

**San Diego Regional Water Quality Control Board**

July 8, 2015

**Certified Mail – Return Receipt Requested**  
Article Number: 7011 0470 0002 8952 5249

Mr. Stephen L. Marsh, Esq.  
Dentons US LLP  
Suite 2600  
600 West Broadway  
San Diego, California 92101  
[stephen.marsh@dentons.com](mailto:stephen.marsh@dentons.com)

**In reply refer to:** SM-828254:FMelbourn

**Final Adopted Stipulated Administrative Civil Liability Order No. R9-2015-0015  
Jacobs Center for Neighborhood Innovation  
Northwest Village Creek Construction Project, WDID No. 9 37C269293**

Mr. Marsh:

Attached find Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order No. R9-2015-0015 (Order), Jacobs Center for Neighborhood Innovation, Northwest Village Creek Construction Project, San Diego County, without attachment. I will include the attachment in the email transmittal. The Order was adopted on July 7, 2015, by the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) by way of Executive Officer approval pursuant to San Diego Water Board Resolution No R9-2014-0046.

As required by the Order, payment of \$46,718 is payable to the California State Water Resources Control Board's Cleanup and Abatement Account. Payment must be submitted to the following address within thirty (30) days of adoption:

State Water Resources Control Board  
Accounting Office  
Attn: ACL Payment  
PO Box 1888  
Sacramento, CA 95812-1888

Additionally, upon payment please email me a Portable Document Format (PDF) file copy of the check to both of the email addresses below.

Mr. Stephen L. Marsh, Esq. - 2 -  
Jacobs Center for Neighborhood Innovation  
Northwest Village Creek Construction Project  
Final Adopted Stipulated Administrative Civil Liability Order No. R9-2015-0015

July 8, 2015

In the subject line of any response, please include the reference number SM-828254:FMelbourn. Written responses shall be sent via email to [SanDiego@waterboards.ca.gov](mailto:SanDiego@waterboards.ca.gov). For questions or comments, please contact me by telephone at (619) 521-3372, or by email at [fmelbourn@waterboards.ca.gov](mailto:fmelbourn@waterboards.ca.gov).

Respectfully,



FRANK T. MELBOURN  
Water Resource Control Engineer  
Compliance Assurance Unit

FTM:cmc:ftm

Enclosure: Final Adopted Stipulated ACL Order No. R9-2015-0015

cc with enclosure and attachment:

1. David Boyers, State Water Board, [dboyers@waterboards.ca.gov](mailto:dboyers@waterboards.ca.gov)
2. Wayne Chiu, San Diego Water Board, [wchiu@waterboards.ca.gov](mailto:wchiu@waterboards.ca.gov)
3. Chiara Clemente, San Diego Water Board, [cclemente@waterboards.ca.gov](mailto:cclemente@waterboards.ca.gov)
4. Kailyn Ellison, State Water Board, [kellison@waterboards.ca.gov](mailto:kellison@waterboards.ca.gov)
5. Jeremy Haas, San Diego Water Board, [jhaas@waterboards.ca.gov](mailto:jhaas@waterboards.ca.gov)
6. Stephen Maduli-Williams, Jacobs Center for Neighborhood Innovation, [swilliams@jacobscenter.org](mailto:swilliams@jacobscenter.org)
7. Kelly Moden, Jacobs Center for Neighborhood Innovation, [kmoden@jacobscenter.org](mailto:kmoden@jacobscenter.org)
8. James Smith, San Diego Water Board, [jsmith@waterboards.ca.gov](mailto:jsmith@waterboards.ca.gov)
9. Laurie Walsh, San Diego Water Board, [lwalsh@waterboards.ca.gov](mailto:lwalsh@waterboards.ca.gov)

Tech Staff Info & Use	
Order No.	R9-2015-0015
WDID No.	9 37C369293
Enforcement ID	418163
Place ID	SM-828254
Violation ID	855292
Violation ID	855293
Violation ID	855294
Violation ID	855295

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION**

**SETTLEMENT AGREEMENT AND STIPULATION FOR ENTRY OF  
ADMINISTRATIVE CIVIL LIABILITY ORDER NO. R9-2015-0015  
IN THE MATTER OF  
JACOBS CENTER FOR NEIGHBORHOOD INNOVATION**

**NORTHWEST VILLAGE CREEK CONSTRUCTION PROJECT  
SAN DIEGO COUNTY**

**INTRODUCTION**

This Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order (Stipulated Order) is entered into by and between the Assistant Executive Officer of the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board), on behalf of the San Diego Water Board Prosecution Team (Prosecution Team), and Jacobs Center for Neighborhood Innovation (Discharger) (collectively Parties) and is presented to the San Diego Water Board, for adoption as an order, by settlement, pursuant to Government Code section 11415.60.

**RECITALS**

1. The Discharger is constructing the Northwest Village Creek Construction Project (Project). The Project entails demolition of an asphalt parking lot and structure, and grading for a retail pharmacy and access road. The Project is located at 602 Euclid Avenue, San Diego, California (Site), in the San Diego community of Chollas View.
2. Discharger is the project developer. Stephen Maduli-Williams, Discharger Vice President is the Legally Responsible Person (LRP) for the Discharger for the Project.
3. On March 26, 2014, Discharger filed a Notice of Intent (NOI) to comply with California State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, as amended by Order Nos. 2010-0014-DWQ and 2012-0006-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities* (Construction Storm Water Permit) and was assigned Waste Discharge Identification (WDID) No. 9 37C369293 to the Project.
4. Construction Storm Water Permit section V.A.2. requires the implementation of best management practices (BMPs), using best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) to reduce pollution from storm water runoff from construction sites.

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5. Construction Storm Water Permit section VIII requires dischargers to calculate the site's Risk Level based upon "the site's sediment risk and receiving water risk during periods of soil exposure (i.e. grading and site stabilization)." The Site's Storm Water Pollution Prevention Plan (SWPPP) characterizes the Project as being Risk Level 1.
6. The 3.7 acre Site lies within the Chollas Hydrologic Subarea (HSA) (908.22) of the Pueblo San Diego Hydrologic Unit. Storm water discharges from the Site drain directly into Chollas Creek and indirectly into Chollas Creek via the City of San Diego's storm water conveyance system.
7. The Water Quality Control Plan for the San Diego Basin (Basin Plan) designates the following beneficial uses for Chollas Creek:
  - a. Contact Water Recreation (REC-1);
  - b. Non-contact Water Recreation (REC-2);
  - c. Warm Freshwater Habitat (WARM); and
  - d. Wildlife Habitat (WILD).
8. On December 4, 2014, Wayne Chiu of the San Diego Water Board's Storm Water Management Unit inspected the Site. Based upon the results of the inspection, the San Diego Water Board issued Notice of Violation No. R9-2014-0145 on December 10, 2014, to the Discharger.
9. The San Diego Water Board invested 110.5 staff hours to investigate, prepare enforcement documents, and consider this action for a total cost of \$7,879. See Technical Analysis Exhibit No. 8.
10. Discharger is alleged to have violated provisions of law for which the San Diego Water Board may impose civil liability pursuant to section 13385 of the California Water Code (Water Code).

The Prosecution Team alleges the following violations, set forth in full in the attached Technical Analysis, by the Discharger:

11. Violation No. 1: Discharge of Sediment Laden Storm Water: (1 day)  
Discharger discharged sediment laden storm water from the Site into Chollas Creek on December 4, 2014, in violation of Construction Storm Water Permit sections III.A., III.B., V.A.1., and V.A.2. The Discharger ceased the discharge upon the San Diego Water Board's discovery and direction. Discharger's action resulted in one (1) day of violation.

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12. Violation No. 2: Failure to Implement Erosion Controls: (1 day)  
During the December 4, 2014, San Diego Water Board inspection several areas of the Site appeared to be inactive and without effective soil cover for erosion control in violation of Construction Storm Water Permit, Attachment C, section D.2. The Discharger corrected the violation upon notification by the San Diego Water Board; therefore, Discharger is in violation for one (1) day.
13. Violation No. 3: Failure to Implement Sediment Controls: (1 day)  
The December 4, 2014, San Diego Water Board inspection noted the discharge of a significant amount of sediment onto Market Street and the sidewalk as a result of inadequate sediment control BMPs along the Site perimeter and the two Market Street entrances in violation of Construction Storm Water Permit, Attachment C, section E.1. The Discharger corrected the violation upon notification by the San Diego Water Board; therefore, Discharger is in violation for one (1) day.
14. Violation No. 4: Failure to Implement Run-on and Runoff Controls: (1 day)  
The December 4, 2014, San Diego Water Board inspection documented where Site perimeter sediment controls were not established or maintained, resulting in run-on from the Church's Chicken property onto the Site in violation of Construction Storm Water Permit, Attachment C, section F. The Discharger corrected the violation upon notification by the San Diego Water Board; therefore, Discharger is in violation for one (1) day.
15. Violation No. 5: Failure to Cover Stockpiles: (1 day)  
The December 4, 2014, San Diego Water Board inspection documented that the large soil stockpile failed to have adequate cover in violation of Construction Storm Water Permit, Attachment C, section B.1.b. The Discharger corrected the violation upon notification by the San Diego Water Board; therefore, Discharger is in violation for one (1) day.
16. Violation No. 6: Failure to Implement Entrance Tracking BMPs: (1 day)  
The December 4, 2014, San Diego Water Board inspection documented significant sediment tracking at the Market Street site entrance (east, near Church's Chicken), indicating inadequate sediment control BMPs and sweeping of the entrance in violation of Construction Storm Water Permit, Attachment C, section B.1.e. The Discharger corrected the violation upon notification by the San Diego Water Board; therefore, Discharger is in violation for one (1) day.

