This assessment assumes all deficient BMPs were in fact corrected as of November 25, 2017. If this matter proceeds to hearing, the Prosecution Team reserves the right to consider additional days of violation.
Initial Liability for Violation 3	\$38,500	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day (\$10,000/day).
Adjustments for Discharger Conduct		
Culpability	1.1	The discharger's degree of culpability prior to the violation is determined by what a reasonable and prudent person would have done or not done under similar circumstances. The Discharger had a site-specific SWPPP prepared by a Qualified SWPPP Developer and obtained coverage under the General Permit. The Discharger had installed some BMPs; however, they were inadequate for the intensity of the storm, some were improperly installed, and numerous disturbed soil areas lacked erosion and sediment controls.

PENALTY FACTOR	VALUE	DISCUSSION
History of Violations	1	There is no known history of violations.
Cleanup and Cooperation	1.1	Adjustments to lower the multiplier should be made where there is exceptional cleanup and cooperation compared to what can reasonably be expected, as well as a higher multiplier where there is not. Once it was determined that turbid discharges were occurring, the Discharger took appropriate steps to abate the discharges; however, it took substantially longer than 72 hours (the time allowed by the Permit) to bring the Project's deficient BMPs into compliance.
Total Base Liability for Violation 3	\$46,585	The base liability is calculated as the initial liability multiplied by each of the above three factors.

Violation 3 11/16/2018 Inadequate BMPs **\$46,585.00**

Violation 4 – Violation of prohibition of discharge attributable to human activities of any waste or deleterious material to surface waters on November 29, 2017

Enclosure 7, the NCE Sampling Report for November 29, 2017, documents that the Discharger failed to inspect and remove sediment following repair of the 24-inch pipe containing Bijou Park Creek. The northeast manhole was observed on November 29, 2017 to have highly turbid water flowing through it upon initial reintroduction of flow following completion of the repairs. The flow through the manhole lasted several minutes until it could be shut down. Subsequently, the manhole was blocked and filter fabric was placed over the outlet until the water ran clear. The northeast manhole discharges to the City MS4. The Prosecution Team alleges the discharge of sediment to surface water is a violation of the General Permit, section III, Discharge Prohibitions, subsection F which states, "*The discharge attributable to human activities of any waste or deleterious material to surface waters of the Lake Tahoe Hydrologic Unit is prohibited.*" The Prosecution Team finds that Violation 4 is significant and has therefore elected to assess discretionary penalties for this violation, as described in the table below.

PENALTY FACTOR	VALUE	DISCUSSION
Degree of toxicity	2	The degree of toxicity of the discharge poses a moderate risk when the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a

PENALTY FACTOR	VALUE	DISCUSSION
		<p>moderate level of threat to potential receptors. Turbid discharges can cloud the receiving water, adversely affecting Lake Tahoe's famed lake clarity as well as reducing the amount of sunlight reaching aquatic plants. Turbid discharges can also clog fish gills and smother aquatic habitat and spawning areas. In addition, turbid discharges can transport other materials such as nutrients, metals, and oils and grease, which can negatively impact aquatic life and aquatic habitat.</p>
Actual harm or potential for harm to beneficial uses	2	<p>A below moderate actual harm or potential for harm to beneficial uses is appropriate if potential impacts are observed or reasonably expected, but based on the characteristics of the discharge and applicable beneficial uses, harm or potential harm to beneficial uses is measurable in the short term, but not appreciable. The Discharger's actions on November 19, 2017 caused a relatively small amount of turbid storm water runoff to discharge from the Project Site to the City MS4 via the Bijou Park Creek pipe. The City MS4 directs storm water flow to Lake Tahoe, an Outstanding National Resource Water (ONRW) under federal policy and afforded the highest protections. The beneficial uses of Lake Tahoe include, but are not limited to, contact and non-contact water recreation, municipal and domestic supply, cold freshwater habitat, spawning, and migration. The discharge likely had a below-moderate actual harm or potential for harm to beneficial uses because although the MS4 system discharges directly to Lake Tahoe at the Ski Run Marina, and therefore can adversely affect lake clarity and beneficial uses, the observed discharge amount was small.</p>
Susceptibility to cleanup or abatement	1	<p>A score of 1 is appropriate if less than 50 percent of the discharge is susceptible to cleanup or abatement, or if 50 percent or more of the discharge is susceptible to cleanup or abatement, but the discharger failed to cleanup 50 percent or more of the discharge within a reasonable time. The turbid storm water discharge was not subject to cleanup or abatement due to the short distance between the project site and Lake Tahoe and the lack of access to the MS4 systems. Once discharged to Lake Tahoe, the turbid storm water discharge would have quickly dispersed over a significant</p>

PENALTY FACTOR	VALUE	DISCUSSION
		distance, further impeding cleanup or abatement of 50 percent or more of the discharge.
Potential for harm score	5	The potential for harm score is calculated by adding the scores for degree of toxicity; actual harm or potential for harm to beneficial uses; and susceptibility to cleanup or abatement. Here that results in a score of 5 (2+2+1).
Deviation from requirement and per day factor	0.15	A major Deviation from Requirement is appropriate where the intended effectiveness of the requirement was rendered ineffective. Here, the Deviation from Requirement is major because the Discharger's contractor did not heed NCE's admonition that the pipe repair could not result in the discharge of turbid water. Based upon a major Deviation from Requirement and a Potential for Harm score of 5, a per day factor of 0.15 was determined from Table 2 of the Enforcement Policy.
Volume discharged	n/a	A proposed liability based on the volume discharged is not included; however, the Prosecution Team reserves the right to require the Discharger to produce an estimate of the volume of the discharge and to propose liability on a per gallon basis should this matter proceed to hearing.
Adjustment for high volume discharges	n/a	A proposed liability based on the volume discharged is not included; however, the Prosecution Team reserves the right to propose liability on a per gallon basis should this matter proceed to hearing.
Days of discharge	1	The violation consists of a single day of sediment discharge on November 29, 2017.
Initial Liability for Violation 4	\$1,500	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day (\$10,000/day).
Adjustments for Discharger Conduct		
Culpability	1.2	The discharger's degree of culpability prior to the violation is determined by what a reasonable and prudent person would have done or not done under similar circumstances. According to Enclosure 7, NCE "made clear to the contractor that we cannot have construction runoff (turbid water)

PENALTY FACTOR	VALUE	DISCUSSION
		leaving the site.” However, the contractor did not take reasonable measures to prevent the discharge and failed to inspect the pipe following repair, resulting in a discharge of sediment.
History of Violations	1	There is no known history of violations.
Cleanup and Cooperation	1	Adjustments to lower the multiplier should be made where there is exceptional cleanup and cooperation compared to what can reasonably be expected, as well as a higher multiplier where there is not. In this case, there are no reasons to adjust the multiplier either lower or higher. The contractor took appropriate action upon notification of the turbid discharge, which is what is reasonably expected.
Total Base Liability for Violation 4	\$1,800	The base liability is calculated as the initial liability multiplied by each of the above three factors.

Violation 4 11/29/2018 Discharge due to human activities **\$1,800**

Violation 5 – Storm water runoff exceeding Total Phosphorus effluent limitation on March 22, 2018

Enclosure 10, the NCE Sampling Report for March 21-23, 2018, documents that on March 22, 2018 storm water runoff from the Project contained a Total Phosphorus (P) average concentration of 0.15 milligrams per liter (mg/L). Storm water overwhelmed the capacity of the SEZ swale and flowed through two 24-inch storm drains which conveyed flows to the Ski Run Marina via the Transition manhole. The Prosecution Team alleges that this discharge of storm water is a violation of the General Permit, section IV - Effluent Limitations, subsection A because the measured value of 0.15 mg/L Total P exceeds the NEL for Total P of 0.1 mg/L. . However, there were extenuating circumstances which caused the exceedance.