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17. Violation No. 7: Failure to Implement Vehicle Fluid Leaks BMPs: (1 day)  
The December 4, 2014, San Diego Water Board inspection confirmed that the vehicles did not use drip pans to catch vehicle fluid leaks in violation of Construction Storm Water Permit, Attachment C, section B.3.a. The Discharger corrected the violation upon notification by the San Diego Water Board; therefore, Discharger is in violation for one (1) day.
18. Violation No. 8: Failure to Complete Inspection Checklist: (1 day)  
The submitted weekly QSP inspection report for December 4, 2014, did not include implementation dates in violation of Construction Storm Water Permit, Attachment C, section G.5.g. The Discharger corrected the violation upon notification by the San Diego Water Board; therefore, Discharger is in violation for one (1) day.
19. Pursuant to Water Code section 13385(a), a person that violates Water Code section 13376, a waste discharge requirement, or a requirement of section 301 of the federal Clean Water Act is subject to administrative civil liability pursuant to Water Code section 13385(c) "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."
20. The alleged violations constitute violations subject to Water Code section 13385. Therefore, the maximum liability that the San Diego Water Board may assess pursuant to Water Code section 13385(c) is summarized in Table 1, Maximum and Minimum Liability Amounts.
21. Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The State Water Board's Water Quality Enforcement Policy (Enforcement Policy) requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability that the San Diego Water Board shall assess pursuant to Water Code section 13385(e) is summarized in Table 1. Maximum and Minimum Liability Amounts. See also Technical Analysis Exhibit No. 7.

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**Table 1. Maximum and Minimum Liability Amounts**

Violation	Days	Liability	
		Maximum	Minimum
1. Discharge of Sediment Laden Storm Water	1	\$10,000	\$1,070
2. Failure to Implement Erosion Controls	1	\$10,000	\$5,089
3. Failure to Implement Sediment Controls	1	\$10,000	\$109
4. Failure to Implement Run-on and Runoff Controls	1	\$10,000	\$547
5. Failure to Cover Stockpiles	1	\$10,000	\$2,545
6. Failure to Implement Entrance Tracking BMPs	1	\$10,000	\$1,231
7. Failure to Implement Vehicle Fluid Leaks BMPs	1	\$10,000	\$2,896
8. Failure to Complete Inspection Checklist	1	\$10,000	\$113
	<b>Totals</b>	<b>\$80,000</b>	<b>\$13,600</b>

22. The Parties have engaged in confidential settlement negotiations and agree to resolve the alleged violations set forth above in this Stipulated Order without formal administrative proceedings. The Parties have agreed to the final imposition of **forty-six thousand seven hundred eighteen dollars (\$46,718)** in liability against the Discharger pursuant to Water Code section 13385 and Government Code section 11415.60. The liability amount includes seven thousand eight hundred seventy-nine dollars (\$7,879) in San Diego Water Board staff costs. Table 2. Penalty Summary, provides a breakdown of the liabilities. The Prosecution Team calculated the administrative civil liability penalty under Water Code section 13385 in accordance with the Enforcement Policy. A full discussion of the penalty calculation factors can be found in Attachment A, incorporated herein by reference as if set forth in full.

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**Table 2. Penalty Summary**

<b>Alleged Violation</b>	<b>Days of Violation</b>	<b>Liability Per Day of Violation</b>	<b>Liability Amount</b>
<b>1. Discharge of Sediment Laden Storm Water, December 4, 2014.</b>	1	\$3,300	\$3,300
<b>2. Failure to Implement Erosions, December 4, 2014.</b>	1	\$5,089	\$5,089
<b>3. Failure to Implement Sediment Controls, December 4, 2014.</b>	1	\$4,550	\$4,550
<b>4. Failure to Implement Run-on and Runoff Controls, December 4, 2014.</b>	1	\$4,550	\$4,550
<b>5. Failure to Cover Stockpiles, December 4, 2014.</b>	1	\$4,550	\$4,550
<b>6. Failure to Implement Entrance Tracking BMPs, December 4, 2014.</b>	1	\$4,550	\$4,550
<b>7. Failure to Implement Vehicle Fluid Leaks BMPs, December 4, 2014.</b>	1	\$7,700	\$7,700
<b>8. Failure to Complete Inspection Checklist, December 4, 2014.</b>	1	\$4,550	\$4,550
<b>Total Base Liability Amount</b>			<b>\$38,839</b>
<b>Staff Costs</b>			<b>\$7,879</b>
<b>Total Liability</b>			<b>\$46,718</b>

23. Based on the information in the record, the Prosecution Team determined that the above resolution of the alleged violations is fair and reasonable, and fulfills the enforcement objectives of Water Code sections 13000 et seq., and the Enforcement Policy, and satisfies the objectives and requirements of the federal Clean Water Act as implemented by the foregoing, and that no further action is warranted concerning the alleged violations except as provided in this Stipulated Order, and that this Stipulated Order is in the best interest of the public.

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**STIPULATIONS**

The Parties stipulate to the following:

24. Party Contact Information:

For the San Diego Water Board: Chiara Clemente, Enforcement Coordinator  
San Diego Water Board  
2375 Northside Drive, Suite 100  
San Diego, California 92108  
(619) 521-3371  
[Chiara.Clemente@waterboards.ca.gov](mailto:Chiara.Clemente@waterboards.ca.gov)

Kailyn Ellison (Counsel)  
State Water Resources Control Board  
Office of Enforcement  
1001 I Street, 16<sup>th</sup> Floor  
Sacramento, California 95814  
(916) 445-9557  
[Kailyn.Ellison@waterboards.ca.gov](mailto:Kailyn.Ellison@waterboards.ca.gov)

For the Discharger:

Stephen L. Marsh (Counsel)  
McKenna Long & Aldridge LLP  
600 West Broadway, Suite 2600  
San Diego, California 92101-3372  
(619) 699-2418  
[smarsh@mckennalong.com](mailto:smarsh@mckennalong.com)

25. Administrative Civil Liability: Discharger hereby agrees to the imposition of an administrative civil liability totaling \$46,718 as set forth in Paragraph 22 herein.

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26. Payment and Costs: Discharger shall pay the total administrative civil liability amount of forty-six thousand seven hundred eighteen dollars (\$46,718) within thirty (30) days of adoption of this Stipulated Order executed by the San Diego Water Board. Payment shall be made by check to the "State Water Board Cleanup and Abatement Account." Discharger shall indicate on the check the number of this Stipulated Order (R9-2015-0015) and send it to:

State Water Resources Control Board  
Accounting Office  
Attn: ACL Payment  
P.O. Box 1888  
Sacramento, California 95812-1888

Discharger shall email a PDF file copy of the check to the designated San Diego Water Board Party Contacts.

27. Matters Addressed by Stipulation: Upon adoption of this Stipulated Order by the San Diego Water Board, this Stipulated Order represents a final and binding resolution to settle, as set forth herein, all claims, violations, or causes of action as alleged. The provisions of this paragraph are expressly conditioned on the payment of the administrative civil liability as provided herein by the deadlines specified in this Stipulated Order, and the Discharger's full satisfaction of the obligations described in this Stipulated Order.
28. Compliance with Applicable Laws: Discharger understands that payment of the administrative civil liability in accordance with the terms of this Stipulated Order and/or compliance with the terms of this Stipulated Order is not a substitute for compliance with applicable laws, and that continuing violations of the type alleged in this Stipulated Order may subject it to further enforcement, including additional administrative civil liability.
29. Attorney's Fees and Costs: Except as otherwise provided herein, each Party shall bear its attorney's fees and costs arising from the Party's own counsel in connection with the matters set forth herein.
30. Covenant Not to Take Further Enforcement Action: In consideration of Discharger's compliance with this Stipulated Order, the Prosecution Team and the San Diego Water Board hereby covenant not to bring any further administrative or judicial enforcement action against the Discharger, whether under California or federal law, concerning the specific violations alleged in this Stipulated Order.

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31. No Admission of Liability if Stipulated Order Does Not Take Effect: If this Stipulated Order does not take effect because it is not approved by the San Diego Water Board, or its delegee, or is vacated in whole or in part by the State Water Resources Control Board or a court, Discharger's signature becomes void and the Discharger does not admit or stipulate to any of the findings or allegations in this Stipulated Order, or that it has been or is in violation of the Water Code, or any other federal, state, or local law or ordinance.
32. Public Notice: Discharger understands that the San Diego Water Board will conduct a thirty (30) day public review and comment period prior to consideration and adoption. If significant new information is received that reasonably affects the propriety of presenting this Stipulated Order to the San Diego Water Board, or its delegate, for adoption, the Assistant Executive Officer may unilaterally declare this Stipulated Order void and decide not to present it to the San Diego Water Board. Discharger agrees that it may not rescind or otherwise withdraw its approval of this Stipulated Order.
33. Addressing Objections Raised During Public Comment Period: The Parties agree that the procedures for adopting this Stipulated Order by the San Diego Water Board and review of this Stipulated Order by the public are lawful and adequate. In the event procedural objections are raised prior to the adoption of this Stipulated Order, the Parties agree to meet and confer concerning any such objections and may agree to revise or adjust the procedure as necessary or advisable under the circumstances.
34. No Waiver of Right to Enforce: The failure of the Prosecution Team or San Diego Water Board to enforce any provision of this Stipulated Order shall in no way be deemed a waiver of such provision, or in any way affect the validity of this Stipulated Order. The failure of the Prosecution Team or San Diego Water Board to enforce any such provision shall not preclude it from later enforcing the same or any other provision of this Stipulated Order.
35. Interpretation: This Stipulated Order shall be construed as if the Parties prepared it jointly. Any uncertainty or ambiguity shall not be interpreted against any one Party.
36. Modification: This Stipulated Order shall not be modified by any of the Parties by oral representation made before or after its execution. All modifications must be in writing, signed by all Parties, and approved by the San Diego Water Board, or its delegate.