On the morning of March 22, 2018, upstream neighbors were upset by flooding conditions in their neighborhood and removed Project BMPs that were preventing substantial run-on from entering the Project site. The result was a rapid inundation of the Project site from run-on, causing the violation. This violation is a serious violation, due to exceedance of a Group 1 pollutant by more than 40 percent, and therefore is subject to a MMP of \$3,000. However, pursuant to Water Code section 13385, subdivision (j)(1)(C), subdivisions (h) and (i) do not apply in the event of an intentional

act of a third party, the effects of which were beyond the control of the discharger. Therefore, this violation is exempt from an MMP.

Violation 5 3/22/2018 Effluent Discharge (Total P, Serious) **Exempt**

Violation 6 – Storm water runoff exceeding turbidity effluent limitation on March 23, 2018

Enclosure 10, the NCE Sampling Report for March 21-23, 2018, documents that on March 23, 2018 storm water runoff from the Project contained an average turbidity of 23.6 NTU. This storm water runoff flowed through the West Manhole which discharges to the City MS4. The flow in the West Manhole on March 23, 2018 was a mixture of storm water from the Project site and run-on from the previous day. There was no storm water run-on onto the Project reported on March 23, 2018.

The Prosecution Team alleges that the discharge of storm water runoff on March 23, 2018 is a violation of the General Permit, section IV - Effluent Limitations, subsection A because the measured turbidity of 23.6 NTU exceeds the NEL for turbidity of 20 NTU. This is a chronic violation potentially subject to MMPs. However, due to the removal of BMPs by the upstream neighbors on March 22, 2018, run-on from the previous day was still discharging from the Project Site via the West Manhole, causing the violation. Pursuant to Water Code section 13385, subdivision (j)(1)(C), subdivisions (h) and (i) do not apply in the event of an intentional act of a third party, the effects of which were beyond the control of the discharger. Therefore, this violation is exempt from an MMP.

Violation 6 3/23/2018 Effluent Limitation (Turbidity, Chronic) **Exempt**

Violation 7 – Storm water runoff exceeding Total Iron effluent limitation on March 23, 2018

Enclosure 10, the NCE Sampling Report for March 21-23, 2018, documents that on March 23, 2018 storm water runoff from the Project contained an average concentration of 0.86 mg/L Total Iron. This storm water runoff flowed through the West Manhole which discharges to the City MS4. No storm water run-on was reported on this date.

The Prosecution Team alleges that this discharge is a violation of the General Permit, section IV - Effluent Limitations, subsection A because the measured value of 0.86 mg/L Total Iron exceeds the NEL for Total Iron of 0.5 mg/L. Total Iron is a Group 1 pollutant. The concentration in the stormwater effluent on March 23, 2018 exceeded the NEL by more than 40 percent, and therefore meets the definition of a serious violation. However, due to the removal of BMPs by the upstream neighbors on March 22, 2018, run-on from the previous day was still discharging from the Project Site via the West Manhole, causing the violation. Pursuant to Water Code section 13385, subdivision (j)(1)(C), subdivisions (h) and (i) do not apply in the event of an intentional act of a third party, the effects of which were beyond the control of the discharger. Therefore, this violation is exempt from an MMP.

Violation 7 3/23/2018 Effluent Discharge (Total Iron, Serious) **Exempt**

Violation 8 – Storm water runoff exceeding turbidity effluent limitation on April 7, 2018

Enclosure 12, the NCE Sampling Report for April 7, 2018, documents that on April 7, 2018 storm water runoff from the Project contained a turbidity of 142 NTU. This storm water flowed off-site at the Ski Run entrance to a catch basin that discharges to the City MS4. The storm water run-on onto the Project on this date averaged 87 NTU. While both the run-on and the storm water runoff exceeded the General Permit's NEL for turbidity of 20 NTU, the storm water runoff's turbidity was greater than that of the run-on. Section X of the General Permit states that if constituent concentrations of waters entering the Project (e.g., run-on) exceed the NEL, *"there must be no increase in the constituent concentrations in the waters that are discharged from the project area."*

The Prosecution Team alleges the discharge of storm water runoff with turbidity exceeding that of the run-on is a violation of the General Permit, section X – Compliance Determination, subsection A – Compliance with Effluent Limitations. This chronic violation is potentially subject to an MMP of \$3,000. However, this is the first chronic violation within a 6-month period and is therefore not subject to an MMP. Nevertheless, the Prosecution Team finds that Violation 8 is significant and has therefore elected to assess discretionary penalties for this violation. The table below describes the factors applicable to a discretionary penalty for Violation 8.

PENALTY FACTOR	VALUE	DISCUSSION
Degree of toxicity	2	The degree of toxicity of the discharge poses a moderate risk when the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of threat to potential receptors. Turbid discharges can cloud the receiving water, adversely affecting Lake Tahoe's famed lake clarity as well as reducing the amount of sunlight reaching aquatic plants. Turbid discharges can also clog fish gills and smother aquatic habitat and spawning areas. In addition, turbid discharges can transport other materials such as nutrients, metals, and oils and grease, which can negatively impact aquatic life and aquatic habitat.
Actual harm or potential for harm to beneficial uses	2	A below moderate actual harm or potential for harm to beneficial uses is appropriate if potential impacts are observed or reasonably expected, but based on the characteristics of the discharge and applicable beneficial uses, harm or potential harm to beneficial uses is measurable in the short term, but not appreciable. The site conditions on April 7, 2018 caused a relatively small ("low flow") amount of turbid storm water runoff to discharge from the Project Site at the Ski Run entrance. The turbid storm water runoff discharged to the City MS4 which

PENALTY FACTOR	VALUE	DISCUSSION
		directs storm water flow to Lake Tahoe, an Outstanding National Resource Water (ONRW) under federal policy and afforded the highest protections. The beneficial uses of Lake Tahoe include, but are not limited to, contact and non-contact water recreation, municipal and domestic supply, cold freshwater habitat, spawning, and migration. The discharge likely had a below-moderate actual harm or potential for harm to beneficial uses because although the MS4 system discharges directly to Lake Tahoe at the Ski Run Marina, and therefore can adversely affect lake clarity and beneficial uses, the observed discharge amount was small.
Susceptibility to cleanup or abatement	1	A score of 1 is appropriate if less than 50 percent of the discharge is susceptible to cleanup or abatement, or if 50 percent or more of the discharge is susceptible to cleanup or abatement, but the discharger failed to cleanup 50 percent or more of the discharge within a reasonable time. The turbid storm water discharge was not subject to cleanup or abatement due to the short distance between the project site and Lake Tahoe and the lack of access to the MS4 systems. Once discharged to Lake Tahoe, the turbid storm water discharge would have quickly dispersed over a significant distance, further impeding cleanup or abatement of 50 percent or more of the discharge
Potential for harm score	5	The potential for harm score is calculated by adding the scores for degree of toxicity; actual harm or potential for harm to beneficial uses; and susceptibility to cleanup or abatement. Here that results in a score of 5 (2+2+1).
Deviation from requirement and per day factor	0.10	A moderate Deviation from Requirement is appropriate where the intended effectiveness of the requirement was partially compromised, meaning the requirement was not met, and the effectiveness of the requirement was only partially achieved. Here, the Deviation from Requirement is moderate because the Discharger took steps prior to the storm event to maximize the detention time in the SEZ swale and inspected and maintained BMPs. Based upon a moderate Deviation from Requirement and a Potential for Harm score of 5, a per day factor of 0.10 was determined from Table 2 of the Enforcement Policy.