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37. If Stipulated Order Does Not Take Effect: In the event that this Stipulated Order does not take effect because it is not approved by the San Diego Water Board, or its delegate, or is vacated in whole or in part by the State Water Resources Control Board or a court, the Parties acknowledge that they expect to proceed to a contested evidentiary hearing before the San Diego Water Board and/or a hearing panel to determine whether to assess administrative civil liabilities for the underlying alleged violations, unless the Parties agree otherwise. The Parties agree that all oral and written statements and agreements made during the course of settlement discussions will not be admissible as evidence in the hearing pursuant to Evidence Code sections 1152 and 1154. The Parties agree to waive any and all objections based on settlement communications in this matter, other than Evidence Code sections 1152 and 1154 evidentiary objections, including, but not limited to:
- a. Objections related to prejudice or bias of any of the San Diego Water Board members or their advisors and any other objections that are premised in whole or in part on the fact that the San Diego Water Board members or their advisors were exposed to some of the material facts and the Parties' settlement positions as a consequence of reviewing the Order, and therefore may have formed impressions or conclusions prior to any contested evidentiary hearing on the violations alleged in this Stipulated Order; or
  - b. Laches or delay or other equitable defenses based on the time period for administrative or judicial review to the extent this period has been extended by these settlement proceedings.
38. Waiver of Hearing: Discharger has been informed of the rights provided by Water Code section 13323(b), and hereby waives its right to a hearing before the San Diego Water Board prior to the adoption of this Stipulated Order by the San Diego Water Board, or its delegate.
39. Waiver of Right to Petition: Discharger hereby waives its right to petition the San Diego Water Board's adoption of this Stipulated Order for review by the State Water Resources Control Board, and further waives its right, if any, to appeal the same to a California Superior Court and/or any California appellate level court.
40. Covenant Not to Sue: Discharger covenants not to sue or pursue any administrative or civil claim(s) against any State Agency or the State of California, its officers, Board Members, employees, representatives, agents, or attorneys arising out of or relating to any matter addressed herein.

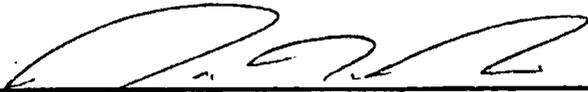
**Settlement Agreement and  
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41. San Diego Water Board is Not Liable: Neither the San Diego Water Board members nor the San Diego Water Board staff, attorneys, or representatives shall be liable for any injury or damage to persons or property resulting from acts or omissions by the Discharger, its directors, officers, employees, agents, representatives, or contractors in carrying out activities pursuant to this Stipulated Order.
42. Authority to Bind: Each person executing this Stipulated Order in a representative capacity represents and warrants that he or she is authorized to execute this Stipulated Order on behalf of, and to bind the entity on whose behalf he or she executes this Stipulated Order.
43. Necessity for Written Approvals: All approvals and decisions of the San Diego Water Board under the terms of this Stipulated Order shall be communicated to the Discharger in writing. No oral advice, guidance, suggestions or comments by employees or officials of the San Diego Water Board regarding submissions or notices shall be construed to relieve the Discharger of its obligation to obtain any final written approval required by this Stipulated Order.
44. No Third Party Beneficiaries: This Stipulated Order is not intended to confer any rights or obligations on any third party or parties, and no third party or parties shall have any right of action under this Stipulated Order for any cause whatsoever.
45. Effective Date: This Stipulated Order shall be effective and binding on the Parties upon the date the San Diego Water Board adopts this Stipulated Order.
46. Counterpart Signatures: This Stipulated Order may be executed and delivered in any number of counterparts, each of which when executed and delivered shall be deemed to be an original, but such counterparts shall together constitute one document.
47. Severability: The provisions of this Stipulated Order are severable; should any provision be found invalid the remainder shall remain in full force and effect.

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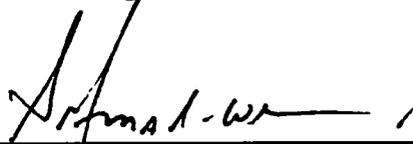
**It is so stipulated.**

California Regional Water Quality Control Board, San Diego Region, Prosecution Team

By:   
\_\_\_\_\_  
JAMES G. SMITH  
Assistant Executive Officer

Date: 30 Apr 2015

Jacobs Center for Neighborhood Innovation

By:   
\_\_\_\_\_  
STEPHEN MADULI-WILLIAMS  
Vice President

Date: 5-15-15

Approved as to Form

By:   
\_\_\_\_\_  
STEPHEN L. MARSH  
Counsel for Discharger

Date: 14 May 2015

**Settlement Agreement and  
Stipulation for Entry of  
ACL Order No. R9-2015-0015  
Northwest Village Creek Construction Project**

**FINDINGS OF THE CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD,  
SAN DIEGO REGION**

48. The terms of the foregoing Stipulation are fully incorporated herein and made part of this Stipulated Order of the San Diego Water Board.
49. The San Diego Water Board finds that the Recitals set forth herein are true.
50. The proposed Stipulated Order was noticed for public comment for a minimum of thirty (30) days prior to San Diego Water Board consideration.
51. This Stipulated Order is severable; should any provision be found invalid the remainder shall remain in full force and effect.
52. In adopting this Stipulated Order, the San Diego Water Board has considered, where applicable, each of the factors prescribed in Water Code sections 13327 and 13385(e). The consideration of these factors is based upon information and comments obtained by the San Diego Water Board's staff in investigating the allegations herein or otherwise provided to the San Diego Water Board or its delegate by the Parties and members of the public. In addition to these factors, this Stipulated Order recovers the costs incurred by the staff of the San Diego Water Board for this matter.
53. This is an action to enforce the laws and regulations administered by the San Diego Water Board. The San Diego Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321 (a)(2), Title 14, of the California Code of Regulations.
54. The San Diego Water Board's Executive Officer is hereby authorized to refer this matter directly to the Attorney General for enforcement if the Discharger fails to perform any of its obligations under this Stipulated Order.
55. Fulfillment of the Discharger's obligations under this Stipulated Order constitutes full and final satisfaction of any and all liability for each allegation in this Stipulated Order in accordance with the terms of this Stipulated Order.

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Pursuant to Water Code sections 13323 and 13385, and Government Code section 11415.60, **IT IS HEREBY ORDERED** by the California Regional Water Quality Control Board, San Diego Region.

I, David W. Gibson, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by the California Regional Water Quality Control Board, San Diego Region, on \_\_\_\_\_.

\_\_\_\_\_  
DAVID W. GIBSON  
Executive Officer

Date: \_\_\_\_\_

or

I, David W. Gibson, Executive Officer, do hereby certify that the foregoing is a full, true, and correct copy of an Order adopted by delegated authority granted to me from the California Regional Water Quality Control Board, San Diego Region.

  
\_\_\_\_\_  
DAVID W. GIBSON  
Executive Officer

Date: 7 July 2015

Attachment A: Technical Analysis

Attachment A

CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD  
SAN DIEGO REGION

# TECHNICAL ANALYSIS

Settlement Agreement and Stipulation for Entry of  
Administrative Civil Liability  
Order No. R9-2015-0015  
Jacobs Center for Neighborhood Innovation  
Northwest Village Creek Construction Project

Noncompliance with

State Water Resources Control Board  
Order No. 2009-0009-DWQ, as amended by  
Order Nos. 2010-0014-DWQ and 2012-0006-DWQ,  
*National Pollutant Discharge Elimination System (NPDES)*  
*General Permit for Storm Water Discharges Associated with*  
*Construction and Land Disturbance Activities*  
and  
Water Code section 13376  
and  
Clean Water Act section 301

Prepared  
by

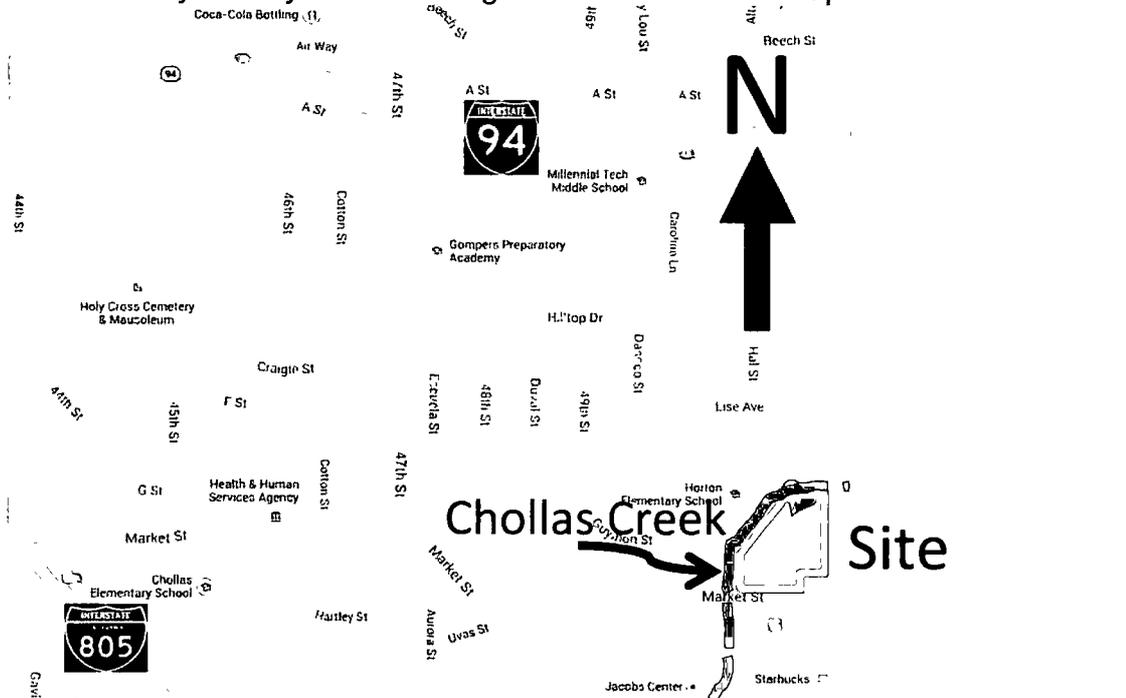
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April 23, 2015

**A. Introduction**

This technical analysis provides a summary of factual and analytical evidence that support the findings in Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order No. R9-2015-0015 in the Matter of Jacobs Center for Neighborhood Innovation (Stipulated Order) and the assessment of civil liability in the amount of forty-six thousand seven hundred and eighteen dollars (**\$46,718**) against Jacobs Center for Neighborhood Innovation (Discharger) for violations of California State Water Resources Control Board (State Water Board) Order No. 2009-0009-DWQ, as amended by Order Nos. 2010-0014-DWQ and 2012-0006-DWQ, *National Pollutant Discharge Elimination System (NPDES) General Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities* (Construction Storm Water Permit). See Exhibit No. 1, Construction Storm Water Permit.

The Stipulated Order will be issued to the Discharger because the Discharger failed to comply with the terms and conditions of the Construction Storm Water Permit during the ongoing construction of a retail shopping center that includes a Walgreens store, referred to as the Northwest Village Creek Construction Project (Project), located on 3.7 acres within the City of San Diego's Chollas View community at 602 Euclid Avenue, San Diego, California 92114 (Site). The Site lies within the Chollas Hydrologic Subarea (HSA) (908.22) of the Pueblo San Diego Hydrologic Unit. Storm water discharges from the Site drain directly into Chollas Creek and indirectly into Chollas Creek via the City of San Diego's storm water conveyance system. See Figure 1. Site Location Map.



**Figure 1. Site Location Map.** Location of Northwest Village Creek Construction Project site (outlined in red) at 602 Euclid Avenue, San Diego, California 92114.

Jacobs Center for Neighborhood Innovation (JCNI) is the project developer. Stephen Maduli-Williams is the contact for JCNI and the “Legally Responsible Person” (LRP) for the Discharger for the Project. JCNI was founded in 1995 and is a nonprofit foundation working in partnership with the Jacobs Family Foundation. On March 26, 2014, Stephen Maduli-Williams, on behalf of JCNI, filed a Notice of Intent (NOI) to comply with the Construction Storm Water Permit for the Project with the State Water Board. See Exhibit No. 2, Notice of Intent. The NOI stated that construction activities would begin on March 24, 2014, and end on October 31, 2014. On March 28, 2014, the State Water Board processed the NOI and assigned Waste Discharge Identification (WDID) No. 9 37C369293 to the Project. On December 19, 2014, Mr. Maduli-Williams submitted a Change of Information (COI) to the NOI stating that construction activity for the Project did not commence until August 25, 2014.

The Site’s Storm Water Pollution Prevention Plan (SWPPP) characterizes the Project as being Risk Level 1. Pursuant to Construction Storm Water Permit section VIII, dischargers “calculate the site’s sediment risk and receiving water risk during periods of soil exposure (i.e. grading and site stabilization).” “Risk Level 1” is assigned to projects with low receiving water risk and low sediment risk. (Construction Storm Water Permit, § II.J.1.a.)

**B. Construction Storm Water Permit**

The Construction Storm Water Permit authorizes discharges of storm water associated with construction activity as long as the best available technology economically achievable (BAT) and best conventional pollutant control technology (BCT) are implemented to reduce or eliminate pollutants in storm water runoff. BAT/BCT technologies include passive systems such as erosion and sediment control best management practices (BMPs<sup>1</sup>) as well as structural controls, as necessary, to achieve compliance with water quality standards. The Construction Storm Water Permit identifies effective erosion control measures such as “preserving existing vegetation where feasible, limiting disturbance, and stabilizing and re-vegetating disturbed areas as soon as possible after grading or construction activities.” (Construction Storm Water Permit, § II.J.1.e.)

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<sup>1</sup> Best management practices (BMPs) are “schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of ‘waters of the United States.’ BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.” (40 C.F.R. § 122.2)

The Construction Storm Water Permit further identifies erosion control BMPs as the primary means of preventing storm water contamination. (Construction Storm Water Permit, § II.J.1.e.) The Construction Storm Water Permit identifies sediment controls as the secondary means of preventing storm water contamination. (*Id.* at § II.J.1.f.) The Construction Storm Water Permit further states that when erosion control techniques are ineffective, sediment control techniques should be used to capture any soil that becomes eroded. (*Id.* at § II.J.1.e.)

**C. Complaint Inspection**

On December 4, 2014, the California Regional Water Quality Control Board, San Diego Region (San Diego Water Board) received a telephone complaint from a concerned citizen about a discharge of sediment laden storm water from the Project. The concerned citizen emailed photographs of the Site in the form of JPG computer files and videos in the form of MOV files that document violations of the Construction Storm Water Permit. See Exhibit No. 3, Concerned Citizen Photographs.

San Diego Water Board inspector Wayne Chiu inspected the Site on December 4, 2014, after receiving the citizen complaint that morning of a sediment laden storm water discharge from the Site into Chollas Creek. Mr. Chiu observed multiple violations of the Construction Storm Water Permit as outlined in the December 10, 2014, Notice of Violation (NOV) No. R9-2014-0145. See Exhibit No. 4, Notice of Violation No. R9-2014-0145.<sup>2</sup>

**D. QSP Site Inspection Reports**

Whitson Contracting & Management, Inc., the Project Qualified SWPPP Practitioner (QSP) conducted weekly storm water site inspections for the Discharger as well as pre-, during-, and post-storm event inspections. These reports further documented the failure of the Discharger to implement effective erosion and sediment control BMPs, as well as Housekeeping BMPs. See Exhibit No. 5, Qualified SWPPP Practitioner Inspection Reports.

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<sup>2</sup> The NOV transmittal includes a copy of the December 4, 2014, San Diego Water Board inspection report.

**E. Beneficial Uses of Affected Waters**

The Basin Plan designates beneficial uses for all surface and ground waters in the San Diego Region. These beneficial uses "form the cornerstone of water quality protection under the Basin Plan." (Basin Plan, Chapter 2) Beneficial uses are defined in the Basin Plan as "the uses of water necessary for the survival or well being of man, plants and wildlife." (*Id.*)

The Basin Plan also designates water quality objectives to protect the designated beneficial uses. Water Code section 13050(h) defines "water quality objectives" as "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area."

The Basin Plan designates the following beneficial uses for Chollas Creek:

1. Contact Water Recreation (REC-1);
2. Non-contact Water Recreation (REC-2);
3. Warm Freshwater Habitat (WARM); and
4. Wildlife Habitat (WILD).

Chollas Creek is designated as an impaired water body for copper, lead, and zinc pursuant to Clean Water Act section 303(d). A Total Maximum Daily Load (TMDL) has been adopted to address this impairment. Chollas Creek is designated as a water quality limited segment for indicator bacteria pursuant to Clean Water Act section 303(d). A TMDL has been adopted to address this impairment.

**F. Determination of Administrative Civil Liability**

An administrative civil liability may be imposed pursuant to the procedures in Water Code section 13323. The Stipulated Order alleges the act(s) or failure to act that constitutes a violation of law, the provision of law authorizing civil liability, and the civil liability. Pursuant to the relevant portions of Water Code section 13385(a)

A person who violates any of the following shall be liable civilly in accordance with this section:

- (1) Section 13375 or 13376.
- (2) A waste discharge requirement or dredged or fill material permit issued pursuant to this chapter or any water quality certification issued pursuant to Section 13160.
- (3) A requirement established pursuant to section 13383.

Furthermore, Water Code section 13385 (c) provides that

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.

Water Code section 13385(e) requires the consideration of several factors when determining the amount of civil liability to impose. These factors include

the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, the degree of toxicity of the discharge, 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 violation, and other matters that justice may require. 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.

**G. Alleged Violations**

The following allegations against the Discharger are the basis for assessing administrative civil liability pursuant to Water Code section 13385, and also appear in the Stipulated Order:

1. Discharge of Sediment Laden Storm Water Runoff (1 day, December 4, 2014)

All discharges except for storm water and non-storm water discharges specifically authorized by the Construction Storm Water Permit are prohibited. (Construction Storm Water Permit, § III.B.) Furthermore, “[d]ischargers shall not violate any discharge prohibitions contained in applicable Basin Plans or statewide water quality control plans.” (*Id.* at § III.A.) San Diego Water Board Basin Plan, Chapter 4, Waste Discharge Prohibition No. 8 prohibits discharges to the storm water conveyance system that are not composed entirely of storm water. “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.” (*Id.* at § V.A.2. and Att. C, § A.1.b.)