PENALTY FACTOR	VALUE	DISCUSSION
Volume discharged	n/a	A proposed liability based on the volume discharged is not included; however, the Prosecution Team reserves the right to require the Discharger to produce an estimate of the volume of the discharge and to propose liability on a per gallon basis should this matter proceed to hearing.
Adjustment for high volume discharges	n/a	A proposed liability based on the volume discharged is not included; however, the Prosecution Team reserves the right to propose liability on a per gallon basis should this matter proceed to hearing.
Days of discharge	1	This violation is subject to one day of discharge.
Initial Liability for Violation 8	\$1,000	The liability is calculated as per day factor multiplied by the number of days multiplied by the maximum liability per day (\$10,000/day).
Adjustments for Discharger Conduct		
Culpability	1	The discharger's degree of culpability prior to the violation is determined by what a reasonable and prudent person would have done or not done under similar circumstances. The Discharger had a site-specific SWPPP prepared by a Qualified SWPPP Developer and obtained coverage under the General Permit. A reasonably prudent person would know the requirements of a permit he or she enrolled in and what was required after having a SWPPP prepared. The site had been winterized and BMPs inspected and maintained, and therefore should have been adequately protected; however, the discharge still occurred.
History of Violations	1	There is no known history of violations.
Cleanup and Cooperation	1	Adjustments to lower the multiplier should be made where there is exceptional cleanup and cooperation compared to what can reasonably be expected, as well as a higher multiplier where there is not. In this case, there are no reasons to adjust the multiplier either lower or higher.

PENALTY FACTOR	VALUE	DISCUSSION
Total Base Liability for Violation 8	\$1,000	The base liability is calculated as the initial liability multiplied by each of the above three factors.

Violation 8 4/7/2018 Chronic Effluent Discharge (Turbidity) **\$1,000.00**

Violation 9 – Storm water runoff exceeding Total Iron effluent limitation on April 7, 2018

Enclosure 12, the NCE Sampling Report for April 7, 2018, documents that on April 7, 2018 storm water runoff at the Project's Ski Run entrance was sampled and analyzed for various constituents. The sample from the Ski Run entrance, which flowed into the City MS4, was found to contain a Total Iron concentration of 3.6 mg/L. The run-on sample had an average Total Iron concentration of 1.7 mg/L.

The Prosecution Team alleges the discharge of storm water runoff on April 7, 2018 containing Total Iron at a concentration of 3.6 mg/L exceeded the General Permit's NEL of 0.5 mg/L for Total Iron and is therefore a violation of the General Permit, section IV - Effluent Limitations, subsection A. Total Iron is a Group 1 pollutant, the concentration of which on April 7, 2018 exceeded both the NEL and the run-on average by more than 40 percent, meeting the definition of a serious violation. Therefore, this violation is subject to an MMP of \$3,000.

Violation 9 4/7/2018 Effluent Discharge (Total Iron, Serious) **\$3,000.00**

Violation 10 – Storm water runoff exceeding Total P effluent limitation on April 7, 2018

Enclosure 12, the NCE Sampling Report for April 7, 2018, documents that on April 7, 2018 storm water runoff at the Project's Ski Run entrance was sampled and analyzed for various constituents. The sample from the Ski Run entrance, which flowed into the City MS4, was found to contain a Total Phosphorus (P) concentration of 0.33 mg/L. The run-on sample had an average Total P concentration of 0.115 mg/L.

The Prosecution Team alleges the discharge of storm water runoff on April 7, 2018 containing Total P at a concentration of 0.33 mg/L exceeded the General Permit's NEL of 0.1 mg/L for Total P and is therefore a violation of the General Permit, section IV - Effluent Limitations, subsection A. Total P is a Group 1 pollutant, the concentration of which on April 7, 2018 exceeded both the NEL and the run-on average by more than 40 percent, meeting the definition of a serious violation. Therefore, this violation is subject to an MMP of \$3,000.