During the storm event of December 3-4, 2014, storm water runoff flowed across the Site to its southwest corner and into two basins with drains that discharge directly into Chollas Creek without retaining the runoff and allowing the sediment to drop out. The Discharger describes the basins as “detention basins.” However, the basins fail to meet design requirements; therefore, they are not “detention basins.” The SWPPP clearly states that the basins were not designed to remove pollutants such as a sedimentation basin (SE-2).<sup>3</sup> See Exhibit No. 6, Storm Water Pollution Prevention Plan at p. 26, Note SC-b. This was further documented by the San Diego Water Board inspector in his notes that the basins failed to have risers or spillways.<sup>4</sup> The failure to reduce or eliminate the pollutants in the storm water runoff prior to discharge into Chollas Creek is a violation of the Construction Storm Water Permit, and therefore the discharge is unauthorized. The sediment laden storm water runoff from the Project’s two basins discharged directly into Chollas Creek on December 4, 2014, and was documented by photographs taken by a concerned citizen. See Exhibit No. 3, Concerned Citizen Photographs, December 4, 2014.

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<sup>3</sup> California Stormwater BMP Handbook, Construction, November 2009.

<sup>4</sup> Inspection Report dated December 4, 2014, p. 3, Note 7. The inspection report is part of Exhibit No. 4.

2. Failure to Implement Erosion Control (1 day, December 4, 2014)  
“Risk Level 1 dischargers shall provide effective soil cover for inactive areas and all finished slopes, open space, utility backfill, and completed lots.” (Construction Storm Water Permit, Att. C, § D.2.) During the December 4, 2014, inspection, Mr. Chiu noted that several areas of the Site appeared to be inactive and without effective soil cover for erosion control. Furthermore, evidence of erosion due to a lack of erosion control was observed throughout the Site. See Exhibit No. 4, Notice of Violation No. R9-2014-0145.
3. Failure to Implement Sediment Controls (1 day, December 4, 2014)  
“Risk Level 1 dischargers shall establish and maintain effective perimeter controls and stabilize all construction entrances and exits to sufficiently control erosion and sediment discharges from the site.” (Construction Storm Water Permit, Att. C, § E.1.) During Mr. Chiu’s inspection of December 4, 2014, he noted the discharge of a significant amount of sediment onto Market Street and the sidewalk as a result of inadequate sediment control BMPs along the Site perimeter and the two Market Street entrances. See Exhibit No. 4, Notice of Violation No. R9-2014-0145.
4. Failure to Implement Run-on and Runoff Controls (1 day, December 4, 2014)  
“Risk Level 1 dischargers shall effectively manage all run-on, all runoff within the site and all runoff that discharges off the site.” (Construction Storm Water Permit, Att. C, § F.) During Mr. Chiu’s inspection of December 4, 2014, he observed and documented where Site perimeter sediment controls were not established or maintained resulting in run-on from the Church’s Chicken property onto the Site. The run-on resulted in a sediment discharge to Market Street from the Site. See Exhibit No. 4, Notice of Violation No. R9-2014-0145.
5. Failure to Cover Stockpiles (1 day, December 4, 2014)  
“Risk Level 1 dischargers shall implement good site management (i.e., ‘housekeeping’) measures for construction materials that could potentially be a threat to water quality if discharged.” (Construction Storm Water Permit, Att. C, § B.1.) This includes covering and berming inactive loose stockpiles. (*Id.* at § B.1.b.) On December 4, 2014, Mr. Chiu documented that the large soil stockpile failed to have adequate cover. See Exhibit No. 4, Notice of Violation No. R9-2014-0145.

6. Failure to Implement Entrance Tracking BMPs (1 day, December 4, 2014)  
“Risk Level 1 dischargers shall implement good site management (i.e., ‘housekeeping’) measures for construction materials that could potentially be a threat to water quality if discharged.” (Construction Storm Water Permit, Att. C, § B.1., emphasis in the original.) This includes implementing BMPs to prevent off-site tracking of loose construction and landscape materials. (*Id.* at § B.1.e.) On December 4, 2014, Mr. Chiu documented significant sediment tracking at the Market Street site entrance (east, near Church’s Chicken). This demonstrates the inadequacy of sediment control BMPs and sweeping of the entrance. See Exhibit No. 4, Notice of Violation No. R9-2014-0145.
7. Failure to Implement Vehicle Fluid Leaks BMPs (1 day, December 4, 2014)  
“Risk Level 1 dischargers shall implement good housekeeping for vehicle storage and maintenance which at a minimum shall consist of the following:” (Construction Storm Water Permit, Att. C, § B.3., emphasis in the original.) This includes implementing BMPs for vehicle storage and maintenance by preventing oil, grease, or fuel leaks to the ground, storm drains, or surface waters. (*Id.* at § B.3.a.) On December 4, 2014, Mr. Chiu confirmed that the vehicles did not have drip pans to catch vehicle fluid leaks. See Exhibit No. 4, Notice of Violation No. R9-2014-0145; see also Exhibit No. 3, Concerned Citizen Photographs.
8. Failure to Complete Inspection Checklist (1 Report)  
The Construction Storm Water Permit requires Risk Level 1 dischargers to perform weekly inspections and observations and to record a checklist of information. (Construction Storm Water Permit, Att. C, § G.) “Risk Level 1 dischargers shall ensure that checklists shall remain onsite with the SWPPP and at a minimum, shall include: ... Any corrective actions required, including any necessary changes to the SWPPP and the associated implementation dates.” (*Id.* at § G.5.g.)

The weekly QSP inspection report for December 4, 2014, did not include implementation dates. Therefore, it is unclear whether the recommended corrective actions for noted failures or other shortcomings were completed. See Exhibit No. 5, Qualified SWPPP Practitioner Inspection Reports. Failure to correct BMP deficiencies increases the likelihood of a sediment discharge and decreases the pollutant removal effectiveness of the Site’s BMPs.

**H. Penalty Calculation**

The State Water Board's Water Quality Enforcement Policy (Enforcement Policy) provides a penalty calculation methodology for the State Water Board and the nine Regional Water Quality Control Boards (collectively Water Boards) to use in administrative civil liability cases. The penalty calculation methodology enables the Water Boards to fairly and consistently implement liability provisions of the Water Code for maximum enforcement impact to address, correct, and deter water quality violations. The penalty calculation methodology provides a consistent approach and analysis of factors to determine liability based on the applicable Water Code section.

Pursuant to the Enforcement Policy, Water Boards shall determine an initial liability factor based on the Potential for Harm score and the extent of Deviation from Requirements for the violation when there is a discharge. Water Boards shall calculate the Potential for Harm by determining the actual or threatened impact to beneficial uses caused by the violation using a three-factor scoring system to quantify: (1) the potential for harm to beneficial uses; (2) the degree of toxicity of the discharge; and (3) the discharge's susceptibility to cleanup or abatement. These factors will be used to determine a per day factor using the matrix set forth in the Enforcement Policy that is multiplied by the maximum per day amount allowed under the Water Code. If applicable, the Water Board shall also determine an initial liability amount on a per gallon basis using the Potential for Harm score and the extent of Deviation from Requirement of the violation.

For each non-discharge violation, the Water Boards shall calculate an initial liability factor, considering the Potential for Harm and extent of Deviation from Requirements, using the matrix set forth in the Enforcement Policy that corresponds to the appropriate Potential for Harm and the Deviation from Requirement categories.

Pursuant to the Enforcement Policy, Water Boards shall use three adjustment factors for modification of the initial liability amount. These factors are culpability; cleanup and cooperation; and history of violations. The initial liability amount can be increased or decreased based on these adjustment factors. Additional adjustments may be used regarding multiple violations resulting from the same incident and multiple day violations.

**Violation No. 1: Discharge of Sediment Laden Water (1 day)  
December 4, 2014**

**Step 1 – Potential for Harm for Discharge Violations**

Factor 1: Harm or Potential for Harm to Beneficial Uses

This factor evaluates direct or indirect harm or potential for harm from the violation. A score between 0 (negligible) and 5 (major) is assigned in accordance with the statutory factors of the nature, circumstances, extent, and gravity of the violation.

The San Diego Water Board Prosecution Team (Prosecution Team) assigns a score of **3 (Moderate)** out of 5 for Factor 1 of the penalty calculation. The Enforcement Policy defines “Moderate” as “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).” A score of 3 (Moderate) is selected because:

1. Sediment was directly and indirectly discharged into Chollas Creek. The primary storm water pollutant at construction sites is sediment.
2. Chollas Creek is designated as an impaired water body for copper, lead, and zinc pursuant to Clean Water Act section 303(d). Sediment discharged from the Project likely transported other pollutants such as metals; therefore the unauthorized discharge further degraded the poor health of the Chollas Creek waters.
3. Sediment discharges negatively impact the beneficial uses of Chollas Creek: Contact and Non-contact Water Recreation (REC-1 and REC-2, respectively), Warm Freshwater Habitat (WARM), and Wildlife Habitat (WILD); and
4. Impacts to Chollas Creek were likely due to the turbidity and volume of the discharge; resulting in temporary restrictions on beneficial uses.

Factor 2: 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. "Potential receptors" are those identified considering human, environmental, and ecosystem health exposure pathways. In this matter, the Prosecution Team assigns the discharge of sediment to receiving waters a score of 2. The Enforcement Policy defines a score of 2 as "[d]ischarged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of concern regarding receptor protection." A score of 2 is selected because:

1. Sediment discharges diminish the physical quality of in-stream waterways by altering or obstructing flows and affecting existing riparian functions.
2. Sediment acts as a binding carrier to other toxic constituents like metals and organic contaminants (i.e., pesticides and PCBs).
3. Sediment discharges affect the quality of receiving waters and the ability to support habitat related beneficial uses by reducing visibility and impacting biotic feeding and reproduction. Sediment discharges typically increase receiving water turbidity levels.
4. Sediment discharges cause acute effects on the invertebrate aquatic community; e.g., it can be lethal when the benthic community is buried in sediment.

Factor 3: Susceptibility to Cleanup and Abatement

Pursuant to the Enforcement Policy a score of 0 is assigned for this factor if 50 percent or more of the discharge is susceptible to cleanup or abatement. A score of 1 is assigned to this factor if less than 50 percent of the discharge is susceptible to cleanup or abatement. Less than 50 percent of the discharge was susceptible to cleanup or abatement. Accordingly, the Prosecution team assigns a score of 1 to the penalty calculation for Factor 3.

Final Score - "Potential for Harm"

Based on the above determinations, the Potential for Harm final score for this discharge violation is 6.

## Step 2 - Assessments for Discharge Violations

Water Code section 13385 states that a Regional Water Board may impose civil liability on a daily basis, a per gallon basis, or both. Due to the difficulty in accurately determining the volume of sediment laden storm water discharged during the discharge event, civil liability was only calculated on a per day basis for the violation.

### Per Day Assessments for Discharge Violations

The Water Boards shall calculate an initial liability factor for each discharge violation, considering Potential for Harm and the extent of Deviation from Requirement.

### Deviation from Requirement

The Prosecution Team assigns a Deviation from Requirement score of **Major** because the Construction Storm Water Permit prohibits all discharges other than storm water from construction sites to waters of the United States, unless otherwise authorized by an NPDES permit. The Enforcement Policy defines major for discharge violations as: "The requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions)." Pollutants were discharged from the Project to waters of the United States because pollutant controls were not implemented; therefore the discharge occurred without NPDES Permit authorization.

### Per Day Factor and Per Day Assessment

Using a "Potential for Harm" factor of 6 and "Deviation from Requirement" factor of "Major," the "Per Day Factor" for discharging sediment from the Project to Chollas Creek is **0.220** in Table 2 of the Enforcement Policy. Pursuant to Water Code section 13385 the maximum civil liability for these violations is ten thousand dollars (\$10,000) per day of violation (per violation). Calculating the Per Day Assessment is achieved by multiplying:

$$(\text{Per Day Factor}) \times (\text{Statutory Maximum Liability}) = (0.220) \times (\$10,000) = \$2,200$$

## Step 3 - Per Day Assessments for Non-Discharge Violations

Step 3 does not apply to discharge violations.

#### Step 4 - Adjustment Factors

##### Culpability

The Prosecution Team assigns a culpability multiplier of **1.5** out of a range from 0.5 to 1.5 for this violation for the following reasons:

1. Discharger knew the requirements of the Construction Storm Water Permit and agreed to comply with the requirements as evidenced by its certified NOI.
2. Discharger failed to implement BMPs to reduce the sediment in the storm water runoff;
3. The SWPPP clearly states that the two basins with drains that discharge directly into Chollas Creek were not designed to remove pollutants like sedimentation basins (SE-2) do. This was also documented in the San Diego Water Board Inspection Report; specifically that the basins failed to have risers or spillways.
4. Discharger intentionally discharged storm water runoff into Chollas Creek as evidenced by the basins being directly piped to Chollas Creek; and
5. Discharger failed to monitor or report the discharge to the San Diego Water Board.

##### Cleanup and Cooperation

The Prosecution Team assigns a cleanup and cooperation multiplier of **1.0** from a range of .75 to 1.5 for this violation because the Discharger ceased discharge upon direction of San Diego Water Board staff.

##### History of Violation

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

#### Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No. of} \\ \text{Days} \end{array} \times \begin{array}{l} \text{Culpability} \\ \end{array} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$2,200) \times (1) \times (1.5) \times (1.0) \times (1.0) = \$3,300$$

#### Step 6 - Ability to Pay and Ability to Continue In Business

See Section I. Ability to Pay and Ability to Continue In Business.

#### Step 7- Other Factors as Justice May Require

See Section J. Other Factors as Justice May Require.

#### Step 8 - Economic Benefit

The Discharger derived an economic benefit by not plugging up the two basin drains and pumping out the ponded storm water runoff for off-site disposal. It is estimated that the labor and materials necessary to plug the two basin drains is \$500. The estimated cost to pump out the two basins and dispose of the ponded storm water runoff offsite is \$450 based upon an invoice provided by the Discharger. Using the U.S. EPA BEN Model the Discharger enjoyed an economic benefit of \$973. See Exhibit No. 7, Economic Benefit Calculation and Supporting Documentation.

#### Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is (a) ten thousand dollars (\$10,000) per day of violation (per violation); and (b) ten dollars (\$10) for every gallon discharged, over one thousand (1,000) gallons discharged, that was not cleaned up. In this instance, the Prosecution Team is only proposing the assessment of civil liability for the discharge of sediment to waters of the United States on a per day basis based on information currently available. Sediment was known to be discharged to waters of the United States on December 4, 2014; therefore, the maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "at a minimum, liability shall be assessed at a level that recovers the economic benefit, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is  $(1.1 \times \$973) = \$1,070$ .

#### **Step 10 - Civil Liability for Violation No. 1**

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for discharging sediment to waters of the United States in violation of the Construction Storm Water Permit and the Basin Plan for one (1) day is three thousand three hundred dollars (\$3,300), plus staff costs. The liability is within the minimum and maximum liability range.

#### **Violation No. 2: Failure to Implement Erosion Control (1 day) December 4, 2014**

##### **Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)**

##### **Step 3 – Per Day Assessments for Non-Discharge Violations**

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of deviation from applicable requirements. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

##### Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation is characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm." The Prosecution Team selected Moderate for the following reasons:

1. The entire site was graded. Although vertical construction of the Walgreens store commenced, the Site continued to pose a substantial threat to discharge sediment given the large soil stockpiles;
2. Chollas Creek is a sensitive water body listed as impaired under section 303(d) of the federal Clean Water Act; and

3. Sediment is a pollutant that when discharged, can have lethal effects on benthic communities. Furthermore, sediment can transport toxic materials (e.g., metals and synthetic organics) from the Site and into receiving waters.

#### Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as “[t]he 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).” Moderate was selected because many inactive areas throughout the Site were without erosion control BMPs. Erosion control BMPs are the first and most valuable BMPs used at a construction site because they prevent erosion from happening in the first place (i.e., it prevents storm water runoff from being polluted with sediment).

#### Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Moderate," the Per Day Factor for failing to implement effective erosion controls in Table 3 of the Enforcement Policy is **0.35**.

Per Day Assessment = (Per Day Factor) x (Statutory Maximum Liability)

Per Day Assessment = (0.35) x (\$10,000) = \$3,500

#### **Step 4 - Adjustment Factors**

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

#### Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because the failure to use erosion control BMPs in inactive areas throughout the Site during the rainy season was at a minimum negligent implementation of the Construction Storm Water Permit by the Discharger.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

**Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No. of} \\ \text{Days} \end{array} \times \begin{array}{l} \text{Culpability} \\ \end{array} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (1) \times (1.3) \times (1.0) \times (1.0) = \$4,550$$

**Step 6 -Ability to Pay and Ability to Continue In Business**

See Section I. Ability to Pay and Ability to Continue In Business.

**Step 7- Other Factors as Justice May Require**

See Section J. Other Factors as Justice May Require.

**Step 8 - Economic Benefit**

Discharger achieved an economic benefit of \$4,626 by not applying an erosion control BMP (e.g., spraying of bonded fiber matrix) on the finished areas. Bonded fiber matrix costs approximately \$3,901<sup>5</sup> per acre to install. Assuming that one acre was inactive, the cost would be \$3,901. The economic benefit of not spraying the bonded fiber matrix is \$4,626. See Exhibit No. 7, Economic Benefit Calculation and Supporting Documentation.

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<sup>5</sup> *Soil Stabilization BMP Research for Erosion and Sediment Controls, Cost Survey Technical Memorandum*, July 2007, Caltrans, Table 3-1, p. 7.

### Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement erosion control BMPs for one day, December 4, 2014. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is  $(1.1 \times \$4,626) = \$5,089$ .

### Step 10 - Civil Liability for Violation No. 2

Since the minimum liability amount is above the total base liability amount, the civil liability for failing to implement erosion control for one (1) day in violation of the Construction Storm Water Permit is the minimum five thousand eighty nine dollars (\$5,089), plus staff costs.

### Violation No. 3: Failure to Implement Sediment Controls (1 day) December 4, 2014

#### Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)

#### Step 3 – Per Day Assessments for Non-Discharge Violations

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of Deviation from Requirement. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

#### Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm." The Prosecution Team selected Moderate because most of the Site was graded (exposed soil) and discharges indirectly and directly into Chollas Creek, a sensitive water body.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as “[t]he 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).” Moderate was selected because although the Discharger implemented sediment control BMPs, it failed to maintain or augment some of the sediment control BMPs, which resulted in the discharge of sediment to the City of San Diego’s storm drain inlet on Market Street.

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Moderate," the Per Day Factor for failing to implement effective sediment controls in Table 3 of the Enforcement Policy is **0.35**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.35) \times (\$10,000) = \$3,500$$

**Step 4 - Adjustment Factors**

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because the Discharger was not maintaining BMPs and also failed to replace or increase the size of ineffective BMPs.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

### Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No. of} \\ \text{Days} \end{array} \times \begin{array}{l} \text{Culpability} \\ \end{array} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (1) \times (1.3) \times (1.0) \times (1.0) = \$4,550$$

### Step 6 -Ability to Pay and Ability to Continue In Business

See Section I. Ability to Pay and Ability to Continue In Business.

### Step 7- Other Factors as Justice May Require

See Section J. Other Factors as Justice May Require.

### Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$99 by delaying the application of sediment control BMPs (e.g. straw waddles or gravel bags). See Exhibit No. 7, Economic Benefit Calculation and Supporting Documentation.

### Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement sediment control BMPs for one day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is  $(1.1 \times \$99) = \$109$ .

**Step 10 - Civil Liability for Violation No. 3**

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to implement sediment control BMPs for one (1) day in violation of the Construction Storm Water Permit is four thousand five hundred fifty dollars (\$4,550), plus staff costs. The liability is within the minimum and maximum liability range.

**Violation No. 4: Failure to Implement Run-On Runoff Controls (1 day) December 4, 2014**

**Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)**

**Step 3 – Per Day Assessments for Non-Discharge Violations**

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of Deviation from Requirement. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm.” The Prosecution Team selected Moderate for the following reasons:

1. Run-on from the Church’s Chicken property was not effectively controlled and resulted in sediment discharges from the Project onto Market Street;
2. Chollas Creek is a sensitive water body listed as impaired under section 303(d) of the federal Clean Water Act;
3. Sediment is a pollutant that when discharged can be lethal when it smothers benthic communities; and
4. Sediment can transport toxic materials (e.g., metals and synthetic organics) from the Site and into receiving waters.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as “[t]he 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).” The Discharger implemented some run-on/runoff controls; however, some areas of the Site were not being addressed appropriately, nor in a timely manner, and allowed a sediment discharge to occur.

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Moderate," the Per Day Factor for failing to implement effective run-on runoff controls in Table 3 of the Enforcement Policy is **0.35**.

Per Day Assessment = (Per Day Factor) x (Statutory Maximum Liability)

Per Day Assessment = (0.35) x (\$10,000) = \$3,500

**Step 4 - Adjustment Factors**

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because these are common construction activities that could have been easily addressed.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

### Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No.} \\ \text{of} \\ \text{Days} \end{array} \times \text{Culpability} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (1) \times (1.3) \times (1.0) \times (1.0) = \$4,550$$

### Step 6 -Ability to Pay and Ability to Continue In Business

See Section I. Ability to Pay and Ability to Continue In Business.

### Step 7- Other Factors as Justice May Require

See Section J. Other Factors as Justice May Require.

### Step 8 - Economic Benefit

Discharger achieved an economic benefit of \$497 by not implementing run-on/runoff controls. The Discharger could have used 25 foot long eight inch diameter fiber rolls or straw wattles to protect the approximately 480 feet perimeter. With an overlap of one foot on each side, twenty 25 foot long wattles were needed. At a cost of \$24.09 per wattle, the BEN computer model calculates an economic benefit of \$497. See Exhibit No. 7, Economic Benefit Calculation Violation and Supporting Documentation.

### Step 9 - Maximum and Minimum Liability Amounts

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement run-on/runoff controls for one (1) day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is  $(1.1 \times \$497) = \$547$ .

#### **Step 10 - Civil Liability for Violation No. 4**

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to implement run-on/runoff controls for one (1) day in violation of the Construction Storm Water Permit is four thousand five hundred fifty dollars (\$4,550), plus staff costs. The liability is within the minimum and maximum liability range.

#### **Violation No. 5: Failure to Cover Stockpiles (1 day) December 4, 2014.**

#### **Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)**

#### **Step 3 – Per Day Assessments for Non-Discharge Violations**

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of Deviation from Requirement. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

##### Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm." The Prosecution Team selected Moderate because the large stockpile posed a substantial threat to discharge sediment to waters of the United States.

##### Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as "[t]he 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)." Although the Discharger ultimately sprayed the stockpile and placed plastic sheeting at its base, it did not have adequate BMPs at the time of the inspection.

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Moderate," the Per Day Factor for failing to cover stockpiles in Table 3 of the Enforcement Policy is **0.35**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.35) \times (\$10,000) = \$3,500$$

**Step 4 - Adjustment Factors**

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because these are common construction activities that could have been easily addressed.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

**Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No.} \\ \text{of} \\ \text{Days} \end{array} \times \text{Culpability} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (1) \times (1.3) \times (1.0) \times (1.0) = \$4,550$$

**Step 6 -Ability to Pay and Ability to Continue In Business**

See Section I. Ability to Pay and Ability to Continue In Business.

**Step 7- Other Factors as Justice May Require**

See Section J. Other Factors as Justice May Require.

**Step 8 - Economic Benefit**

Discharger achieved an economic benefit of \$2,314 for not covering the inactive large stockpile. Bonded fiber matrix could have been used to cover the stockpile. Bonded fiber matrix costs approximately \$3,901<sup>6</sup> per acre to install. Assuming that one-half acre was inactive, the cost would be \$1,951. The economic benefit of not spraying the bonded fiber matrix is \$2,314. See Exhibit No. 7, Economic Benefit Calculation Violation and Supporting Documentation.

**Step 9 - Maximum and Minimum Liability Amounts**

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to cover stockpiles for one (1) day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is  $(1.1 \times \$2,314) = \$2,545$ .

**Step 10 - Civil Liability for Violation No. 5**

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to cover the stockpile for one (1) day in violation of the Construction Storm Water Permit is four thousand five hundred fifty dollars (\$4,550), plus staff costs. The liability is within the minimum and maximum liability range.

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<sup>6</sup> *Soil Stabilization BMP Research for Erosion and Sediment Controls, Cost Survey Technical Memorandum*, July 2007, Caltrans, Table 3-1, p. 7.

**Violation No. 6: Failure to Implement Entrance Tracking BMPs (1 day) December 4, 2014.**

**Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)**

**Step 3 – Per Day Assessments for Non-Discharge Violations**

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of Deviation from Requirement. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm.” The Prosecution Team selected Moderate because the failure to have adequate entrance tracking control can and did result in the discharge of sediment from the Site into the City of San Diego’s Market Street storm drain inlet.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as “[t]he 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).” The existing controls were inadequate to prevent the discharge of sediment. Additional BMPs should have been implemented to prevent the discharge.

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Moderate," the Per Day Factor for failing to implement effective entrance tracking BMPs in Table 3 of the Enforcement Policy is **0.35**.

Per Day Assessment = (Per Day Factor) x (Statutory Maximum Liability)

Per Day Assessment = (0.35) x (\$10,000) = \$3,500

#### Step 4 - Adjustment Factors

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

##### Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because these are common construction activities that could have been easily addressed.

##### Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

##### History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

#### Step 5 - Determination of Total Base Liability Amount

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{r} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{r} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{r} \text{No.} \\ \text{of} \\ \text{Days} \end{array} \times \text{Culpability} \times \begin{array}{r} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{r} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{r} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (1) \times (1.3) \times (1.0) \times (1.0) = \$4,550$$

#### Step 6 -Ability to Pay and Ability to Continue In Business

See Section I. Ability to Pay and Ability to Continue In Business.

#### Step 7- Other Factors as Justice May Require

See Section J. Other Factors as Justice May Require.

### **Step 8 - Economic Benefit**

Discharger achieved an economic benefit of \$1,119 by not installing a shaker rack at the southeast entrance to Market Street. See Exhibit No. 7, Economic Benefit Calculation and Supporting Documentation.

### **Step 9 - Maximum and Minimum Liability Amounts**

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement Entrance Tracking BMPs for one (1) day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is  $(1.1 \times \$1,119) = \$1,231$ .

### **Step 10 - Civil Liability for Violation No. 6**

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to implement entrance tracking BMPs for one (1) day in violation of the Construction Storm Water Permit is four thousand five hundred fifty dollars (\$4,550), plus staff costs. The liability is within the minimum and maximum liability range.

### **Violation No. 7: Failure to Implement Vehicle Fluid Leaks BMPs (1 day) December 4, 2014.**

### **Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)**

### **Step 3 – Per Day Assessments for Non-Discharge Violations**

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of Deviation from Requirement. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as “[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm.” The Prosecution Team selected Moderate because storm water runoff polluted by vehicle fluids (gasoline, diesel fuel, motor oil, etc.) can be toxic to aquatic life.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Major** Deviation from Requirement. The Enforcement Policy defines a Major Deviation from Requirement as “[t]he requirement has been rendered ineffective (e.g., discharger disregards the requirement, and/or the requirement is rendered ineffective in its essential functions).” There were no drip pans under the heavy equipment.

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Major," the Per Day Factor for failing to use drip pans in Table 3 of the Enforcement Policy is **0.55**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.55) \times (\$10,000) = \$5,500$$

**Step 4 - Adjustment Factors**

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.4** for this violation. QSP inspection reports from September 2014 indicated that drip pans were used. Dedicated vehicle areas with visqueen and fiber rolls were noted in the QSP's October 2014 reports; however, the November 2014 reports indicate that the visqueen and fiber rolls were removed. Therefore, at some time drip pans were no longer used. The QSP inspection reports up to December 3, 2014, stated that drip pans were being used. The December 4, 2014, QSP inspection report confirmed Mr. Chiu's finding that drip pans were not in use.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of **1.0** because the Discharger does not have a history of violations.

**Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{r} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{r} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{r} \text{No.} \\ \text{of} \\ \text{Days} \end{array} \times \text{Culpability} \times \begin{array}{r} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{r} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{r} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$5,500) \times (1) \times (1.4) \times (1.0) \times (1.0) = \$7,700$$

**Step 6 -Ability to Pay and Ability to Continue In Business**

See Section I. Ability to Pay and Ability to Continue In Business.

**Step 7- Other Factors as Justice May Require**

See Section J. Other Factors as Justice May Require.

**Step 8 - Economic Benefit**

Discharger achieved an economic benefit of \$2,633 by not installing drip pillow berms under heavy equipment at the Site. See Exhibit No. 7, Economic Benefit Calculation and Supporting Documentation.

### **Step 9 - Maximum and Minimum Liability Amounts**

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to implement vehicle leaks BMPs for one (1) day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is  $(1.1 \times \$2,633) = \$2,896$ .