Violation 10 4/7/2018 Effluent Discharge (Total P, Serious) **\$3,000.00**

The Total Base Liability amount for Violations 1 through 10 is as follows:

Violation	Base Liability Amount	Type of Penalty
1	\$0	Mandatory Minimum Penalty
2	\$3,388	Discretionary
3	\$46,585	Discretionary
4	\$1,800	Discretionary
5	Exempt	Mandatory Minimum Penalty
6	Exempt	Mandatory Minimum Penalty
7	Exempt	Mandatory Minimum Penalty
8	\$1,000	Discretionary
9	\$3,000	Mandatory Minimum Penalty
10	\$3,000	Mandatory Minimum Penalty
Total	\$58,773	

Other Factors

The Enforcement Policy states that five other factors must be considered before obtaining the final liability amount.

Other Factor Considerations		
Ability to pay and continue in business	No adjustment	Bijou Marketplace LLC is a limited liability corporation developing a large commercial property in downtown South Lake Tahoe. An entity with a project of this size likely has the ability to pay the penalty and remain in business.
Economic benefit	\$3,152	As shown in Enclosure 13, the economic benefit is based on the delayed and/or avoided costs associated with properly stabilizing the Project with erosion control BMPs prior to November 16, 2017 (Violation 3) and avoided costs for failure to inspect the 24-inch pipeline containing Bijou Park

Other Factor Considerations		
		<p>Creek flows after repairs but prior to putting it back on-line on November 29, 2017 (Violation 4).</p> <p>The delayed cost of properly stabilizing the site with temporary erosion control BMPs prior to November 16, 2017 was calculated to be approximately \$2,644. Based on review of the November 24, 2017 Revised Construction Site Stormwater BMP Plan, additional silt fence and fiber rolls should have been installed prior to the storm event. The Discharger avoided the costs for materials and labor to install, maintain and remove these items. Other BMPs (application of additional mulch in disturbed soil areas, and installation of additional rolled erosion control product and gravel bag berms) necessary to stabilize the site were delayed.</p> <p>The cost of preventing the sediment discharge that occurred on November 29, 2017 primarily consisted of failing to inspect the pipe following repair prior to initiating flow (an avoided cost). Once the discharge was discovered, the flow was stopped while preparations were made to filter the discharge until the flow ran clear. The latter was neither avoided nor delayed since this step was taken that same day to avoid any additional discharge of sediment. Therefore, the only cost savings (failure to inspect the pipeline prior to discharge) was an avoided cost estimated to be \$508 to conduct a closed-circuit television/video pipeline inspection.</p> <p>The total economic benefit is estimated to be $\\$2,644 + \\$508 = \\$3,152$.</p>
Other factors as justice may require	No adjustment	The costs of investigation and enforcement are “other factors as justice may require” and could be added to the liability amount. However, the Lahontan Water Board has not added these costs at this time.

Other Factor Considerations		
Maximum liability	\$130,000.00	Based on Water Code section 13385, subdivision (c), liability can be imposed up to \$10,000 per violation per day. There are 13 days of violation alleged in Violations 1-4, and 8-10. Because Violations 5-7 are exempt from MMPs, they have not been included in the determination of maximum liability.
Minimum liability	\$9,467.20	Based on California Water Code section 13385, subdivision (e), civil liability must be at least the economic benefit of non-compliance. Per the Enforcement Policy, the minimum liability is to be the economic benefit plus 10%. ($\$3,152 + 10\% = \$3,467.20$.) In addition, Violations 9 and 10 are mandatory minimum penalties of \$3,000 each. The minimum liability is the sum of the economic benefit + 10 percent and the two mandatory minimum penalties.
Final Liability	\$58,773	The final liability amount is the total base liability plus any adjustment for the ability to pay, economic benefit, and other factors. The final liability must be more than the minimum liability and less than the maximum liability.

Based on the assessment, above, the Water Board Prosecution Team recommends a liability amount of **\$58,773** be assessed for Violations 1 through 10.