### **Step 10 - Civil Liability for Violation No. 7**

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to implement vehicle leaks BMPs for one (1) day in violation of the Construction Storm Water Permit is seven thousand seven hundred dollars (\$7,700), plus staff costs. The liability is within the minimum and maximum liability range.

### **Violation No. 8: Failure to Complete Inspection Checklist (1 Report) December 4, 2014.**

#### **Steps 1 & 2 – Not Applicable (Non-Discharge Violation Alleged)**

#### **Step 3 – Per Day Assessments for Non-Discharge Violations**

The Water Boards shall calculate an initial liability factor for each non-discharge violation, considering Potential for Harm and the extent of Deviation from Requirement. While non-discharge violations may not directly or immediately impact beneficial uses, they harm or undermine the regulatory program.

#### Potential for Harm

The violation poses either a Minor, Moderate, or Major threat to beneficial uses. The Potential for Harm for this violation was characterized as **Moderate**. The Enforcement Policy defines Moderate Potential for Harm as "[t]he characteristics of the violation present a substantial threat to beneficial uses, and/or the circumstances of the violation indicate a substantial potential for harm." The Prosecution Team selected Moderate because failing to complete the inspection checklist allowed problem areas to remain unaddressed and therefore, to threaten beneficial uses.

Deviation from Requirement

The violation is characterized as either a Minor, Moderate, or Major deviation from the requirement. In this case, the Prosecution Team characterized the violation as a **Moderate** Deviation from Requirement. The Enforcement Policy defines a Moderate Deviation from Requirement as “[t]he 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).” The Discharger employed a QSP that inspected the Site weekly and forwarded a checklist indicating what BMPs were acceptable, missing, or required repair. Weekly inspections can identify vulnerable areas of the site, provide feedback as to the effectiveness of the BMPs, and indicate where use of a different BMP may be called for. The Discharger received the checklist; however it failed to provide the date that the corrective work was initiated. Construction Storm Water Permit, Attachment C, section G.3., requires implementation of repairs within 72 hours of identification. Here, the Discharger failed to act on a key component of the Construction Storm Water Permit.

Per Day Factor and Per Day Assessment

Using a Potential for Harm factor of "Moderate" and Deviation from Requirement factor of "Moderate," the Per Day Factor for failing to complete the inspection checklist in Table 3 of the Enforcement Policy is **0.35**.

$$\text{Per Day Assessment} = (\text{Per Day Factor}) \times (\text{Statutory Maximum Liability})$$

$$\text{Per Day Assessment} = (0.35) \times (\$10,000) = \$3,500$$

**Step 4 - Adjustment Factors**

Three additional factors are considered and can modify the amount of initial liability: Culpability; Cleanup and Cooperation; and History of Violations.

Culpability

The culpability multiplier ranges between 0.5 and 1.5. The Prosecution Team assigns a multiplier of **1.3** for this violation because the QSP identified problems during the weekly inspections and the Discharger did not document or follow-up. Based upon the QSP's photographs, some BMP problems may have occurred over several weeks.

Cleanup and Cooperation

This is the extent to which the discharger voluntarily cooperated in returning to compliance and correcting environmental damage. Multiplier ranges between 0.75 to 1.5 with the lower multiplier applying where there is a high degree of cleanup and cooperation, and a higher multiplier where this is absent. In this case, the Prosecution Team assigns a multiplier of **1.0** because the Discharger corrected the violations upon San Diego Water Board notification.

History of Violations

The Prosecution Team assigns a history of violation multiplier of 1.0 because the Discharger does not have a history of violations.

**Step 5 - Determination of Total Base Liability Amount**

The Total Base Liability amount is determined by multiplying the Per Day Assessment by the Days of Violation to determine the Initial Amount of Liability and then applying the adjustment factors as follows:

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = \begin{array}{l} \text{Per Day} \\ \text{Assessment} \end{array} \times \begin{array}{l} \text{No.} \\ \text{of} \\ \text{Days} \end{array} \times \text{Culpability} \times \begin{array}{l} \text{Cleanup \&} \\ \text{Cooperation} \end{array} \times \begin{array}{l} \text{History of} \\ \text{Violations} \end{array}$$

$$\begin{array}{l} \text{Total} \\ \text{Base} \\ \text{Liability} \end{array} = (\$3,500) \times (1) \times (1.3) \times (1.0) \times (1.0) = \$4,550$$

**Step 6 -Ability to Pay and Ability to Continue In Business**

See Section I. Ability to Pay and Ability to Continue In Business.

**Step 7- Other Factors as Justice May Require**

See Section J. Other Factors as Justice May Require.

**Step 8 - Economic Benefit**

Discharger achieved an economic benefit of \$103 by failing to properly implement the checklist. See Exhibit No. 7, Economic Benefit Calculation and Supporting Documentation.

**Step 9 - Maximum and Minimum Liability Amounts**

Pursuant to Water Code section 13385 the maximum civil liability that the San Diego Water Board may assess for this violation is ten thousand dollars (\$10,000) per day of violation (per violation). In this instance, the Prosecution Team is proposing the assessment of civil liability for the failure to complete the inspection checklist for one (1) day. The maximum civil liability that could be assessed for this violation is ten thousand dollars (\$10,000).

Water Code section 13385(e) requires that when pursuing civil liability under section 13385, "[a]t a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation." The Enforcement Policy requires that the adjusted Total Base Liability shall be at least ten percent (10%) higher than the economic benefit. Therefore, the minimum liability is  $(1.1 \times \$103) = \$113$ .

**Step 10 - Civil Liability for Violation No. 8**

Based on the unique facts of this case, and the penalty calculation methodology within Section VI of the Enforcement Policy, the civil liability for failing to complete weekly inspection checklists for one (1) day in violation of the Construction Storm Water Permit is four thousand five hundred fifty dollars (\$4,550), plus staff costs. The liability is within the minimum and maximum liability range.

**I. Ability to Pay and Ability to Continue In Business**

The Total Base Liability Amount may be adjusted to address the violator's ability to pay or continue in business. The Total Base Liability Amount should not be adjusted here because Discharger has the ability to pay and continue in business. Although Discharger is a section 501(c)(3) tax-exempt nonprofit foundation, Discharger's 2012 IRS Form 990-PF shows that Discharger possesses over one hundred and fifty million dollars (\$150,000,000) in assets.

**J. Other Factors as Justice May Require**

The Enforcement Policy provides that if the San Diego Water Board believes that the amount determined using the above factors is inappropriate, the liability amount may be adjusted under the provision for "other factors as justice may require," if express findings are made.

Examples of circumstances warranting an adjustment under this step are:

- a. The discharger has provided, or Water Board staff has identified, other pertinent information not previously considered that indicates a higher or lower amount is justified.
- b. A consideration of issues of environmental justice indicates that the amount would have a disproportionate impact on a particular disadvantaged group.
- c. The calculated amount is entirely disproportionate to assessments for similar conduct made in the recent past using the Enforcement Policy.

(Enforcement Policy, p. 19.)

The circumstances in this matter do not warrant an adjustment under this step.

The Enforcement Policy also provides under the "Other Factors as Justice May Require" that the cost of investigation and enforcement should be added to the liability amount. From December 9, 2014, to April 22, 2015, the San Diego Water Board invested 110.5 hours to investigate, prepare enforcement documents, and consider this action. The total investment of the San Diego Water Board to date is \$7,879. These staff costs are not divided by violation and are added at the end of the collective penalty assessment. A summary of the staff costs incurred to date is provided in Exhibit No. 8, Staff Cost Summary.

**K. Total Liability Amount**

The total liability amount for the violations in Stipulated Order No. R9-2015-0015 is \$38,839, plus staff costs of \$7,879 for a total of \$46,718. A summary of the methodology used by the Prosecution Team to calculate the civil liability is provided in Exhibit No. 9, Penalty Methodology Summary. Below is a tabular summary of the total liability, Table No. 1. Penalty Summary.

**Table 1. Penalty Summary**

<b>Alleged Violation</b>	<b>Days of Violation</b>	<b>Liability Per Day of Violation</b>	<b>Liability Amount</b>
<b>1. Discharge of Sediment Laden Storm Water Runoff, December 4, 2014</b>	1	\$3,300	\$3,300
<b>2. Failure to Implement Erosion Control, December 4, 2014</b>	1	\$4,550	\$5,089
<b>3. Failure to Implement Sediment Control, December 4, 2014</b>	1	\$4,550	\$4,550
<b>4. Failure to Implement Run-on and Runoff Controls, December 4, 2014</b>	1	\$4,550	\$4,550
<b>5. Failure to Cover Stockpiles, December 4, 2014</b>	1	\$4,550	\$4,550
<b>6. Failure to Implement Entrance Tracking BMPs, December 4, 2014</b>	1	\$4,550	\$4,550
<b>7. Failure to Implement Vehicle Fluid Leaks BMPs, December 4, 2014</b>	1	\$7,700	\$7,700
<b>8. Failure to Complete Inspection Checklist, December 4, 2014</b>	1	\$4,550	\$4,550
<b>Total Base Liability Amount</b>			\$38,839
<b>Staff Costs to Date</b>			\$7,879
<b>Total Liability</b>			\$46,718

Exhibits

1. Construction Storm Water Permit
2. Notice of Intent
3. Concerned Citizen Photographs
4. Notice of Violation No. R9-2014-0145
5. Qualified SWPPP Practitioner Inspection Reports
6. Storm Water Pollution Prevention Plan
7. Economic Benefit Calculation Violation and Supporting Documentation
8. Staff Cost Summary
9. Penalty Methodology Summary